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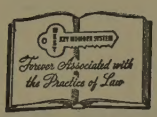
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SECOND SERIES

47 Cal.2d 566

PEOPLE of the State of California, Plaintiff and Respondent,

v.

Richard G. RISER, Defendant and Appellant.

Cr. 5896.

Supreme Court of California.
In Bank.
Dec. 31, 1956.

Rehearing Denied Jan. 30, 1957.

Defendant was convicted of murder in the first degree. The Superior Court of Stanislaus County, Frank C. Damrell, J., entered judgment and order adverse to the defendant, and the defendant appealed. The Supreme Court, Traynor, J., held that where it was not reasonably probable that jury, if faced with excluded statements showing that certain eyewitnesses for the prosecution had allegedly made inconsistent statements to the police, would have chosen to believe unsupported testimony of defendant that he had not been at the scene of the homicides, error of Superior Court in vacating subpoena duces tecum to compel production of such statements by prosecution was not a miscarriage of justice and did not require reversal.

Judgment and order affirmed.

Carter, J., dissented.

See also Cal., 305 P.2d 18.

1. Jury ⇐108

Where prospective juror stated in voir dire examination in murder prosecution that he did not believe in capital punishment, Superior Court properly sustained the State's challenge to the prospective juror for implied bias under the Penal Code, though prospective juror stated that nothing would prevent his finding defendant guilty if the evidence warranted a finding of guilt. West's Ann.Pen.Code, §§ 190, 1074, subd. 8.

2. Criminal Law ⇐404(4)

In prosecution for murders committed with a .38 caliber revolver, court properly admitted in evidence special .38 caliber shells, which contained bullets that were coppercoated factory loads, and which were found in the automobile of one of the defendants, where there was expert testimony that the loads resembled in weight and shape a factory-load bullet found at the scene of the crime and were of the same type and from the same manufacturer, though he could not say that they came from the same box as the special shells in question.

3. Criminal Law ⇐404(4)

In prosecution for murders committed with a .38 caliber revolver, special .38 caliber shells, which contained hand-cast lead bullets, and which were found in automobile of one of the defendants, were properly admitted, where there was expert testimony, based on spectroscopic analysis of metal in bullets, that those introduced in evidence were probably poured from the same batch of lead as hand-cast bullets found at scene of crime.

4. Criminal Law ⇐404(4)

In murder prosecution, wherein expert evidence established that murders were committed with a Smith and Wesson .38 Special revolver, court properly admitted

in evidence a holster, which was found in the automobile of one of the defendants, and which, according to experts, once carried a Smith and Wesson .38 Special revolver.

5. Criminal Law ⇐404(4)

When specific type of weapon used to commit a homicide is not known, it may be permissible to admit into evidence weapons found in defendant's possession some time after the crime if they could have been the weapons employed, and there need be no conclusive demonstration that the weapons were the murder weapons.

6. Criminal Law ⇐349

When the prosecution relies on a specific type of weapon as murder weapon, it is error to admit evidence that other weapons were found in possession of defendant, since such evidence tends to show, not that defendant committed the murder, but only that he is the sort of person who carries deadly weapons.

7. Criminal Law ⇐404(4)

In prosecution for murders committed with a Smith and Wesson .38 Special revolver, it was error to admit in evidence a Colt .38 caliber revolver found in possession of one of the defendants, and holsters, belts, and .22 caliber shells found in the automobile of one of the defendants.

8. Criminal Law ⇐1169(1)

Where .38 caliber shells and holster, which had been used for a Smith and Wesson .38 Special revolver were properly admitted in prosecution for murders committed with a Smith and Wesson .38 Special revolver, defendants were not prejudiced by the erroneous admission in evidence of a Colt revolver, two other holsters, belts, and box of .22 caliber shells.

9. Criminal Law ⇐369(2), 372(1)

Evidence of other crimes is not admissible when its sole effect is to show a criminal disposition, but if it tends logically and by reasonable inference to establish any fact material for the prosecution, or overcome any material fact sought to be proved by the defense, it is admissible, though it may connect the accused with an offense not included in the charge.

10. Criminal Law ⇐369(2)

In prosecution for murders committed with a Smith and Wesson .38 Special revolver, evidence that defendants prior to the murders had a revolver of unknown make was admissible to show that defendants had the means to commit the murders, though such evidence also showed the commission of another crime by defendants.

11. Criminal Law ⇐824(5)

Where trial court, throughout trial of murder prosecution, whenever requested to do so, instructed clearly at length that statements made by one defendant were not evidence against another defendant who was not present, and trial court repeated such warning in general instructions at close of trial, failure of trial court without a request to give such an instruction immediately when evidence was introduced concerning a statement of one of the defendants, outside of the presence of the other defendant, concerning other crimes allegedly committed by the defendants, was not error.

12. Criminal Law ⇐486

Party relying on expert analysis of demonstrative evidence must show that it is in fact the evidence found at the scene of the crime, and that between time of receipt and analysis there has been no substitution or tampering, but it is not necessary to negative all possibility of tampering.

13. Criminal Law ⇐486

Burden on party offering evidence concerning expert analysis of demonstrative evidence is to show to satisfaction of trial court in criminal prosecution that, taking all circumstances into account, including ease or difficulty with which particular evidence could have been altered, that it is reasonably certain that there was no alteration, and requirement of reasonable certainty is not met when some vital link in chain of possession is not accounted for,

but when there is the barest speculation that there was tampering, it is proper to admit the evidence and let what doubt remains go to its weight.

14. Criminal Law ⇐404(4)

Where deputy sheriff took articles, on which there were fingerprints, from scene of the crime and locked them in sheriff's identification truck, and about 4:00 a. m. or 5:00 a. m. he placed the articles in unlocked office that he shared with another police officer, and the articles remained there until about 8:30 a. m. when they were removed and kept under lock and key or in custody of specific persons, it was not error to admit articles in evidence in murder prosecution, in absence of any showing by defendant how his fingerprints could have been forged or that any one had tampered with the articles while they were in the unlocked office.

15. Homicide ⇐289

Where overwhelming evidence in murder prosecution was that homicides had been committed in the perpetration of a robbery, trial court properly instructed that, though there are two degrees of murder, defendants were either guilty of murder in the first degree or were innocent, and that murder, which is committed in perpetration or attempt to perpetrate robbery, is murder of the first degree, whether the killing was intentional, unintentional, or accidental. West's Ann.Pen.Code, § 189.

16. Criminal Law ⇐857(1)

Though jury may not weigh the possibility of pardon or parole in determining guilt of an accused, it may consider such consequences in exercising its discretion to choose between different punishments.

17. Criminal Law ⇐863(2)

Where jury during deliberations in murder prosecution returned to court room and inquired if defendants would be eligible for parole if jury recommended life imprisonment, it was not error for trial court to inform jury that a person convicted of first degree murder and sentenced to life imprisonment may be eligible for parole after he has served seven calendar years. West's Ann.Pen.Code, §§ 3040–3065, 3048.

18. Criminal Law ⇐1211

Provision of the Penal Code that minimum terms of sentence and imprisonment for a person previously convicted of a felony, either in California or elsewhere, and armed with a deadly weapon, is 10 years, is concerned with the length of sentences and the fixing thereof, and not with how much of a sentence must be served before a prisoner is eligible for parole. West's Ann.Pen.Code, §§ 3024(b), 3040–3065, 3048.

19. Pardon ⇐3

An adjudication cannot be made under section of the Penal Code limiting eligibility for parole when a defendant has been adjudicated an habitual criminal, unless the prior convictions, on which it is to be based, have been charged in the indictment. West's Ann.Pen.Code, § 3048.

20. Criminal Law ⇐700

In murder prosecution, evidence was insufficient to justify conclusion that identification of defendant by eyewitness was the result of an idea planted in the mind of the eyewitness by the prosecution.

21. Criminal Law ⇐627½

On a proper showing, defendant in a criminal case can compel production of evidence in possession of the prosecution, when it becomes clear during the course of the trial that the prosecution has in its possession relevant and material evidence.

22. Criminal Law ⇐627½

In absence of some governmental requirement that information be kept confidential for purposes of effective law enforcement, State has no interest in denying accused access to all evidence that can throw light on issues in the case, and it has no interest in convicting on testimony of witnesses, who have not been rigorously cross-examined and as thoroughly impeached as evidence permits, and to deny flatly to accused any right of production of evi-

dence in possession of prosecution, on ground that an imbalance will be created between advantages of prosecution and defense loses sight of true purpose of criminal trial, which is the ascertainment of facts.

23. Criminal Law ⇐627½

Impeachment of prosecution's witness, which will justify production of evidence in possession of the prosecution, is not necessarily restricted to impeachment by prior inconsistent statements to the exclusion, for example, of impeachment for bias.

24. Criminal Law ⇐627½

The proper test for determining whether motion by defendant for the production of evidence in possession of the prosecution must be granted is not whether the evidence has been conclusively proved admissible but whether there is good reason to believe that evidence, when produced, will be admissible in evidence for some purpose in the case.

25. Criminal Law ⇐627½

In order to justify granting of motion of defendant for the production of evidence in the possession of the prosecution, there must be more than a mere possibility that the evidence, when produced, will contain contradictory matter and be in such a form that evidence can be used to impeach witness for the prosecution, but the chance that it may turn out eventually that evidence cannot be used for impeachment, should not block production at the threshold.

26. Criminal Law ⇐627½

Where prosecution, in murder prosecution, never denied that statements by witnesses for the prosecution to the police existed and were in possession of the prosecution or the police, and it was probable that such statements were inconsistent with testimony of witnesses at trial, and defendant was unable to prove conclusively that statements were in a form warranting their use for impeachment only because prosecution kept statements in its exclusive control, and prosecution could not claim that necessities of law enforcement required that statements be kept confidential, trial court erred in vacating subpoena duces tecum commanding production of statements.

27. Criminal Law ⇐1166½(1)

The Supreme Court, in determining whether error of trial court in vacating subpoena duces tecum seeking to require the production of statements made to the police by witnesses for the prosecution, was prejudicial, was required to determine whether there was a reasonable certainty that jury would have reached a different verdict had defendant been allowed to obtain and introduce in evidence prior inconsistent statements of the witnesses for the prosecution.

28. Criminal Law ⇐566

Fingerprint evidence is the strongest evidence of identity, and is ordinarily sufficient alone to identify defendant.

29. Criminal Law ⇐1186(4)

Where it was not reasonably probable in murder prosecution that jury, faced with excluded statements showing that certain eyewitnesses for the prosecution had allegedly made inconsistent statements to the police, would have chosen to believe unsupported testimony of defendant that he had not been at the scene of the homicides, error of Superior Court in vacating subpoena duces tecum to compel production of such statements by prosecution was not a miscarriage of justice and did not require reversal. West's Ann.Const. art. 6, § 4½.

William H. Coburn, Jr., Albany, for appellant.

Edmund G. Brown, Atty. Gen., and Doris H. Maier, Deputy Atty. Gen., for respondent.

TRAYNOR, Justice.

Richard G. Riser and his brother Roscoe R. Riser were charged by indictment with the murder of Earl and Pauline Hastings. The jury returned verdicts of guilty of

murder in the first degree, without fixing the punishment at life imprisonment in the case of Richard G. Riser. The court denied his motion for a new trial and sentenced him to death. His appeal to this court is automatic under section 1239(b) of the Penal Code.

Just before midnight on July 11, 1955, Earl and Pauline Hastings, proprietors of the Hilltop Cafe near Oakdale in Stanislaus County, were shot and killed during the course of a robbery of their cafe. Mr. Basford, a customer, left the cafe about 11:30 p. m. On his way out he passed two men who remarked that they were going in to have a beer. He was unable to identify either of the men, but thought that they had driven up to the Hilltop in a two-tone Chrysler, Buick, or Pontiac.

When these men entered the cafe, the only persons present were two customers, Mrs. Burgess and Mr. Pantel, both seated at the bar, and the Hastings. The men sat on stools at the end of the bar away from the other customers and ordered beers. After they had ordered a second round of beers, the shorter of the two rose from his stool, drew a gun, and announced, "This is a stick-up." The other man, who was also armed, silently took a position by the front door, while his companion went behind the bar where the Hastings were. In an attempt to prevent the robbery, Mr. Hastings seized a bottle and attacked the gunman. In the ensuing struggle Hastings was struck several times on the forehead and shot. The same gunman then shot and killed Mrs. Hastings, apparently as she was trying to reach a gun. Then he stepped over Mr. Hastings' body, rifled the cash register, and departed with the gunman at the door.

The police arrived shortly after midnight, removed the bodies, and searched and photographed the premises. They recovered several bullets fired by the gunman, and dusted for fingerprints bottles and glasses found on the bar in front of the stools used by the two men.

Mrs. Burgess identified Richard and Roscoe Riser as the two gunmen and testified that Richard had done the shooting. She admitted that she had been in the bar since 7:30 p. m. and had had five beers, that the bar was quite dark, and that she could not see one of the men too well. Mr. Pantel testified that he thought Richard was the man who did the shooting, but was not positive; that he had not seen Roscoe before the police lineup at Stockton, and that the man at the door appeared to be of Filipino or Mexican extraction. Expert witnesses testified that fingerprints found on a bottle and a glass removed from the bar were the fingerprints of Richard Riser, and that bullets found in a brief case in Roscoe's Chrysler were similar in composition to bullets found at the scene of the crime. The killing had been done with a Smith and Wesson .38 Special revolver. This gun was never recovered, but according to expert testimony a holster found in Roscoe's car had once carried a Smith and Wesson .38 Special revolver. The brothers' defense was an alibi: that they had been in Stockton on the night of July 11th.

During the voir dire examination of jurors, Hardy M. Dunavin stated that he did not believe in capital punishment, that nothing would prevent his finding defendant guilty if the evidence warranted it, but that in no event would he vote for the death penalty. In response to the court's question whether he entertained conscientious scruples that would prevent his finding defendant guilty if the offense charged could be punishable with death, he replied, "No." On the basis of these answers, and over defendant's objection, the court sustained a challenge by the prosecution under section 1074(8) of the Penal Code.

Section 1074(8) provides that: "A challenge for implied bias may be taken for all or any of the following causes, and for no other * * * 8. If the offense charged be punishable with death, the entertaining of such conscientious opinions as would preclude his finding the defend-

ant guilty; in which case he must neither be permitted nor compelled to serve as a juror." Defendant contends that, although this provision requires the exclusion of jurors whose determination of guilt would be affected by their views of capital punishment, neither its language nor its policy require the exclusion of those whose assessment of punishment alone would be influenced, and that section 190 in providing that a person found guilty of murder in the first degree "shall suffer death, or confinement in the state prison for life, at the discretion of the jury * * *" has made the determination of guilt and the assessment of punishment separate questions. The prosecution contends that the statute and decisions of this court require exclusion even when scruples go only to the assessment of punishment.

In support of its position the prosecution cites People v. Ah Chung, 54 Cal. 398, 402, and People v. Amaya, 134 Cal. 531, 535, 66 P. 794 where this court upheld challenges under section 1074(8). In neither of those cases, however, would the effect of the juror's opinion have been confined to the assessment of punishment. Because the jurors stated that they would not find the defendants guilty on the basis of circumstantial evidence alone when the penalty might be death, it was clear that although they were not unqualifiedly opposed to capital punishment, their views of its seriousness would affect their weighing the evidence in the determination of guilt. See also People v. Warner, 147 Cal. 546, 550, 82 P. 196.

Likewise distinguishable is People v. Cebulla, 137 Cal. 314, 317, 70 P. 181, because the juror there stated that his conscience would not permit him to bring in a verdict of guilty. Since the practical effect of permitting such a juror to serve would be to assure acquittal, the distinction between his state of mind and that of juror Dunavin in the present case is not merely verbal. For the same reason People v. Sanchez, 24 Cal. 17, 22, People v. Goldenson, 76 Cal. 328, 346, 19 P. 161, and People v. Miller, 177 Cal. 404, 407, 170 P. 817, are not direct authority in the present situation. In each of these cases the juror stated that his conscientious opinion would affect his determination of guilt. The Sanchez case came at a time when the jury had no discretion to fix the punishment, so that the only way a juror could effectively express his opposition to capital punishment was by finding the defendant not guilty. Similarly in the Goldenson and Miller cases, although the jury had by then been given discretion to choose between death and life imprisonment, it was not yet clear that one juror acting alone could prevent imposition of the extreme penalty. Before People v. Hall, 199 Cal. 451, 453–458, 249 P. 859, it was widely thought that the death penalty remained the norm, and that a unanimous jury was needed to reduce the penalty to life imprisonment, so that the juror's only course was to find the defendant not guilty.

People v. Rollins, 179 Cal. 793, 795–796, 179 P. 209, also came before People v. Hall, and may be distinguished on the same ground as these other cases. But the court articulated a broad reason for excluding from the jury those who are opposed to the death penalty, even though their scruples would not prevent their finding the defendant guilty: "[T]he discretion given to the jury [by section 190] to provide for life imprisonment in such a case is not an arbitrary discretion to be exercised without regard to the circumstances of the particular case, but only where it appears to the jury that there is some circumstance that warrants or justifies the imposition of the lesser punishment." 179 Cal. at page 796, 179 P. at page 210. General views of the social desirability or moral permissibility of capital punishment could logically have no place among the factors influencing the exercise of a discretion so conceived. See also People v. Collins, 105 Cal. 504, 512, 39 P. 16; People v. Majors, 65 Cal. 138, 148, 3 P. 597; cf. People v. Tanner, 2 Cal. 257, 258–260. Our decisions since the Rollins case have without discussion systematically excluded jurors opposed to the death penalty, apparently accepting the reasoning of the Rollins case in regard to the

relation between sections 190 and 1074(8). People v. Riley, 35 Cal.2d 279, 284, 217 P.2d 625; People v. Hoyt, 20 Cal.2d 306, 318, 125 P.2d 29; People v. Kynette, 15 Cal.2d 731, 744–745, 104 P.2d 794, certiorari denied 312 U.S. 703, 61 S.Ct. 806, 85 L. Ed. 1136.

We have recently criticized this interpretation of section 190 in People v. Green, 47 Cal.2d 209, 302 P.2d 307, holding it error to instruct a jury that it must find mitigating circumstances in a case to justify fixing the punishment at life imprisonment. Section 190 does not impose the death penalty, leaving discretion with the jury to substitute a lesser penalty; it imposes neither death nor life imprisonment, but with a perfectly even hand presents the two alternatives to the jury. The Legislature, perhaps because of the very gravity of the choice, has formulated no rules to control the exercise of the jury's discretion.

We did not suggest in the Green case, however, that section 190 did not require of the jurors a meaningful choice between these alternatives, a choice fundamentally based on the evidence and made during and not before deliberation on the verdict. The statute calls for the exercise of a legal discretion, not for the unswerving application of views formulated before trial that will compel a certain result no matter what the trial may reveal.

[1] Admittedly, a literal reading of section 1074(8) does not compel the exclusion of jurors incapable of exercising the discretion contemplated by section 190.[1] It would be doing violence to the purpose of these sections of the Penal Code, however, to construe section 1074(8) to permit these jurors to serve. It would in all probability work a de facto abolition of capital punishment, a result which, whether or not desirable of itself, it is hardly appropriate for this court to achieve by construction of an ambiguous statute.

Defendant contends that the admission in evidence of certain guns, holsters, belts, and shells was erroneous on the ground that they were not relevant to any issue in the case. On the morning of July 23rd, almost two weeks after the homicides, police found in Roscoe's Chrysler a brief case containing three holsters, two leather belts, each with twelve rounds of .38 special shells, a box of .22 shells, and fifty-nine .38 special shells. Two more .38 shells were found in the seat of the automobile. On the same day police arrested Richard and seized a loaded Colt .38 revolver in his possession. Later, following directions given them by Roscoe, they discovered a P38 automatic with a clip of shells in a cesspool. The court overruled objections to testimony describing the finding of these objects and also admitted them into evidence.

[2, 3] Some of the .38 special shells contained bullets that were copper-coated factory loads, and others contained hand-cast lead bullets. There was expert testimony that the factory loads resembled in weight and shape a factory-load bullet found at the scene of the crime, and although the expert could not say that they came from the same box as that bullet, he did maintain that they were of the same type and from the same manufacturer. Defendant brought out that this type of bullet is in common use throughout the country; nevertheless, the similarity testified to by the expert, together with the prosecution's showing that the .38 shells found in the brief case would fit the type of revolver known to have been used in the killings, justified the trial court's admitting the factory loads. The relevancy of the hand-cast bullets was even clearer. There was expert testimony, based on spectroscopic analysis of the metal in the bullets,

1. The awkwardness of testing the juror by use of the exact language of section 1074(8) was made abundantly clear in the present case. Time and again the court questioned the juror in the statutory language, and time and again the juror replied that he did not entertain such an opinion "as would prevent him finding the defendant guilty." Finally, in order to make it clear to the juror that he was being asked if he opposed the death penalty, the court was compelled to abandon the statutory language.

that those found in the brief case were probably poured from the same batch of lead as the hand-cast bullets found at the scene of the crime. The expert found "a remarkable resemblance."

[4] As to the holsters, experts testified that markings in People's Exhibit No. 26 indicated that it had once carried a Smith and Wesson .38 Special revolver. Even if this is a popular gun, we cannot say that possession of the holster was not relevant to the issue of the Risers' possession of the murder weapon.

[5–7] The prosecution's own witness established that the bullets found at the scene of the crime had been fired from a Smith and Wesson .38 Special revolver, not from either the Colt .38 or the P38 that the court admitted into evidence. When the specific type of weapon used to commit a homicide is not known, it may be permissible to admit into evidence weapons found in the defendant's possession some time after the crime that could have been the weapons employed. There need be no conclusive demonstration that the weapon in defendant's possession was the murder weapon. People v. Ferdinand, 194 Cal. 555, 563, 229 P. 341; People v. Nakis, 184 Cal. 105, 113–114, 193 P. 92. When the prosecution relies, however, on a specific type of weapon, it is error to admit evidence that other weapons were found in his possession, for such evidence tends to show, not that he committed the crime, but only that he is the sort of person who carries deadly weapons. People v. Riggins, 159 Cal. 113, 121, 112 P. 862; People v. O'Brien, 130 Cal. 1, 5, 62 P. 297; People v. Yee Fook Din, 106 Cal. 163, 165–167, 39 P. 530; People v. Wong Ah Leong, 99 Cal. 440, 34 P. 105. People v. Beltowski, 71 Cal.App.2d 18, 23, 162 P.2d 59, cited by the prosecution as contrary to this proposition, is adequately distinguished in People v. Richardson, 74 Cal.App.2d. 528, 541–542, 169 P.2d 44, on the ground that no specific weapon was relied on in the Beltowski case. It was error therefore to to admit the Colt, two of the holsters, the belts, and the box of .22 shells. The P38 was admissible on other grounds that appear below.

[8] Defendant, however, was not prejudiced by these errors. The shells and one holster were clearly admissible, and from these the jury would have concluded that defendant possessed firearms. The admission of the Colt, more holsters, belts, and shells added little to the jury's knowledge gained from evidence correctly admitted. The introduction of the Colt may have actually benefited defendant, for it provided an explanation for his possession of the .38 shells. An expert testified that these shells would fit either a Colt or a Smith and Wesson .38 Special, and without the Colt in evidence the jury might more easily have concluded that the ammunition was kept for a Smith and Wesson.

Defendant next cites as prejudicial error the introduction of evidence of other crimes. On the stand defendant maintained that the only pistols he had ever owned were the Colt, the P38, and a toy cap pistol, and he denied having a Smith and Wesson .38 Special. He stated that he had obtained the P38 from a sailor in the New Viking Bar, and denied having told a police officer that he had taken it from Doc's Village, a different bar. Officer Dutil then testified that defendant had told him that he had taken the P38 from Doc's Village on June 29, 1955. The prosecution followed this with testimony by the bartender at Doc's Village that the two brothers had robbed Doc's Village on June 29th, that each had been armed with a blue steel gun, and that they had taken away with them a P38 kept behind the bar. Finally, the owner of Doc's Village identified the P38 found in the cesspool as the one that had been kept behind the bar.

[9] Evidence of other crimes is not admissible when its sole effect is to show a criminal disposition, but if it "tends logically and by reasonable inference to establish any fact material for the prosecution, or overcome any material fact sought to be proved by the defense, [it] is admis-

sible although it may connect the accused with an offense not included in the charge." People v. Woods, 35 Cal.2d 504, 509, 218 P.2d 981, 984; see People v. Citrino, 46 Cal.2d 284, 288, 294 P.2d 32.

[10] The cross-examination of defendant to discover whether he had ever owned a Smith and Wesson .38 Special and when he had acquired the P38, and the testimony of the witnesses from Doc's Village, tended to establish that the Risers entered Doc's Village on June 29th armed with two blue steel guns; that they there acquired the P38; that therefore they had at one time been in possession of three guns, and that only two of these were known not to have been Smith and Wesson .38 Specials. The P38 was admissible to corroborate the bartender's testimony that the Risers acquired the P38 at a time when they already had two guns. This evidence that the Risers had a third gun of unknown make was relevant to show that they had the means to commit the crime. See People v. Simeone, 26 Cal.2d 795, 804–805, 161 P.2d 369.

The trial court closely limited the effect of the testimony on the Doc's Village incident to showing how the Risers were armed and when they obtained the P38, and specifically instructed the jury against drawing broad inferences of criminal tendencies. The court's further limitation of the testimony to purposes of impeachment was, if anything, unduly favorable to defendant.

Roscoe Riser also took the stand. On direct examination he stated that he had never been involved in a robbery; on cross-examination the district attorney gave detailed descriptions of numerous robberies committed in San Francisco by Roscoe and Richard, intermittently asking Roscoe if he had not furnished these descriptions in admitting the robberies to the police. Roscoe denied the prior inconsistent statements.

[11] Defendant complains that the court should have immediately instructed the jury that these references to his participation in robberies could in no way be used against him, since the prosecution did not show that he had been present when Roscoe was interrogated. Throughout the trial the court, whenever requested to do so, instructed clearly and at length that statements made by one defendant were not evidence against another defendant who had not been present, and it repeated this warning in its general instructions at the close of the trial. There is no reason to suppose that the jury, even though not reinstructed at this particular juncture, did not understand and apply the general principle the court had laid down. Furthermore, since defendant did not request the court to repeat its warning at this time, he cannot now complain.

Defendant says that it was misconduct for the prosecutor to fail to produce witnesses that Roscoe had in fact made the statements attributed to him; that since the prosecutor apparently had neither the intention nor the means of establishing the truth of his allegations, he must have made them solely to inflame the jury against the brothers. Cf. People v. Evans, 39 Cal.2d 242, 248–249, 246 P.2d 636. We must assume, however, that in view of the court's instructions the jury did not consider defendant's alleged participation in the robberies. The injury if any was to Roscoe, and his appeal is not now before us.

As a further error, defendant complains of the admission in evidence of a bottle and a glass bearing fingerprints testified to be the fingerprints of Richard Riser. Deputy Sheriff Lochry identified the bottle and glass as articles that he had taken from the Hilltop Cafe. When he arrived at the Cafe, early in the morning of July 12th, he found several bottles, glasses, and salt cellars on the bar. He dusted them for fingerprints, put them in a box, and locked the box in the sheriff's identification truck. About 4 or 5 a. m. he returned to the sheriff's office and put the articles in an open book case in an office that he shared with another police officer. This office was unlocked; it was flanked on one side by an office shared by two or three persons, and on the other side by a hall leading to a general office. According to Lochry, the

evidence remained in the book case approximately four hours, until about 8:30 a. m., when it was removed and thereafter kept under lock and key or in the custody of specific persons.

Defendant contends that in view of these facts the prosecution failed to establish continuous possession, which is a necessary foundation for the admission of demonstrative evidence; that since someone could have altered the prints or imposed wholly new ones during the four hours the glass and bottle were left unguarded in the book case, the prosecution has not sufficiently identified the prints as those that existed when the articles were removed from the bar. Defendant would require the prosecution to negative all possibility of tampering.

[12] Undoubtedly the party relying on an expert analysis of demonstrative evidence must show that it is in fact the evidence found at the scene of the crime, and that between receipt and analysis there has been no substitution or tampering, see People v. Coleman, 100 Cal.App.2d 797, 801, 224 P.2d 837; 21 A.L.R.2d 1216, 1219, 1236–1237, but it has never been suggested by the cases, what the practicalities of proof could not tolerate that this burden is an absolute one requiring the party to negative all possibility of tampering. See e. g., People v. Brown, 92 Cal.App.2d 360, 365, 206 P.2d 1095; Commonwealth v. Mazarella, 279 Pa. 465, 472, 124 A. 163.

[13, 14] The burden on the party offering the evidence is to show to the satisfaction of the trial court that, taking all the circumstances into account including the ease or difficulty with which the particular evidence could have been altered, it is reasonably certain that there was no alteration. The requirement of reasonable certainty is not met when some vital link in the chain of possession is not accounted for, because then it is as likely as not that the evidence analyzed was not the evidence originally received. Left to such speculation the court must exclude the evidence. See Dobson v. Industrial Accident Comm'n, 114 Cal.App.2d 782, 785, 251 P.2d 349; McGowan v. City of Los Angeles, 100 Cal. App.2d 386, 389–392, 223 P.2d 862, 21 A.L.R.2d 1206; People v. Smith, 55 Cal. App. 324, 327–329, 203 P. 816; Novak v. District of Columbia, 82 U.S.App.D.C. 95, 160 F.2d 588. Conversely, when it is the barest speculation that there was tampering, it is proper to admit the evidence and let what doubt remains go to its weight. See People v. Tomasovich, 56 Cal.App. 520, 529, 206 P. 119; State v. Smith, Mo., 222 S.W. 455, 458–459. In the present case defendant did not point to any indication of actual tampering, did not show how fingerprints could have been forged, and did not establish that any one who might have been interested in tampering with the prints knew that the bottles and glasses were in Deputy Sheriff Lochry's book case. There was no error in the court's ruling.

In the course of instructing the jury the court stated that "Although there are two degrees of murder, the evidence in this case is such that either both of the defendants, or one of them, is innocent of the charge of murder * * * or one or both of the defendants are guilty of murder in the first degree. * * * For murder which is committed in the perpetration or attempt to perpetrate * * * robbery * * * is murder of the first degree; whether the killing was intentional, unintentional or accidental." See Pen.Code, § 189.

[15] Defendant contends that it was error for the court thus to remove from the jury's consideration the degree of murder, and whether in fact it had been in the course of a robbery or attempted robbery. The evidence, however, was overwhelming that the homicides had been committed in the perpetration of a robbery, and when there is no reasonable doubt on this issue the court is justified in withdrawing it from the jury. People v. Sanford, 33 Cal.2d 590, 595, 203 P.2d 534; People v. Perkins, 8 Cal.2d 502, 516, 66 P.2d 631; see People v. Rupp, 41 Cal.2d 371, 381–382, 260 P.2d 1. Defendant offered no evidence indicat-

ing that a robbery had not been committed, and in his own statement of facts to this court he says that "the killing took place during the commission of a robbery."

In addition to this instruction on felony murder, the court gave the jury the code definition of murder, including the provisions on premeditated murder and second degree murder, and the code definition of robbery. Pen.Code, §§ 189, 211. These instructions were unnecessary because they covered questions that had already been withdrawn from the jury by the first instruction. But if any confusion was generated by these instructions, it could only have benefited defendant by leading the jury to think that the question of the degree of murder was still open to its determination. See People v. Peterson, 29 Cal.2d 69, 78–79, 173 P.2d 11, certiorari denied, 331 U.S. 861, 67 S.Ct. 1751, 91 L.Ed. 1867.

In the midst of its deliberations the jury returned to the courtroom and the following discussion took place between court and jury:

"The Foreman: The question was, under those circumstances would either of the defendants be eligible for parole if a recommendation was made for life imprisonment.

"The Court: I see. Well, the answer of the Court is for the purpose of determining the punishment and for that purpose, only, it is the law that a person convicted of First Degree Murder and sentenced to life imprisonment may be eligible for parole. Does that answer your question?

"The Foreman: Yes.

"The Court: I might state that it further provides that they may be eligible for parole but not before he has served seven calender years. Now, I just state that the law is worded that way."

The next day the jury informed the court that it had one verdict complete as to one of the brothers. It then submitted a written question to the court asking whether "In the event of what is a verdict of guilty on both counts one and two, is there any recommendation the Jury can make that would preclude the possibility of parole during the lifetime of a person convicted." The court answered, "No." Within an hour the jury returned its verdicts of guilty, fixing the punishment at life imprisonment for Roscoe, but with no specification of punishment for Richard. Under the instructions that were given the verdict as to Richard necessarily implied that the jury fixed the punishment at death.

[16, 17] It is now well-established that although the jury may not weigh the possibility of pardon or parole in determining the guilt of an accused, it may consider these consequences in exercising its discretion to choose between different punishments. People v. Reese, 47 Cal.2d 112, 301 P.2d 582; People v. Byrd, 42 Cal.2d 200, 206–208, 266 P.2d 505, certiorari denied, 348 U.S. 848, 75 S.Ct. 73, 99 L.Ed. 668; People v. Barclay, 40 Cal.2d 146, 158, 252 P.2d 321; People v. Osborn, 37 Cal.2d 380, 384–385, 231 P.2d 850. Defendant contends, however, that it was error for the court to give the jury information about eligibility for parole before it had determined the question of guilt or innocence. This contention is without merit. In both People v. Reese, supra, and People v. Byrd, supra, we upheld the trial court when it had included in its original instructions to the jury the information that one sentenced to life imprisonment could be paroled. In those cases, as in the present one, the court cautioned the jury against allowing this information to influence its determination of guilt. Prudence requires no more; it does not require that the jury be kept in ignorance of the consequences of different penalties until it has finally determined guilt. Moreover, it is by no means clear in the present case that the jury, when it addressed its questions to the court, had not already found defendant guilty.

Defendant also claims that the court misinformed the jury when it said that defendant could be paroled in seven years if sentenced to life imprisonment; that

because of sections 3024(b) and 3048 of the Penal Code, defendant could not be paroled in less than ten years.

[18] Section 3024(b) provides that the minimum terms of sentence and imprisonment "for a person previously convicted of a felony either in this State or elsewhere, and armed with a deadly weapon [is] * * * 10 years * * *." As we pointed out in People v. Reese, 47 Cal.2d 112, 301 P.2d 582, this provision is in an article of the Code concerned with the length of sentences and the fixing thereof, and not with how much of a sentence must be served before a prisoner is eligible for parole. That subject is covered in a different article, embracing sections 3040 to 3065. Section 3049 provides that a person whose minimum term of imprisonment is more than one year may be paroled at any time after the expiration of one-third of the minimum term. Section 3046 limits section 3049 by stating that no person imprisoned under a life sentence may be paroled until he has served at least seven calendar years. Authority to grant parole after a certain portion of a minimum term has been served is not destroyed by a provision such as section 3024 which sets the minimum term itself.

[19] Section 3048, also cited by defendant, limits eligibility for parole when a defendant has been adjudicated an habitual criminal. Such an adjudication cannot be made unless the prior convictions on which it is to be based have been charged in the indictment. People v. Wagner, 78 Cal.App. 503, 506–507, 248 P. 946. No prior convictions were charged in the indictment in the present case, therefore section 3048 has no application.

[20] Defendant's most serious objections go to the eye-witness testimony of Mrs. Burgess and Mr. Pantel. One charge is that the prosecution improperly coached Mrs. Burgess into identifying defendant as the man she had seen at the Hilltop. Mrs. Burgess identified defendant in a Stockton police lineup. She admitted that after this Lieutenant Kilroy had been to her house on numerous occasions, shown her pictures and taken her for rides, and that after her appearance before the grand jury the district attorney had discussed her testimony with her on several occasions. There is no evidence, however, that she was prepared in any way before the lineup, and she specifically denied having seen pictures of defendant before that time. This evidence is insufficient to justify a conclusion that Mrs. Burgess' identification was the result of an idea planted in her mind by the prosecution.

Before trial defendant moved for an order directing the prosecution to furnish him with a copy of the fingerprint taken from the bottle, and directing the Sheriff's Office of Stanislaus County to allow him to inspect statements made to police by Mrs. Burgess and Mr. Pantel immediately after the homicides. The motion was denied.

After cross-examination of witnesses Burgess and Pantel, defendant had issued a subpoena duces tecum addressed to Captain Ross of the Sheriff's Office commanding him to produce the originals of the same statements sought by the pretrial motion. The affidavit in support of the subpoena asserted that the statements were material and relevant to issues in the case and contradictory to the witnesses' present testimony. Defendant first learned of the statements from local newspapers, which reported Captain Ross as saying that the witnesses had described the man who did the shooting as tall and slender, with a dark complexion and black hair, and the other man as dark complexioned with black hair. Apparently the Riser brothers have blond hair and light complexions, and differ significantly in other characteristics from the newspaper descriptions. On cross-examination Mrs. Burgess admitted having made a statement to the police. She claimed, however, that she described the man who did the shooting as stocky, not as tall and slender, and although she admitted describing the man by the door as dark complexioned, she denied having said that he had black hair.

The prosecution moved for an order vacating the subpoena. Despite defendant's argument that he was entitled to the statements for purposes of impeachment, the motion was granted on the ground that the subpoena sought to bring into court evidence that could not be used for impeachment and was not otherwise admissible. Defendant contends that this order was erroneous.

Originally at common law the accused in a criminal action could not compel production of documents or other evidence in the possession of the prosecution. (See 6 Wigmore, Evidence (3rd ed. 1940), 475–476; 8 Id. at 219–220.) Production was denied before trial on the ground that to compel the prosecution to reveal its evidence beforehand would enable the defendant to secure perjured testimony and fabricated evidence to meet the state's case. It was felt, furthermore, that to allow the defendant to compel production when the prosecution could not in its turn compel production from the defendant because of the privilege against self incrimination would unduly shift to the defendant's side a balance of advantages already heavily weighted in his favor. See generally State v. Tune, 13 N.J. 203, 98 A.2d 881; State ex rel. Robertson v. Steele, 117 Minn. 384, 135 N.W. 1128; 6 Wigmore, Evidence, supra, at 475–476.

[21] Whatever the force of these arguments when directed to pretrial discovery, they have little or no application when production is sought by subpoena during trial of statements referred to on cross-examination. The question then is not whether the defendant will be allowed advance disclosure of evidence upon which the prosecution plans to base its case, but whether he will be allowed any disclosure of evidence that the prosecution does not intend to produce in court at all. See United States v. Krulewitch, 2 Cir., 145 F.2d 76, 78, 156 A.L.R. 337. Furthermore, the additional possibility that the defendant will obtain perjured testimony or fabricated evidence as a result of disclosure at this point in the proceedings is too slight to justify denying production. The decisions of this court have always impliedly recognized that on a proper showing a defendant in a criminal case can compel production when it becomes clear during the course of trial that the prosecution has in its possession relevant and material evidence. Production has been denied, not on the ground that there was never any right to it, but because the requirements justifying production had not been met in the particular case. People v. Gallardo, 41 Cal.2d 57, 67, 257 P.2d 29; People v. Bermijo, 2 Cal.2d 270, 276, 40 P.2d 823; People v. Glaze, 139 Cal. 154, 72 P. 965.

[22] There is authority to the contrary, see, e. g., Little v. United States, 8 Cir., 93 F.2d 401, 407, certiorari denied, 303 U.S. 644, 58 S.Ct. 643, 82 L.Ed. 1105; State v. Rhoads, 81 Ohio St. 397, 91 N.E. 186, 27 L.R.A.,N.S., 558, but we are convinced that the better reasoned decisions support the position implicit in our cases. See Gordon v. United States, 344 U.S. 414, 73 S.Ct. 369, 97 L.Ed. 447; United States v. Krulewitch, 2 Cir., 145 F.2d 76, 78–79, 156 A.L.R. 337; Asgill v. United States, 4 Cir., 60 F.2d 776, 778–779; People v. Walsh, 262 N.Y. 140, 149–150, 186 N.E. 422; People v. Dellabonda, 265 Mich. 486, 496–507, 251 N.W. 594. Absent some governmental requirement that information be kept confidential for the purposes of effective law enforcement, the state has no interest in denying the accused access to all evidence that can throw light on issues in the case, and in particular it has no interest in convicting on the testimony of witnesses who have not been as rigorously cross-examined and as thoroughly impeached as the evidence permits. To deny flatly any right of production on the ground that an imbalance would be created between the advantages of prosecution and defense would be to lose sight of the true purpose of a criminal trial, the ascertainment of the facts. See Gordon v. United States, supra, 344 U.S. at page 419, 73 S.Ct. at page 373; 8 Wigmore,

Evidence, supra, at 219–220; cf. People v. Davis, 52 Mich. 569, 18 N.W. 362.

[23] In People v. Glaze, supra, we refused to order production of a statement that appeared to the court to be inadmissible for any purpose, even for impeachment. The witness had neither signed the statement nor adopted it in any way. The lower courts have consistently enforced this requirement that the evidence sought be admissible, without denying, however, that production can be had when the evidence can be used to impeach and is not confidential. People v. Wilkins, 135 Cal.App.2d 371, 377–378, 287 P.2d 555; People v. Santora, 51 Cal.App.2d 707, 712, 125 P.2d 606; People v. Singh, 136 Cal.App. 233, 243, 28 P.2d 416; People v. Keyes, 103 Cal.App. 624, 638–640, 284 P. 1096, 1105; People v. Haughey, 79 Cal.App. 541, 543–544, 250 P. 406; People v. Nields, 70 Cal.App. 191, 232 P. 985; People v. Emmons, 7 Cal.App. 685, 690–691, 95 P. 1032. Nor do we think that the impeachment justifying production is necessarily restricted to impeachment by prior inconsistent statements to the exclusion, for example, of impeachment for bias. See Asgill v. United States, supra, 60 F.2d at page 779.

In the present case the court denied production on the ground that the statements could not be used to impeach the witnesses. We are at a loss to understand how the court could have reached this conclusion without even seeing the statements. Whether they were in writing or signed by the witnesses the record does not show, and it is safe to say that no one but the prosecution knew. Even if they were not signed, defendant might have been able to show, by the testimony of a stenographer or other witnesses or by the admissions of Mrs. Burgess and Mr. Pantel themselves, that the statements had been accurately transcribed and therefore could be used for impeachment. See People v. Bjornsen, 79 Cal.App.2d 519, 534–535, 180 P.2d 443; People v. Orosco, 73 Cal.App. 580, 593, 239 P. 82.

[24, 25] Obviously a defendant cannot show conclusively that a document is admissible without seeing it, and yet in order to see it he is told that he must show that it is admissible. The proper test for determining whether production must be granted is not whether the evidence has been conclusively proved admissible but whether, as stated in People v. Glaze, supra, 139 Cal. at page 158, 72 P. at page 967, "there is good reason to believe that the document, when produced, would be admissible in evidence for some purpose in the case * * *." There must be more than a mere possibility that the statements when produced will contain contradictory matter and be in such a form that they can be used to impeach, but the chance that it may turn out eventually that they cannot be used for this purpose should not block production at the threshold.

This precise problem, the relation between admissibility and the right to production, was presented in Gordon v. United States, supra, and the court there concluded that the prosecution had not conceded enough in admitting that it would be error to refuse to order production if it would be error not to admit the evidence once produced. "[P]roduction may sometimes be required though inspection may show that the document could properly be excluded." 344 U.S. at page 418, 73 S.Ct. at page 372. As in the case before us, the court was faced with a record that showed no reason why the statements once produced could not be used for impeachment.

[26] That the statements of Mrs. Burgess and Mr. Pantel existed and were in the possession of the prosecution or the police was never denied; that it was probable that they were inconsistent with the witnesses' testimony was shown by the newspaper accounts. Defendant was unable to prove conclusively that the statements were in a form warranting use for impeachment only because the prosecution kept them in its exclusive control. The prosecution did not claim that the necessi-

ties of law enforcement required that the statements be kept confidential, and in view of the fact that the police had released the substance of the statements to the press, there could be no such claim. Defendant was not exploring for generally useful information, but demanded particular documents reasonably thought to be usable for the specific purpose of impeachment. Finally, defendant went as far as he could without benefit of the statements, at least in the case of Mrs. Burgess. Once the witness denied the prior inconsistencies, there was nothing further defendant could do to press the impeachment. It does not appear that there were any witnesses to the statements who could recall exactly what had been said, and even if there were defendant was not compelled to rely on them if far more impressive documentary proof was at hand. We conclude that defendant sustained the burden imposed on him and that it was error to vacate the subpoena.

[27] In deciding whether this error was prejudicial we must determine whether there was a reasonable probability that the jury would have reached a different verdict had defendant been allowed to obtain and introduce in evidence prior inconsistent statements of the eye-witnesses. People v. Watson, 46 Cal.2d 818, 836, 299 P.2d 243. Even if we assume that prior inconsistent statements would have impaired the value of the eye-witness testimony, there remained against defendant the fingerprint evidence, the evidence that he possessed hand-cast bullets that probably had a common origin with bullets found at the scene of the crime and a holster that had once carried a Smith and Wesson .38 Special, and the evidence that he had had a gun in addition to those he admitted owning.

Weighed against this evidence was the testimony of the Risers that they had not been at the Hilltop on July 11th. Both stated that they nad been at the house of Della Fay Jones, Roscoe's girl friend, until 7:30 or 8 o'clock in the evening, and then had gone on, Roscoe and Della to a movie and Richard on a round of Stockton bars. Richard returned home about midnight and did not see Roscoe until the next morning. Della Fay Jones did not testify.

Richard had earlier told police that it was probably on the 11th that he and Roscoe had gone to Riverbank to buy furniture, returning to Stockton by way of Oakdale where they stopped at a bar. At the trial he explained that he had been confused about the dates as a result of almost continuous questioning by the police for three or four days. Roscoe could not recall the Riverbank expedition at all.

Witness Basford testified that the two men he met coming into the Hilltop Cafe had been in a Chrysler, Buick, or Pontiac. Both brothers testified that Roscoe's Chrysler had a flat tire on the 11th, and Roscoe said that it had been left in the backyard of their mother's house from the 10th until the 13th, while they used an old Dodge converted into a truck. Their mother stated that the Chrysler had been in the yard from the 10th to the 13th, and that if it had been removed it could only have been while she was asleep. A witness for the prosecution testified that he had seen the brothers getting into the Chrysler on the afternoon or evening of the 11th, but on cross-examination his testimony proved extremely weak.

[28, 29] Fingerprint evidence is the strongest evidence of identity, and is ordinarily sufficient alone to identify the defendant. See People v. Adamson, 27 Cal. 2d 478, 495, 165 P.2d 3, affirmed 332 U.S. 46, 67 S.Ct. 1672, 91 L.Ed. 1903. Here there is in addition to the fingerprint evidence the evidence of a common origin for the hand-cast bullets, a "remarkable resemblance" which we have no reason to believe could be the result of chance. The evidence that the holster had once carried a Smith and Wesson .38 Special, and that defendant had possessed an unidentified third gun, although not as strong as the

fingerprint and bullet evidence, contribute to an impressive total of proof identifying defendant. We are of the opinion, therefore, that it is not reasonably probable that the jury, faced with this evidence, would have chosen to believe instead the unsupported testimony of defendant that he had not been at the Hilltop Cafe on the night of July 11th; accordingly, there has been no miscarriage of justice. Cal.Const. art. VI, § 4½.

The judgment and order are affirmed.

GIBSON, C. J., and SCHAUER, SPENCE and McCOMB, JJ., concur.

CARTER, Justice.

I dissent.

I cannot agree with the conclusion reached by a majority of this court that while it was error it was not prejudicial error for the trial court to deny defendant the right to produce documents containing statements by eyewitnesses allegedly contrary to those made at the trial by such witnesses. In my opinion nothing could be more prejudicial. It is impossible for an appellate court to say that the jury was not impressed by testimony which absolutely identified the defendant as the perpetrator of the crime given by persons present at the time the crime was committed.

In view of the holding in Gordon v. United States, 344 U.S. 414, 73 S.Ct. 369, 97 L.Ed. 447, it seems incredible that a majority of this court could hold that this error was not prejudicial. The same problem was there presented. The court had this to say: "By proper cross-examination, defense counsel laid a foundation for his demand by showing that the documents were in existence, were in possession of the Government, were made by the Government's witness under examination, were contradictory of his present testimony, and that the contradiction was as to relevant, important and material matters which directly bore on the main issue being tried: the participation of the accused in the crime. The demand was for production of these specific documents and did not propose any broad or blind fishing expedition among documents possessed by the Government on the chance that something impeaching might turn up. Nor was this a demand for statements taken from persons or informants not offered as witnesses. The Government did not assert any privilege for the documents on grounds of national security, confidential character, public interest, or otherwise. * * * Indeed, we would find it hard to withstand the force of Judge Cooley's observation in a similar situation that 'the state has no interest in interposing any obstacle to the disclosure of the facts, unless it is interested in convicting accused parties on the testimony of untrustworthy persons.' [People v. Davis, 52 Mich. 569, 18 N.W. 362, 363.] In the light of our reason and experience, the better rule is that upon the foundation that was laid the court should have overruled the objections which the Government advanced and ordered production of the documents.

"The trial court, of course, had no occasion to rule as to their admissibility, and we find it appropriate to consider that question only because the Government argues that the trial judge, in the exercise of his discretion, might have excluded these prior contradictory statements and since that would not have amounted to reversible error, it was not such to decline their production. We think this misconceives the issue. It is unnecessary to decide whether it would have been reversible error for the trial judge to exclude these statements once they had been produced and inspected. For production purposes, it need only appear that the evidence is relevant, competent, and outside of any exclusionary rule; for rarely can the trial judge understandingly exercise his discretion to exclude a document which he has not seen, and *no appellate court could rationally say whether the excluding of evidence unknown to the record was error, or, if so, was harmless.* The question to be answered on an

application for an order to produce is one of admissibility under traditional canons of evidence, and not whether exclusion might be overlooked as harmless error.

"The Court of Appeals affirmed on the ground that Marshall's admission, on cross-examination, of the implicit contradiction between the documents and his testimony removed the need for resort to the statements and the admission was all the accused were entitled to demand. We cannot agree. We think that an admission that a contradiction is contained in a writing should not bar admission of the document itself in evidence, providing it meets all other requirements of admissibility and no valid claim of privilege is raised against it. The elementary wisdom of the best evidence rule rests on the fact that the document is a more reliable, complete and accurate source of information as to its contents and meaning than anyone's description and this is no less true as to the extent and circumstances of a contradiction. We hold that the accused is entitled to the application of that rule, not merely because it will emphasize the contradiction to the jury, but because it will best inform them as to the document's impeaching weight and significance. Traditional rules of admissibility prevent opening the door to documents which merely differ on immaterial matters. *The alleged contradictions to this witness' testimony relate not to collateral matters but to the very incrimination of petitioners.*" Emphasis added; 344 U.S. at pages 418–421, 73 S.Ct. at page 373. It was concluded: "The Government, in its brief, argues strongly for the widest sort of discretion in the trial judge in these matters and urges that even if we find error or irregularity we disregard it as harmless and affirm the conviction. We are well aware of the necessity that appellate courts give the trial judge wide latitude in control of cross-examination, especially in dealing with collateral evidence as to character. Michelson v. United States, 335 U.S. 469, 69 S.Ct. 213, 93 L.Ed. 168. But this principle cannot be expanded to justify a curtailment which keeps from the jury relevant and important facts bearing on the trustworthiness of crucial testimony. Reversals should not be based on trivial, theoretical and harmless rulings. But we cannot say that these errors were unlikely to have influenced the jury's verdict. We believe they prejudiced substantial rights and the judgment must be *reversed.*" 344 U.S. at pages 422–423, 73 S.Ct. at page 374.

The eyewitness testimony was by far the most important evidence against this defendant. The murder weapon was never found; the similarity in the hand-cast bullets was only that they were "probably of common origin"; and it was thought that defendant's holster had once carried a gun of a type of the murder weapon. It would appear to me that, in Judge Cooley's language, the state should have no interest in interposing any obstacle to the disclosure of facts; that all material and relevant facts should be set forth for the determination of the jury and, if certain state witnesses have been accused of making contradictory statements relating to a material fact, those statements should also be before the jury so that it could determine for itself the trustworthiness of such witnesses. The American concept of due process most certainly encompasses the right of an accused to be confronted by trustworthy witnesses and the right to show, if he can, that witnesses against him may not be worthy of belief. Due process most certainly also encompasses the concept that the state will not seek to conceal material evidence in the accused's favor. If due process of law does not encompass such concepts, then we have most assuredly departed a long way from the very foundation upon which our system of justice rests—the ideal that every man is presumed innocent until proven guilty beyond a reasonable doubt. In the words of Mr. Justice Holmes, Olmstead v. United States, 277 U.S. 438, 48 S.Ct. 564, 72 L.Ed. 944, it is better that one criminal escape than that the government play an ignoble part.

In Mesarosh v. United States, 77 S.Ct. 1; 77 S.Ct. 8, 9, the government moved to remand the case to the trial court because of untruthful testimony given before other tribunals by Mazzei, a government witness, although contending that the testimony given in the instant case by Mazzei was "entirely truthful and credible." The government sought to have the matter remanded to the District Court for a full consideration of the credibility of the testimony of the witness Mazzei. The counter-motion of petitioners asked for a new trial. In reversing the judgments below with directions to grant the petitioners a new trial, Mr. Chief Justice Warren, speaking for the court, had this to say [77 S.Ct. 8]: "Mazzei, by his testimony, has poisoned the water in this reservoir, and the reservoir cannot be cleansed without first draining it of all impurity. This is a federal criminal case, and this Court has supervisory jurisdiction over the proceedings of the federal courts. If it has any duty to perform in this regard, it is to see that the waters of justice are not polluted. Pollution having taken place here, the condition should be remedied at the earliest opportunity. 'The untainted administration of justice is certainly one of the most cherished aspects of our institutions. Its observance is one of our proudest boasts. This Court is charged with supervisory functions in relation to proceedings in the federal courts. See McNabb v. United States, 318 U.S. 332, 63 S.Ct. 608, 87 L.Ed. 819. Therefore, fastidious regard for the honor of the administration of justice requires the Court to make certain that the doing of justice be made so manifest that only irrational or perverse claims of its disregard can be asserted.' Communist Party [of United States] v. Subversive Activities Control Board, 351 U.S. 115, 124, 76 S.Ct. 663, 668.

"The government of a strong and free nation does not need convictions based upon such testimony. It cannot afford to abide with them. The interests of justice call for a reversal of the judgments below with direction to grant the petitioners a new trial."

Surely the great State of California does not need convictions based upon the deprivation of an accused's constitutional right to due process of law.

For the foregoing reasons I would reverse the judgment.

Rehearing denied; CARTER, J., dissenting.



47 Cal.2d 594

PEOPLE of the State of California, Plaintiff and Respondent,

v.

Roscoe R. RISER, Defendant and Appellant.

Cr. 5896.

Supreme Court of California.
In Bank.
Dec. 31, 1956.

Defendant was convicted of murder. The Superior Court, Stanislaus County, Frank C. Damrell, J., entered judgment, and defendant appealed, and the People filed a motion that appeal be dismissed because defendant did not file his notice of appeal within required time. The Supreme Court, Traynor, J., held that mere fact that after defendant was convicted of murder he was removed from county jail to penitentiary, so that communication between defendant and his counsel became difficult, would not justify excusing failure of defendant to file timely notice of appeal.

Appeal dismissed.

See also Cal., 305 P.2d 1.

1. Criminal Law ⇐1069(1)

The State, which establishes the time limit for appeals in criminal cases, may not frustrate those within its control from meeting the requirement, whether by slowness of prison methods or by negligence or misleading assurances of its employees.

West's Ann.Rules on Appeal, rules 31, 53(b).

2. Criminal Law ⇐1069(6)

Mere fact that defendant is incarcerated during time for filing of appeal is not sufficient to permit him to invoke the rule that where lateness of filing of appeal is wholly attributable either to negligence of prison employees or to prison routine, appeal should not be dismissed. West's Ann. Rules on Appeal, rules 31, 53(b).

3. Criminal Law ⇐1068½

The State has no duty to see that every convicted prisoner perfects an appeal, nor is it responsible should the public defender fail to act. West's Ann. Rules on Appeal, rules 31, 53(b).

4. Criminal Law ⇐1081

Where there is no showing by a defendant of a convincing excuse for delay in filing notice of appeal, appeal must be dismissed. West's Ann.Rules on Appeal, rules 31, 53(b).

5. Criminal Law ⇐1081

Mere fact that after defendant was convicted of murder he was removed from county jail to penitentiary, so that communication between defendant and his counsel became difficult, would not justify excusing failure of defendant to file timely notice of appeal. West's Ann. Rules on Appeal, rules 31, 53(b).

Walter C. Hancock, Public Defender, Stanislaus County, and William R. Lundgren, Deputy Public Defender, Modesto, for appellant.

Edmund G. Brown, Atty. Gen., and Doris H. Maier, Deputy Atty. Gen., for respondent.

TRAYNOR, Justice.

Roscoe R. Riser and his brother Richard G. Riser were found guilty by a jury of murder in the first degree. The jury fixed the punishment at life imprisonment for Roscoe Riser. A motion for a new trial was denied, and on February 24, 1956, judgment was entered on the verdict. Richard Riser's appeal to this court is automatic under section 1239(b) of the Penal Code, but to perfect an appeal defendant Roscoe Riser was required by rule 31 of the Rules on Appeal to file his notice of appeal "within 10 days after the rendition of the judgment * * *." Defendant did not file a notice of appeal until March 30th, considerably beyond the ten-day period. The People have filed a motion that the appeal be dismissed because defendant did not file his notice of appeal within the required time.

In an affidavit the deputy public defender, one of defendant's counsel, gives an explanation of the delay. He states that prior to judgment he discussed with defendant the question of appeal, but they reached no decision; that late in the morning of February 24th, after judgment had been entered, he and the public defender attempted to get in touch with defendant at the county jail only to find that he had already been sent to San Quentin; and that during the succeeding ten days, they received no communication from him and consequently took no action to perfect an appeal.

Defendant contends that in view of the seriousness of the sentence the appeal should be allowed because of the difficulty of communication between him and his counsel, because the delay in filing was owing to no fault of defendant, and because the points on appeal would be the same as those raised by the automatic appeal of Richard Riser.

[1] In support of this contention, defendant cites People v. Slobodion, 30 Cal. 2d 362, 181 P.2d 868. In that case we declined to dismiss an appeal where a prisoner had deposited his notice of appeal with prison employees and the lateness of filing was wholly attributable either to the negligence of those employees or to prison routine. The appellant had done all he could to assure timely filing. Recently, in People v. Head, 46 Cal.2d 886, 299 P.2d 872, we refused to dismiss an ap-

peal where the appellant had relied on the representations of prison officials that his appeal would be taken care of. Thus the state, which establishes the time limit for appeals, may not frustrate those within its control from meeting the requirement, whether by the slowness of prison methods or by the negligence or misleading assurances of its employees.

[2, 3] The mere fact, however, that an appellant is incarcerated during the time for filing is not enough to invoke the Slobodion rule, since it does not point to the state as the cause of delay. In the present case we are told only that after judgment defendant was removed to San Quentin and that communication with him became difficult. There is no showing, however, that communication was attempted, or that if it was prison routine was a substantial factor in making the appeal late. Nor is it claimed that defendant attempted to file his notice through prison officials within the ten-day period. The state has no duty to see that every convicted prisoner perfects an appeal, nor is it responsible should the public defender fail to act. See People v. Walsh, 129 Cal. App.2d 327, 328–329, 277 P.2d 73; People v. Cox, 120 Cal.App.2d 246, 260 P.2d 1050.

Since defendant cannot show state action that would bring him within the Slobodion or Head cases, he is faced with the established rule that neither the parties nor the court can extend the time set by the Rules. People v. Behrmann, 34 Cal.2d 459, 211 P.2d 575; In re Horowitz, 33 Cal.2d 534, 537, 203 P.2d 513. Rule 53(b) allows a reviewing court for good cause to relieve a party from a failure to comply with the Rules, "except the failure to give timely notice of appeal."

[4, 5] Quite apart from the question, see People v. Aresen, 91 Cal.App.2d 26, 28–30, 204 P.2d 389, 957, whether the language and purpose of the Rules allow relief in extreme cases when it is impossible to file the notice and the appellant is in no way at fault, clearly when there is no showing of a convincing excuse for delay, the appeal must be dismissed. Even before judgment defendant had considered the taking of an appeal, yet apparently made no efforts after he was moved to San Quentin to file his notice.

The appeal is dismissed.

GIBSON, C. J., and CARTER, SCHAUER, SPENCE, and McCOMB, JJ., concur.



47 Cal.2d 540

Olive BENNETT et al., Plaintiffs and Appellants,

v.

The HIBERNIA BANK (a Corporation), et al., Defendants and Respondents.

S. F. 19089.

Supreme Court of California.
In Bank.
Dec. 27, 1956.

As Modified on Denial of Rehearing Jan. 23, 1957.

Action against membership bank to obtain declaratory relief determining plaintiffs' rights in the bank. The Superior Court, City and County of San Francisco, H. A. van der Zee, J., sustained general demurrer without leave to amend, and plaintiffs appealed. The Supreme Court, Gibson, C. J., held that complaint, which contained purely evidentiary matter and allegations which were inconsistent, ambiguous, and uncertain, was, when liberally construed, sufficient as against a general demurrer.

Judgment reversed.

Spence, J., dissented.

Opinion, 289 P.2d 57, vacated.

1. Declaratory Judgment ⇐314

In action, against membership bank and others, to obtain declaratory relief to determine plaintiffs' rights in the bank, complaint, which contained purely eviden-

tiary matter and allegations which were inconsistent, ambiguous, and uncertain, was, when liberally construed, sufficient as against a general demurrer. West's Ann. Code Civ.Proc., § 452.

2. Declaratory Judgment ⇐313

Generally, complaint in action for declaratory relief is sufficient if it sets forth facts showing the existence of an actual controversy relating to the legal rights and duties of the respective parties under a contract and requests that the rights and duties be adjudged. West's Ann.Code Civ. Proc., § 1060.

3. Declaratory Judgment ⇐385

If, in declaratory judgment action, complaint sets forth facts showing existence of an actual controversy relating to the legal rights and duties of parties under a contract and requests that the rights and duties be adjudged, the court must declare the rights of the parties regardless of whether the facts alleged established that the plaintiff is entitled to a favorable declaration. West's Ann.Code Civ.Proc., § 1060.

4. Declaratory Judgment ⇐385

Where, in declaratory judgment action, complaint shows, on its face, that all relief is barred by the statute of limitations, it is unnecessary for the court to make a declaration of rights, and a general demurrer may be sustained, and the same rule is applicable where the complaint shows that the entire controversy has been settled by a prior judgment.

5. Building and Loan Associations ⇐6(2)

Where, after June, 1863, savings and loan society was composed of members only, and none of the members owned stock, and, in August, 1864, society filed a certificate of incorporation as a membership corporation under the 1862 Act, corporation thus became a valid membership corporation regardless of its prior legal status, and, therefore, under 1864 statute contemplating that entire membership of the prior organization should be continued in the new organization, member of prior organization automatically became member of the new corporation. St.1853, p. 87; St.1862, p. 199, as amended by St. 1863–4, p. 531.

6. Corporations ⇐56

Power to adopt by-laws is ordinarily in stockholders or members of a corporation, but directors may be given such authority by statute or articles of incorporation. St.1862, p. 200.

7. Corporations ⇐56

1862 statute, which provided that one of the purposes for which a corporation and, hence, the directors could make by-laws was to regulate the time and manner in which any one could become or cease to be a member of the corporation, was broad enough to permit directors of corporation to adopt by-laws specifying the conditions under which membership rights might be acquired or lost. St.1862, p. 200.

8. Corporations ⇐182

Where membership corporation had been organized as a business and profit making organization, and members had property rights in corporate assets, such rights were transferable in absence of statute, by-law, or other regulation to the contrary.

9. Declaratory Judgment ⇐368
Evidence ⇐389

In action against membership bank and others to obtain declaratory relief determining plaintiffs' rights in the bank, question whether by-law of savings and loan society, as predecessor of bank, meant that there could be no transfer of rights of any member without action of directors or that only those who might join the society after adoption of the by-law would acquire nontransferable membership rights was question for trier of the facts, and extrinsic evidence would be admissible on such question.

10. Building and Loan Associations ⇐6(2)

Savings and loan association's by-law, which provided, in part, that no one shall be deemed a member whose account was once closed, had been adopted after per-

son having membership in the corporation had become a member, would not be enforceable against such member, in absence of his consent, if it would unreasonably deprive him of his membership rights.

11. Corporations ⇐54

Reasonableness of corporation's by-law must be considered in the light of all the circumstances, including such matters as the purposes for which the corporation was organized and the extent of the rights of the particular member involved.

12. Judgment ⇐681

Where prior judgment entered in prior action in rem to determine membership rights in corporation in effect determined that plaintiffs' predecessor had no membership rights, complaint, in subsequent action to determine plaintiffs' rights in such corporation, would be subject to demurrer on ground of res judicata unless the additional facts alleged would justify setting such prior judgment aside.

13. Judgment ⇐447(1), 460(10)

Ordinarily, equity will not interfere with a judgment on ground of extrinsic fraud or mistake unless the one whose interests were infringed can present a meritorious case, and plaintiff must plead and prove facts from which it appears, at least prima facie, that, if the judgment were set aside and if the proceedings were reopened, a different result would probably follow.

14. Corporations ⇐189(7½)

In action to determine persons entitled to membership in domestic corporation, personal service must be had upon California members of record and of known address and such members' successors of known address, provided corporation is aware or could, through reasonable diligence, discover that they are successors. West's Ann.Financial Code, §§ 671.1–671.17.

15. Building and Loan Associations ⇐6(2)

Where facts disclosing father's membership appeared on records of membership bank, which knew that father had died and that, upon his death, his successors became entitled to membership and also knew of residence of daughter, who had always lived in California, daughter should have been named in prior action in rem to determine membership rights and should have been given personal service provided membership corporation knew or, with reasonable diligence, could have learned that daughter was father's successor. West's Ann.Financial Code, §§ 671.1–671.17.

16. Building and Loan Associations ⇐6(2)

Under Bank Act provision authorizing action to determine persons entitled to membership in membership corporation or to any interest in its assets, only a reasonable investigation to determine names of its members and their successors is required, and extent of investigation will necessarily depend upon the circumstances of each situation, including such matters as the facts known to the corporation and the value of the membership involved. West's Ann.Financial Code, §§ 671.1–671.17.

17. Judgment ⇐354

Failure to comply with provisions of Bank Act pertaining to action to determine persons entitled to membership in membership corporation or to interest in such corporation's property constitutes ground for vacation of judgment entered in such action. West's Ann.Financial Code, §§ 671.1–671.17.

18. Judgment ⇐443(1), 518

Equitable proceeding instituted for purpose of vacating a judgment constitutes a direct attack, and such attack may be made on ground of extrinsic fraud where it appears that there was a willful failure to give the required service in proceeding resulting in the judgment or that willfully false affidavits of service had been filed.

19. Judgment ⇐435

Extrinsic mistake may be a ground for vacation of a judgment by an independent action in equity if there has been no fair adversary trial.

20. Limitation of Actions ⇐95(1)

If lapse of time can bar an action by member or stockholder to establish his interest in a corporation, the statutory period does not commence to run until stockholder has knowledge or notice that his rights are denied or that his status is repudiated or controverted by the corporation.

21. Corporations ⇐438

Corporation holds its property in trust for benefit of its shareholders and occupies a fiduciary position with respect to them, and, therefore, shareholder is entitled to assume that the corporation will not assert any claim adverse to him.

22. Limitation of Actions ⇐96(2), 100(11)

Where fraud or mistake is involved, statute of limitations commences to run when plaintiff discovers he has a cause of action or, through use of reasonable diligence, should have discovered such fact, but a fiduciary has a duty to make full and fair disclosure of all facts which materially affect parties' rights and interest, and facts which would ordinarily require investigation may not excite suspicion where a fiduciary relationship exists.

23. Limitation of Actions ⇐95(1)

In action against membership bank and others to obtain declaratory relief to determine plaintiffs' rights in the bank, plaintiffs, upon issue whether action was barred by statute of limitations, were bound by everything which their predecessors knew.

24. Limitation of Actions ⇐100(4)

Three year statute of limitation on actions for fraud or mistake did not commence to run immediately upon rendition of judgment in prior action to determine membership in membership bank but was dependent upon knowledge of the judgment. West's Ann.Code Civ.Proc., § 338, subd. 4.

25. Limitation of Actions ⇐55(5), 104(1)

Ordinarily, statute of limitations applicable to conversion actions begins to run from date of the conversion, even though injured party is ignorant of his rights, but such rule is not absolute, and, where there has been a fraudulent concealment of the facts, the statute of limitations does not commence to run until the aggrieved party discovers or ought to have discovered the existence of the cause of action for conversion. West's Ann.Code Civ.Proc., § 338, subd. 3.

26. Trusts ⇐233

Fiduciary has duty to make a full disclosure of facts which materially affect rights of the parties, and, therefore, fiduciary's act which amounts to a conversion of trust property is akin to fraudulent concealment.

27. Limitation of Actions ⇐100(13)

In view of allegations, in action to obtain declaratory relief determining plaintiffs' rights in membership bank, that one of plaintiff's predecessors had no knowledge of events upon which defendants relied as a defense to plaintiffs' claims, and which included alleged obtaining, by extrinsic fraud, the entry of a prior judgment adverse to plaintiffs, fact that a document disclosing such events was matter of public record could not cause the statute of limitations to begin to run on date of such events. West's Ann.Code Civ.Proc., § 338, subd. 3; West's Ann.Financial Code, § 670.

28. Limitation of Actions ⇐95(1)

Documents filed in proceeding for extension of corporate existence, while public records and constructive notice for certain purposes, were not sufficient to start running the statute of limitations in favor of fiduciary as to those of corporation's members who had no knowledge of such documents. West's Ann.Code Civ.Proc., § 338, subd. 4.

29. Limitation of Actions ⇐103(4)

If trustee of an express trust improperly transfers trust property to a third person who has knowledge that the transfer is in breach of trust, the statute of limitations does not run on the beneficiary's action against the third person until such time as

the beneficiary learns of the breach of trust or of facts sufficient to arouse his suspicion.

30. Limitation of Actions ⇐179(2), 195(5)

In action against membership bank to obtain declaratory relief to determine plaintiffs' rights in the bank, plaintiffs would be required to allege and prove, upon question whether their action had been timely brought, facts showing the time and surrounding circumstances of the discovery of the cause of action which was based in part upon fraud.

31. Limitation of Actions ⇐195(3)

Where plaintiff had no duty to inquire until he has notice of facts sufficient to arouse the suspicions of a reasonable man, for example, because of existence of a fiduciary relationship, he need not disprove that an earlier discovery could have been made upon diligent inquiry but need only show that he made an actual discovery of hitherto unknown information within the statutory period before filing his action.

32. Limitation of Actions ⇐179(2)

In action against membership bank and others to obtain declaratory relief determining plaintiffs' rights in the bank, complaint, which contained allegations that discovery of the cause of action, which was based partly on fraud, had been made within two years prior to filing of the action, was sufficient to allege that the action had been timely brought. West's Ann.Code Civ. Proc., § 338, subd. 4.

L. L. James, Carl E. Day, Leander L. James, III, San Francisco, and Morris Lavine, Los Angeles, for appellants.

Alexander S. Keenan, Jr., San Francisco, amicus curiae on behalf of appellants.

Tobin & Tobin, Sullivan, Roche, Johnson & Farraher, Brobeck, Phleger & Harrison and Moses Lasky, San Francisco, for respondents.

GIBSON, Chief Justice.

Plaintiffs are seeking declaratory relief to determine their rights, if any, in the Hibernia Bank which, prior to 1947, was known as the Hibernia Savings and Loan Society. They claim as successors of Callaghan Curtin who, it is alleged, became a member of Hibernia on October 27, 1860. A general demurrer to the complaint was sustained without leave to amend, and plaintiffs have appealed from the ensuing judgment.

[1] The complaint is very lengthy, and it contains a great deal of purely evidentiary matter; some of the allegations are inconsistent, others are ambiguous and uncertain, and our task would have been greatly simplified had the complaint been clarified on special demurrer. We have concluded, however, that the complaint, when liberally construed, Code Civ.Proc., § 452; Treu v. Kirkwood, 42 Cal.2d 602, 608, 268 P.2d 482; Hudson v. Craft, 33 Cal.2d 654, 661, 204 P.2d 1, 7 A.L.R.2d 696; Jaffe v. Stone, 18 Cal.2d 146, 153, 114 P.2d 335, 135 A.L.R. 775, is sufficient as against the general demurrer.

The Complaint

The principal allegations of the complaint may be summarized as follows:

Hibernia was organized in 1859 under an act which authorized the formation of corporations having capital stock and made no provision for corporations composed of members rather than stockholders. Stats. 1853, p. 87. By-laws were adopted which recited that the signers thereof agreed that the by-laws should govern them and determine their mutual duties, rights and privileges as members of the society. It was also provided that those who should sign the by-laws and "pay the entrance fee of two dollars, shall be styled and considered members of this Corporation. Those, who, in addition to the above, shall hold one or more shares of its Stock, shall further be styled and considered Stockholders." It was the intention of the incorporators that Hibernia should be conducted as a membership corporation, and the members alone exercised the right to vote, elect the trustees and amend the by-laws.

Curtin became a member of Hibernia on October 27, 1860, when he signed the by-laws, paid the entrance fee, made a deposit

of $3,500 and received a passbook showing the amount of his deposit.

Some shares of stock were issued following incorporation, but none was issued after November 29, 1861. Between that date and June 27, 1863, all but four certificates for shares were retired and cancelled, and thereafter the corporation was composed of members only, none of whom owned any stock. No dividends were ever declared or paid upon the stock of the corporation; instead, all dividends were paid to the members on their deposits.

On August 29, 1864, Hibernia elected to become incorporated under an act adopted in 1862, and amended in 1864, Stats.1862, p. 199, Stats.1863–1864, p. 531, which provided that savings banks, including associations claiming in good faith to be incorporated under the laws of this state, could incorporate as savings banks without capital stock. A new certificate of incorporation was filed which stated that Hibernia should have no capital stock and that its affairs should be managed by a board of directors. On September 29, 1864, the directors, without a vote or consent of the members, and without consent of Curtin, purported to adopt new by-laws which stated that all prior by-laws were repealed. Article 4 of the by-laws provided that all persons who were members on August 29, 1864, "shall be deemed and considered members of this corporation, and the signatures of such persons to an agreement on their part to become members of this corporation, and ratifying and confirming the incorporation of said The Hibernia Savings and Loan Society, * * * shall be procured as speedily as may be. Other persons may be allowed to become members of this corporation by a vote of the Board of Directors and not otherwise. Membership shall not pass with the ownership of moneys deposited with or under control of the corporation."

Subsequent to August 29, 1864, and prior to January 18, 1871, Curtin signed the agreement provided for in the 1864 by-laws, by the terms of which he ratified the incorporation proceedings taken by Hibernia in 1864 and agreed to become a member of the corporation as it existed under the act of 1862. Those by-laws provided that the "corporate powers" should be exercised by the directors, and amendments were adopted by the directors from time to time. An amendment so adopted in 1868 provided that all persons who were members on August 29, 1864, and then had not less than $100 to their credit, and whose accounts were not subsequently closed, "shall be deemed and considered members. * * * No one shall be deemed a member whose account is once closed." An amendment on January 18, 1871, provided that those who had signed the agreement to become members and who then "had accounts open with said Corporation, shall be deemed and considered the only members thereof at that date. * * * No one shall be deemed a member whose account is once closed." In 1886 an amendment was adopted which provided that a person shall cease to be a member "who shall not have continuously and at all times, at least One Hundred Dollars to his or her credit upon an open deposit account on the books of this Corporation."

In January 1909 Hibernia filed documents purporting to extend its corporate life for a further period of 50 years, and in March 1934 it filed other documents providing for perpetual existence of the corporation. The documents were executed by acting officers, directors and persons claiming to be members of the corporation; none of them was executed by Curtin, and neither he nor his daughter Mary had any knowledge of them.

Curtin maintained a deposit of at least $100 at all times from the opening of the account in October 1860 until April 1914, when he made a written assignment to Mary of all the moneys to his credit with Hibernia and she withdrew the balance on deposit, amounting to $363.54. He died several months later in September 1914. Mary was appointed executrix of Curtin's last will by the Superior Court of Santa Clara County, and his entire estate, including his membership rights in Hibernia, was distributed to her as sole legatee under his will. Mary died in January 1951, and a decree entered in 1952 ordered distribution to plaintiffs of

the residue of her estate, which included the membership in Hibernia. Curtin's membership continued until transferred to Mary either by assignment or descent, and plaintiffs, as distributees of the estate of Mary, succeeded to all of the membership rights.

In October 1945 Hibernia filed an in rem suit to determine membership rights. The complaint named as defendants a number of individuals, together with all persons unknown claiming any right of membership, and alleged that, so far as Hibernia knew, the only persons who were members and had membership rights were 15 named individuals. These persons filed verified answers admitting the allegations of the complaint and alleging that they were members of Hibernia and the only persons having any right or interest in its property or assets other than the right to repayment of funds deposited with interest. Hibernia knew the residences of Curtin and of Mary, who was a resident of the state, and also knew or could have ascertained by an inspection of its records and the records of the Superior Court of Santa Clara County that Curtin's entire estate including his membership rights in Hibernia had been distributed to Mary as sole legatee. Neither Curtin nor Mary were named as defendants, and the only service attempted on them was as unknown defendants, by publication and posting. No appearance was made on their behalf. The court directed entry of the defaults of all nonanswering defendants, including all persons unknown claiming any assets of Hibernia, and judgment was entered naming the 15 answering defendants as the sole members of Hibernia and the only persons having any right or interest in its property and assets.

In 1947 Hibernia was reorganized as a stock corporation under the name of The Hibernia Bank, with stock in the amount of $7,000,000 divided among the 15 individual defendants.

Up to the time of Mary's death in January 1951 neither she nor any of the plaintiff's had any notice or knowledge of the 1945 action or the judgment entered therein or of the conversion of Hibernia into a stock bank, or of the change of its name, or of any facts which might have led them to discovery of the 1945 suit. Although Mary knew that Curtin was one of the early depositors of Hibernia, she had no knowledge of the fact that he was a member or was possessed of any of the rights of a member, and plaintiffs had no such knowledge until about June 1952.

Plaintiff Bennett was informed shortly after October 21, 1951, of a newspaper article published on that date which told about the settlement of an action brought against Hibernia by the descendant of an early depositor. Upon investigation by Bennett, it was discovered that Curtin signed the bylaws in 1860, made a deposit and paid the entrance fee, and thus became a member of Hibernia. Discovery was also made of the 1945 suit, the conversion of Hibernia into a stock bank, and the distribution of all its stock to the 15 individual defendants. The information gained through the investigation was the first knowledge possessed by plaintiffs regarding their rights.

The present action was filed on January 15, 1953.

Scope of General Demurrer in Action for Declaratory Relief

[2-4] It is the general rule that in an action for declaratory relief the complaint is sufficient if it sets forth facts showing the existence of an actual controversy relating to the legal rights and duties of the respective parties under a contract and requests that the rights and duties be adjudged. Code Civ.Proc., § 1060. If these requirements are met, the court must declare the rights of the parties whether or not the facts alleged establish that the plaintiff is entitled to a favorable declaration. Maguire v. Hibernia S. & L. Soc., 23 Cal.2d 718, 728 et seq., 146 P.2d 673, 151 A.L.R. 1062; cf. Anderson v. Stansbury, 38 Cal.2d 707, 717, 242 P.2d 305; Essick v. City of Los Angeles, 34 Cal.2d 614, 624-625, 213 P.2d 492. However, where a complaint shows on its face that all relief is barred by the statute of limitations, it is unnecessary for the court to make a decla-

ration of rights, and a general demurrer may be sustained. Maguire v. Hibernia S. & L. Soc., supra, 23 Cal.2d at pages 733–737, 146 P.2d 673. By analogy, the same rule should apply where the complaint shows that the entire controversy has been settled by a prior judgment.

Since, as we shall see, membership rights are material to a consideration of the defenses of res judicata and the statute of limitations, we shall discuss those rights under a separate heading.

Did Curtin or Mary Have Membership Rights?

[5] It is alleged that Curtin became a member of Hibernia in 1860 when he made a deposit, paid the entrance fee and signed the by-laws of the original organization which provided that persons doing these things "shall be styled and considered members of this corporation." Defendants contend that this allegation must be disregarded because the complaint shows on its face that Curtin was not a stockholder of the original corporation and the statutes made no provision for corporations composed of members rather than stockholders. See Maguire v. Hibernia S. & L. Soc., 23 Cal.2d 719, 723, 146 P.2d 673; People v. Perrin, 56 Cal. 345, 347. They argue that Curtin could not have been a member because Hibernia could not have validly existed as a membership corporation at that time. It appears, however, that an act adopted in 1862 and amended in 1864 provided that previously existing savings corporations and "all associations or societies for the like purpose" claiming in good faith to be incorporated under the laws of this state, could be organized as membership corporations without capital stock. Stats.1862, pp. 199–205, Stats.1864, p. 531. The complaint alleges that after June 1863 the corporation was composed of members only, none of whom owned stock, and that in August 1864 Hibernia filed a certificate of incorporation as a membership corporation under the 1862 act. Hibernia thus became a valid membership corporation in August 1864, regardless of what its prior legal status may have been. The 1864 statute obviously contemplated that the entire membership of the prior organization should be continued in the new organization, and Curtin automatically became a member of the new corporation.

It is further alleged that Curtin's membership continued until transferred to Mary either by assignment or descent and that plaintiffs, as distributees of the estate of Mary, succeeded to all of the membership rights. Defendants claim, however, that membership rights were not transferable and that any such rights which Curtin or Mary may have had were terminated when the account was closed and Curtin died in 1914. In support of their position defendants rely on certain by-laws set forth in the complaint which were adopted in and after September 1864. The complaint alleges that these by-laws were adopted without authority from the members and without Curtin's consent and that they were therefore invalid. Plaintiffs also argue that the by-laws do not establish that membership rights were not transferable or that they were terminated by the closing of the account.

[6, 7] The power to adopt by-laws is ordinarily in stockholders or members of a corporation, but directors may be given such authority by statute or articles of incorporation. See Darrin v. Hoff, 99 Md. 491, 58 A. 196, 200; Morton Gravel Road Co. v. Wysong, 51 Ind. 4, 12; 8 Fletcher, Cyclopedia Corporations (1931), § 4172, p. 645; 13 Am.Jur. 284–285. The 1862 act provided that the "corporate powers of the corporation shall be exercised by a Board of not less than five Directors," and it contained a list of corporate powers, one of which was to "make by-laws, not inconsistent with the laws of this State," for certain enumerated purposes. Stats.1862, p. 200. Under the 1862 act one of the purposes for which the corporation, and hence the directors, could make by-laws was to regulate "the time and manner in which any person may become, or may cease to be, a

member of the corporation." Stats.1862, p. 200. This language was broad enough to permit the directors to adopt by-laws specifying the conditions under which membership rights might be acquired or lost.

[8, 9] Hibernia was organized as a business and profit-making organization, and the members had property rights in the assets of the corporation. In the absence of a statute, by-law or other regulation to the contrary, these rights were transferable. Cf. Riverside Land Co. v. Jarvis, 174 Cal. 316, 327, 163 P. 54; Young v. New Pedrara Onyx Co., 48 Cal.App. 1, 14, 192 P. 55. Article 4 of the 1864 by-laws, after stating that all persons who were members of the prior organization on August 29, 1864, should be deemed members of the new corporation, provided: "Other persons may be allowed to become members of this corporation by a vote of the Board of Directors, and not otherwise. Membership shall not pass with the ownership of moneys deposited with or under the control of the corporation." This language might be construed, as defendants urge, to mean that there could be no transfer of the rights of any member without action by the directors. On the other hand, it might be interpreted as governing only the rights of those who might join the corporation after adoption of the by-law and as providing that such persons, upon becoming members, would acquire only non-transferable membership rights. We cannot hold that the by-law must as a matter of law be construed in the manner urged by defendants, and, if this case goes to trial, the parties should be entitled to produce extrinsic evidence in support of their respective interpretations.

[10, 11] The next question is whether the complaint shows on its face that any membership rights which Curtin or Mary may have had were terminated when the account was closed by Mary in 1914. A by-law adopted in 1868 provides in part: "No one shall be deemed a member whose account is once closed." Since this by-law was adopted after Curtin became a member it would not be enforceable against him, in the absence of his consent, if it would unreasonably deprive him of his membership rights. See People's Home Savings Bank v. Superior Court, 104 Cal. 649, 652, 38 P. 452, 29 L.R.A. 844; Lindsay-Strathmore Irrigation District v. Wutchumna Water Co., 111 Cal.App. 688, 701–702, 296 P. 933; Mancini v. Patrizi, 87 Cal.App. 435, 439–440, 262 P. 375; State v. San Francisco Sav. etc. Soc., 66 Cal.App. 53, 57–58, 225 P. 309; Bornstein v. District Grand Lodge No. 4, 2 Cal.App. 624, 628, 84 P. 271. The reasonableness of the by-law must be considered in the light of all the circumstances, including such matters as the purposes for which the corporation was organized and the extent of the rights of the particular member involved. Hibernia's certificate of incorporation provides that "the object for which it is formed is that of aggregating the funds and savings of the members of said Corporation and of others, and of preserving and safely investing the same for their common benefit." It may be that it was considered necessary to require members to retain their accounts and deposits with Hibernia in order to promote the success of the bank in accordance with the purposes for which it was organized. However, these are matters which must be determined by the trier of fact in the light of all of the evidence.

Defendants assert that Curtin ratified the by-laws in question. It appears that by an agreement signed subsequent to August 29, 1864, and prior to January 18, 1871, Curtin ratified the reorganization proceedings of 1864 and agreed to become a member of Hibernia as it existed under the act of 1862. This agreement was executed pursuant to a by-law adopted September 29, 1864, which provided that all persons who were members on August 29, 1864, shall be deemed members and that "the signatures of such persons to an agreement on their part to become members of this corporation, and ratifying and confirming the incorporation of [Hibernia] * * * shall be procured as speedily as may be." The exact language of the agreement does not

appear in the record, and plaintiffs' allegations regarding its substance can be construed as referring only to the reorganization under the 1862 act as amended in 1864 and not to subsequent steps taken by the new corporation such as the adoption of by-laws. The allegation that Curtin agreed to become a member of Hibernia "as it existed under said act" does not necessarily mean anything more than that he was agreeing to the reorganization under that particular statute rather than to corporate existence of some other type. Defendants, of course, are entitled to show by the language of the agreement or by other evidence that Curtin ratified the by-laws, but the question cannot be resolved on demurrer.

It is obvious from what has been said that serious questions are presented as to what, if any, rights passed to Mary, but we cannot hold as a matter of law that the allegations relied upon by defendants with respect to the by-laws compel us to disregard the general allegations that Curtin's membership rights continued and passed to Mary on the transfer of his account or upon his death.

Is the 1946 Judgment Res Judicata?

[12] The 1946 judgment purported to be in rem and to be binding upon all persons having any claim to membership rights, which would include Mary, who was then alive, and her successors. The judgment in effect determined that Mary and her successors had no membership rights. The complaint is thus subject to demurrer on the ground of res judicata unless the additional facts alleged will, as plaintiffs claim, justify setting that judgment aside. Plaintiffs assert that the complaint alleges facts which, although not disclosed by the judgment roll of the prior action, are sufficient to show that the 1946 judgment was obtained without proper service of process and by extrinsic fraud. It is immaterial, in connection with this question, whether the present action be regarded as primarily one for declaratory relief, with the prayer to set aside the prior judgment as merely incidental, or whether, as defendants assert, this is essentially a suit to set aside that judgment. In either event plaintiffs, having disclosed the existence of the prior judgment, are barred unless they plead and prove sufficient facts to overcome the judgment. It should be kept in mind that we are not concerned here with a judgment which is void on its face and therefore subject to collateral attack.

[13] Ordinarily equity will not interfere with a judgment on the ground of extrinsic fraud or mistake unless the one whose interests were infringed can present a meritorious case; the plaintiff must plead and prove facts from which it appears, at least prima facie, that if the judgment were set aside and the proceedings were reopened, a different result would probably follow. Olivera v. Grace, 19 Cal.2d 570, 578–579, 122 P.2d 564, 140 A.L.R. 1328; Kupfer v. MacDonald, 19 Cal.2d 566, 568–569, 122 P.2d 271; Wattson v. Dillon, 6 Cal.2d 33, 43, 56 P.2d 220; Karlslyst v. Frazier, 213 Cal. 377, 380, 2 P.2d 362; Frost v. Hanscome, 198 Cal. 550, 559, 246 P. 53; Hite v. Mercantile Trust Co., 156 Cal. 765, 768, 106 P. 102; see Hallett v. Slaughter, 22 Cal.2d 552, 557–558, 140 P.2d 3; Bell v. Thompson, 147 Cal. 689, 692–694, 82 P. 327; Parsons v. Weis, 144 Cal. 410, 417–418, 77 P. 1007. This rule has been applied in a number of cases involving proceedings in equity to set aside a judgment upon the ground that summons had not been served or that service was in some manner defective. Swallow v. Tungsten Products Co., 205 Cal. 207, 220, 270 P. 366; Lee v. Colquhoun, 175 Cal. 16, 17, 164 P. 894; Matson v. John Batto & Sons, 173 Cal. 800, 801, 161 P. 1144; Gregory v. Ford, 14 Cal. 138, 141 et seq.; Brozey v. Alesen, 116 Cal.App. 641, 642, 3 P.2d 68; Hickey v. Algie, 51 Cal.App. 595, 599–600, 197 P. 359; see Bell v. Thompson, 147 Cal. 689, 692–693, 82 P. 327; Parsons v. Weis, 144 Cal. 410, 417–418, 77 P. 1007; Young v. Barker, 83 Cal.App.2d 654, 657, 189 P.2d 521. In order to meet the meritorious case requirement the complaint must allege that plaintiffs have membership rights in Hi-

bernia, and, as we have seen, the allegations in this respect are sufficient against a general demurrer. We therefore assume, for the purposes of this discussion, that the membership rights were transferable and that they survived the closing of the account; we also assume that the action is not barred by the statute of limitations.

In considering the effect of the 1946 judgment we must determine whether Hibernia complied with section 29a of the Bank Act[1] in that it did not name Mary, who was then alive, as a defendant or personally serve her with process. The section provides that actions brought thereunder shall include as defendants all persons appearing upon the records of the corporation as members, and all other persons who are known to the plaintiff to claim to be members, and other persons unknown claiming any right of membership or any interest in the property or assets of the corporation. A copy of the summons, which shall contain the names of the parties and a reference to all other persons unknown claiming any right to membership, is to be posted and recorded. Personal service is required to be made upon each defendant residing in this state whose place of residence is known to the plaintiff. A copy of the summons and complaint must be mailed to each of the known defendants who reside out of the state, at their place of residence, if known, and also to each of the known defendants, wherever residing, whose residences are unknown to plaintiff, addressed to them at the county seat of the county or city and county where the action is commenced.

[14] We are of the opinion that section 29a, when properly construed, requires personal service not only upon California members of known address whose names actually appear upon the records of the corporation but also upon persons of known address residing in California who are successors of such members, provided the corporation is aware, or could by the exercise of reasonable diligence discover, that they are successors. While the section, in designating who must be included as defendants, does not expressly refer to persons known by the corporation to be successors of members, it requires the inclusion of all persons appearing on the records of the corporation as members and, if the corporation has actual knowledge that a person is the successor of a member whose name so appears, the successor should be treated as though his name likewise appears on the books as a member. Any other construction of the section would be unreasonable. If such were not the rule, a corporation could deliberately take advantage of and profit at the expense of a successor-member whose name had not been placed upon the books but whose interest was known to the corporation. There is nothing in the statute indicating that personal service need not be made if the defendant does not know or claim that he is a member, and where the corporation knows of the successor's interest, its duty should not be altered because of the fact, as is alleged with respect to Mary, that the successor is unaware of his rights in the company. The successor of a member known by the corporation to be such but whose name has not formally been placed in the books is entitled to the same consideration as the member whose name is in the books.

These principles are applicable not only to a member's successor who is known to

1. Section 29a of the Bank Act, Stats.1945, p. 1017, was enacted in 1945 and now appears with slight changes as sections 671.1 to 671.17 of the Financial Code. It provides that any domestic corporation, which has no capital stock and has been carrying on a banking business for 20 years, may file a verified complaint to determine the persons entitled to membership in the corporation or to any right or interest in its property or assets. The statute also provides for various methods of service of summons, including service by publication against all unknown claimants, and that the judgment shall be conclusive against all persons and shall have the effect of a judgment in rem.

the corporation but also to a successor who is unknown but who could and should be discovered by the company upon a reasonably diligent search. A close analogy in support of this construction of section 29a is afforded by Title & Document Restoration Co. v. Kerrigan, 150 Cal. 289, 317–318, 88 P. 356, 8 L.R.A.,N.S., 682. The statute there involved authorized an in rem proceeding to establish and quiet title to property whenever public records were destroyed, and it provided, among other things, for personal service upon adverse claimants when the plaintiffs knew or had been informed of them. The court said that the evident purpose was to secure, so far as possible, actual notice of the proceeding to all known claimants, and that where a statute is careful to provide for actual notice to the known claimants, it should not be construed as intended to permit a plaintiff to willfully or negligently close his eyes to the means of knowledge and thus secure a decree by publication and posting alone as against persons whose identity he might have learned by the use of due effort. On the basis of this reasoning the court held that the statute, properly construed, imposed upon the plaintiff the duty of inquiry as to the names and residences of all persons who might claim an adverse interest in the property and that it required the plaintiff to designate and serve all persons whom, with reasonable diligence, he could ascertain to be claimants. Moreover, the rule of construction adopted in the Kerrigan case, which did not involve a fiduciary relationship, would seem particularly applicable to statutes dealing with a corporation and its members where, as we shall see, fiduciary obligations are involved.

Section 29a, when construed in the manner set forth above, meets the requirements of due process not only as to persons who must be personally served but also as to persons who cannot reasonably or practicably be given personal service and who are given substituted service under the various provisions for mailing, publication, and posting. Title & Document Restoration Co. v. Kerrigan, 150 Cal. 289, 306, 318, 88 P. 356; cf. Mullane v. Central Hanover Bank & Trust Co., 339 U.S. 306, 70 S.Ct. 652, 94 L.Ed. 865.

[15] The allegations of the complaint are sufficient to show that Mary was entitled to personal service in the proceedings under section 29a leading to the 1946 judgment. Facts disclosing Curtin's membership appeared on the records of Hibernia, which knew that Curtin died in 1914 and that upon his death "his successors" became entitled to membership. Hibernia also knew the residence of Mary, who lived in California throughout her entire lifetime. Mary should have been named in the prior action and given personal service provided Hibernia knew, or with reasonable diligence could have learned, that Mary was Curtin's successor. In this connection the complaint states that the events relating to the probate of Curtin's estate in Santa Clara County and its distribution to Mary were known to Hibernia or could have been ascertained by inspection of Hibernia's records and the records of the superior court in that county.

[16] We do not mean to suggest that a corporation desiring to avail itself of the procedure authorized by section 29a must make a complete search of all known possible sources of information in order to notify its members and their successors, such as, for example, examination of the probate records of all the counties of the state. Only a reasonable investigation is required, and its extent will necessarily depend upon the circumstances of each situation, including such matters as the facts known to the corporation and the value of the membership involved. We cannot hold as a matter of law that Hibernia had no duty to make inquiries at the last known address of a member known to have died, or to examine the probate records at the county seat of the place where the member resided or died, or to make an inquiry concerning the whereabouts of a known assignee of a deposit account.

[17–19] Failure to comply with the statutory provisions constitutes grounds for the vacation of the judgment. A suit in equity instituted for the purpose of vacating a judgment is a *direct* attack. Caldwell v. Taylor, 218 Cal. 471, 475, 23 P.2d 758, 88 A.L.R. 1194; Bacon v. Bacon, 150 Cal. 477, 486, 89 P. 317; Campbell-Kawannanakoa v. Campbell, 152 Cal. 201, 209, 92 P. 184; Parsons v. Weis, 144 Cal. 410, 415, 77 P. 1007; Turner v. Milstein, 103 Cal.App.2d 651, 655, 230 P.2d 25. Such an attack may be made upon the ground of extrinsic fraud where it appears that there was a willful failure to give the required service or that willfully false affidavits of service were filed. Bernhard v. Waring, 213 Cal. 175, 179–181, 2 P.2d 32; Rivieccio v. Bothan, 27 Cal.2d 621, 624, 165 P.2d 677; Wool v. Scott, 140 Cal.App.2d 835, 841 et seq., 296 P.2d 17; City of Los Angeles v. Morgan, 105 Cal.App.2d 726, 730–731, 234 P.2d 319; Turner v. Milstein, 103 Cal.App.2d 651, 654–655, 230 P.2d 25; Sipe v. McKenna, 88 Cal.App.2d 1001, 1005, 200 P.2d 61; cf. Aldrich v. Aldrich, 203 Cal. 433, 437 et seq., 264 P. 754. A direct attack has also been allowed in an independent action in equity where there has been a failure to exercise the degree of diligence required by law in connection with personal service, Stern v. Judson, 163 Cal. 726, 728 et seq., 127 P. 38; Rowe v. Silbaugh, 107 Wash. 518, 182 P. 576, 577, where false recitals of service were the result of fraud, negligence, or mistake, Martin v. Parsons, 49 Cal. 94, 100, and where failure to name a person as a party was the result of mistake. Boyle v. Boyle, 97 Cal.App. 703, 706–707, 276 P. 118. These cases are in accord with the general principles followed in recent decisions of this court holding that extrinsic mistake may be a ground for vacation of a judgment by an independent action in equity where there has been no fair adversary trial. Olivera v. Grace, 19 Cal.2d 570, 578, 122 P.2d 564, 140 A.L.R. 1328; Hallett v. Slaughter, 22 Cal.2d 552, 557, 140 P.2d 3. The allegations are sufficient to bring the case within these principles. Hibernia knew of Curtin's membership, of his death leaving successors, and of Mary's address. Also, as we have seen, the complaint is sufficient to show that Hibernia either knew or, in the exercise of reasonable diligence, could have discovered that Mary was Curtin's successor.

Is the Cause of Action Barred by the Statute of Limitations?

[20–23] The general rules with respect to the statute of limitations in this type of action are set forth in Maguire v. Hibernia S. & L. Soc., 23 Cal.2d 719, 733 et seq., 146 P.2d 673, 151 A.L.R. 1062, where we stated that, if lapse of time can bar an action by a member or stockholder to establish his interest in a corporation, the statutory period does not commence to run until the stockholder has knowledge or notice that his rights are denied or that his status is repudiated or controverted by the corporation. Upon this basis we held that the complaint did not show on its face that the alleged causes of action were barred by the statute of limitations or by laches. The underlying theory is that a corporation holds its property in trust for the benefit of its shareholders and occupies a fiduciary position with respect to them; as a result the shareholder is entitled to assume that the corporation will not assert any adverse claim against him. See Yeaman v. Galveston City Co., 106 Tex. 389, 167 S.W. 710, 723–724; Mountain Waterworks Const. Co. v. Holme, 49 Colo. 412, 113 P. 501, 510; Owingsville & Mt. S. Turnpike Road Co. v. Bondurant's Adm'r, 107 Ky. 505, 54 S.W. 718, 719; Holly Sugar Corp. v. Wilson, 101 Colo. 511, 75 P.2d 149, 152–153; Sharon v. Kansas City Granite & Monument Co., 233 Mo.App. 547, 125 S.W.2d 959, 963; cf. MacDermot v. Hayes, 175 Cal. 95, 114–115, 170 P. 616; Cooper v. Spring Valley Water Co., 171 Cal. 158, 162, 153 P. 936; Hobbs v. Tom Reed Gold Min. Co., 164 Cal. 497, 499, 129 P. 781, 43 L.R.A.,N.S., 1112. In cases involving fraud or mistake the statute commences to run when the plaintiff discovers he has a cause of action or, through the use of reasonable diligence, should have discovered it. See Stafford v. Shultz, 42 Cal.2d 767, 776, 270 P.2d 1. However, a fiduciary has a duty to make a full and fair

disclosure of all facts which materially affect the rights and interest of the parties, and, where a fiduciary relationship exists, facts which would ordinarily require investigation may not excite suspicion. Hobart v. Hobart Estate Co., 26 Cal.2d 412, 440, 159 P.2d 958; see Schaefer v. Berinstein, 140 Cal.App.2d 278, 296, 295 P.2d 113. Mary was, of course, bound by facts known to Curtin, and plaintiffs are bound by everything Curtin or Mary knew.

Defendants contend that, even if the by-laws adopted in and after 1864 did not have the effect of terminating membership rights or making such rights nontransferable, they nevertheless amounted to a repudiation of any claim that membership rights could pass by descent or assignment or could survive the closing of Curtin's deposit account. The allegations of the complaint are uncertain and obviously incomplete as to what transpired with respect to these by-laws, but the facts alleged do not establish as a matter of law that Curtin or Mary or plaintiffs knew or should have known that the adoption of the by-laws or any action taken pursuant to them amounted to a repudiation of membership rights acquired by Curtin.

[24] The 1945 action, of course, repudiated any claims to membership rights which Mary may have had, but the complaint alleges that neither Mary nor any of the plaintiffs had any knowledge of the action prior to the death of Mary in January 1951. Defendants argue, however, that the statute commenced to run immediately upon the rendition of the judgment in 1946 and that the running of the statute did not depend upon knowledge of the judgment. We do not agree. The applicable statute is subdivision 4 of section 338 of the Code of Civil Procedure, which provides for a three-year limitation in actions on the ground of fraud or mistake and states that the cause of action shall not be deemed to have accrued until the aggrieved party has discovered the facts constituting the fraud or mistake. Cf. Anglo Calif. Trust Co. v. Kelley, 117 Cal.App. 692, 695–696, 4 P.2d 604.

[25] It is also claimed that the proceedings taken in 1947 caused the statute of limitations to run against any membership rights which Mary obtained from Curtin. In that year the 15 defendants designated in the 1946 judgment as the sole persons entitled to membership took steps to convert Hibernia into a stock corporation, terminate the reserve fund and substitute for it capital stock together with surplus, change the name of the corporation to The Hibernia Bank, and issue to these 15 defendants shares of stock in lieu of their interest in the reserve fund and other assets of the corporation. Plaintiffs allege that, contrary to the Bank Act,[2] a majority of the members were not present at the meeting in which these changes were authorized, that notice of the meeting was not mailed to all members but only to the 15 persons referred to above, and that Mary was not present at the meeting and had no knowledge thereof. Defendants take the position that these allegations show an actual invasion which constituted a conversion. Ordinarily the statute of limitations applying in conversion actions, Code Civ.Proc., § 388, subd. 3, begins to run from the date of the conversion even though the injured person is ignorant of his rights. First National Bk. v. Thompson, 60 Cal.App.2d 79, 83, 140 P.2d 75; Coy v. E. F. Hutton & Co., 44 Cal.App.2d 386, 389–391, 112 P.2d 639; Rose v. Dunk-Harbison Co., 7 Cal.App.2d 502, 505–506, 46 P. 2d 242. This rule, however, is not absolute; for example, where there has been a fraudulent concealment of the facts the statute of limitations does not commence to run until the aggrieved party discovers or ought to have discovered the existence of the cause of action for conversion. Bartlett v. Pacific Nat. Bank, 110 Cal.App. 2d 683, 694, 244 P.2d 91; see Rose v. Dunk-Harbison Co., 7 Cal.App.2d 502, 505, 46 P.

2. Section 29 of the Bank Act, now Fin. Code, § 670, provides that banking corporations having no capital stock may elect to have such stock.

2d 242; 2 Wood on Limitations (4th ed., 1916) 858–859; cf. Pashley v. Pacific Elec. Ry. Co., 25 Cal.2d 226, 229, 153 P.2d 325.

[26, 27] Since a fiduciary has a duty to make a full disclosure of facts which materially affect the rights of the parties, it seems obvious that any act by him amounting to a conversion of trust property is akin to a fraudulent concealment. Cf. Airola v. Gorham, 56 Cal.App.2d 42, 45–47, 54, 133 P.2d 78 [breach of trust by secret delivery of deed to third person]; Bell v. Bayly Bros., 53 Cal.App.2d 149, 157, 127 P.2d 662. This is in accord with statements in many decisions that statutes of limitation do not begin to run against an action for breach of a voluntary trust until there has been a repudiation which is brought home to the beneficiary. See In re Estate of Clary, 203 Cal. 335, 341–342, 264 P. 242; Hermosa Beach Land & Water Co. v. Law Credit Co., 175 Cal. 493, 496, 166 P. 22; Cortelyou v. Imperial Land Co., 166 Cal. 14, 20, 134 P. 981; Taylor v. Morris, 163 Cal. 717, 725, 127 P. 66; Elizalde v. Murphy, 163 Cal. 681, 685, 126 P. 978; Luco v. De Toro, 91 Cal. 405, 416, 18 P. 866, 27 P. 1082; Alton v. Rogers, 127 Cal.App.2d 667, 679, 274 P.2d 487; Mulli v. Mulli, 105 Cal.App.2d 68, 74–75, 232 P.2d 556; Kornbau v. Evans, 66 Cal. App.2d 677, 683–684, 152 P.2d 651. Similar principles were followed in Maguire v. Hibernia S. & L. Soc., supra, 23 Cal.2d 719, 735, 146 P.2d 673, 151 A.L.R. 1062. The complaint alleges that Mary had no knowledge of the events which took place in 1947. In view of the allegations indicating that a fiduciary relationship existed, the fact that a document disclosing these events was a matter of public record filed with the Secretary of State cannot alone cause the statute to run. Cf. Seeger v. Odell, 18 Cal.2d 409, 414–415, 115 P.2d 977, 136 A.L.R. 1291; Stoll v. Selander, 81 Cal.App.2d 286, 292, 183 P.2d 935.

[28] The complaint does not show that the statute of limitations commenced to run as the result of the proceedings for extension of corporate existence in 1909. The documents filed in that year, while public records and constructive notice for certain purposes, are not sufficient to start the running of the statute in favor of the fiduciary as to those of its members who had no knowledge of them. The complaint alleges that neither Curtin nor Mary had any knowledge of these proceedings.

[29] It does not follow from the fact that there may have been no fiduciary relationship between Mary and the 15 individual defendants that the statute has run in their favor. The complaint alleges that the individual defendants received their shares of stock in 1947 with full knowledge of, and subject to, the rights of Curtin and his successors as members. Accordingly, we must assume that these defendants had notice of any breach of fiduciary duty or trust upon the part of the corporation. In analogous situations it has been held that, if a trustee of an express trust improperly transfers trust property to a third person who has knowledge that the transfer is in breach of trust, the statute of limitations does not run on the beneficiary's action against the third person until such time as the beneficiary learns of the breach of trust or of facts sufficient to arouse his suspicion. Schofield v. Cleveland Trust Co., 149 Ohio St. 133, 78 N.E.2d 167, 171; Davidson v. Stagg, 94 Mont. 272, 22 P.2d 152, 154–155; Pennsylvania Co. for Ins. on Lives, etc. v. Ninth Bank & Trust Co., 306 Pa. 148, 158 A. 251, 253; In re Marshall's Estate, 138 Pa. 285, 22 A. 24, 26–67; Baldwin v. Taplin, 113 Vt. 291, 34 A.2d 117, 121–122; Hall v. Windsor Savings Bank, 97 Vt. 125, 121 A. 582, 585, 124 A. 593, 596; American Nat. Bank of Enid v. Crews, 191 Okl. 53, 126 P.2d 733, 742, 743; State Bank & Trust Co. v. Commercial Trust & Sav. Bank, 300 Ill. App. 435, 21 N.E.2d 157; see Rest., Trusts, § 327, comments i, k, Illus. 3; 3 Scott on Trusts (2d ed. 1956), § 327.2, p. 2378. Defendants point to several California decisions which declare, in broad general terms, that where an involuntary trust is raised by operation of law the statute of limitations commences to run immediately and no repudiation is necessary. See Kroger v. Truitt, 27 Cal.2d 288, 293, 163 P.2d 735; Wrightson v. Dougherty, 5 Cal.2d 257, 264, 54 P.2d 13; Benoist v. Benoist, 178 Cal. 234, 236–237, 172 P. 1109; Norton v. Bassett, 154 Cal. 411, 416, 97 P. 894; Broder v. Conklin, 121 Cal. 282, 288, 53 P. 699. In none of these cases, however, did it appear that the beneficiary of the trust lacked knowledge of the transfer for a sufficient period to prevent the statute from being a bar. The distinction is material because

the beneficiary's lack of knowledge of the breach of trust is the basis for tolling the statute, and, accordingly, the California cases cited above are not controlling here.

[30–32] Plaintiffs must allege and prove facts showing the time and surrounding circumstances of the discovery of the cause of action upon which they rely. Hobart v. Hobart Estate Co., 26 Cal.2d 412, 441–443, 159 P.2d 958. The purpose of this requirement is to afford the court a means of determining whether or not the discovery of the asserted invasion was made within the time alleged, that is, whether plaintiffs actually learned something they did not know before. In applying this rule it is important to recognize the distinction between cases where a plaintiff is under a duty to inquire and those in which he has no such duty until he has notice of facts sufficient to arouse the suspicions of a reasonable man. Where there is no such duty, for example, because of the existence of a fiduciary relationship, a plaintiff need not disprove that an earlier discovery could have been made upon a diligent inquiry but need show only that he made an actual discovery of hitherto unknown information within the statutory period before filing the action. Hobart v. Hobart Estate Co., 26 Cal.2d 412, 442, 159 P.2d 958. The circumstances of the discovery which, according to the complaint, was made within two years prior to the filing of the action are sufficiently alleged to meet the requirements of the rule set forth above.

Conclusion.

The court erred in sustaining the general demurrer.

The judgment is reversed.

SHENK, CARTER, TRAYNOR, and SCHAUER, JJ., concur.

McCOMB, J., did not participate herein.

SPENCE, Justice.

I dissent.

I agree with the majority that "it is unnecessary for the court to make a declaration of rights" if the complaint shows on its face "that the entire controversy has been settled by a prior judgment." My disagreement is based upon my view that plaintiffs' complaint does show on its face that the entire controversy has been settled by the final judgment in the action brought by the bank in 1945.

It appears that neither plaintiffs nor their predecessors had any dealings with the bank after 1914. In April of that year Curtin assigned his account to Mary, who thereupon closed the account by withdrawing the entire balance of $363.54. Curtin thereafter died in 1914 and Mary died in 1951. Plaintiffs' present claim to alleged membership rights is based solely upon such claim as they may have as successors in interest of Curtin and Mary.

When the account was assigned and closed in 1914, the by-laws of the bank then provided, and had provided for approximately fifty years, that "Membership shall not pass with the ownership of moneys deposited * * *"; that persons other than the original members might become members but only by action of the board of directors "and not otherwise"; and that "[n]o one shall be deemed a member whose account is once closed." Regardless of plaintiffs' failure to allege whether Curtin did or did not consent to the quoted by-laws, and regardless of plaintiffs' general, conclusionary allegations regarding membership rights, there can be no doubt that plaintiffs' specific allegations concerning the by-laws show that neither Curtin nor Mary, following the assignment and the closing of the account, was among the "persons appearing and designated upon the books and records of the corporation as members therein, * * *." Bank Act, § 29a, Stat.1945, p. 1017.

Nor were plaintiffs persons "known to the [bank] to claim to be members therein" for they allege, in their attempt to avoid the bar of the statute of limitations, that neither Curtin nor Mary knew of any such claim. If plaintiffs' predecessors were not known to themselves "to claim" membership, they could not have been known to the bank "to claim" to be members. The verb "claim" means "To ask for, or seek to obtain, by virtue of authority, right, or supposed right; to demand as due." (Webster's New Inter. Dict., Second Ed.) It carries a connotation of an affirmative assertion of a supposed right. Since plaintiffs alleged that neither Curtin nor Mary knew of any supposed right, they of course do not allege

that Curtin or Mary ever affirmatively asserted, or made known a claim to, any supposed right.

It follows that when the bank brought its action in 1945, under section 29a of the Bank Act, neither Curtin nor Mary was among the persons required by the act to be personally named or served as defendants. They and their successors are nevertheless barred as they were among the "other persons unknown" whose claims, if any, were foreclosed by the judgment in rem which was entered in that action. I find nothing in Title & Document Restoration Co. v. Kerrigan, 150 Cal. 289, 88 P. 356, 8 L.R.A., N.S., 682, or Mullane v. Central Hanover Bank & Trust Co., 339 U.S. 306, 70 S.Ct. 652, 94 L.Ed. 865, which points to a contrary conclusion here.

I therefore conclude that the trial court properly sustained the general demurrer to plaintiffs' complaint and entered judgment in favor of defendants. In view of this conclusion, it is unnecessary to discuss defendants' further contention that plaintiffs' belated claim is barred by the statute of limitations.

For the reasons stated, I would affirm the judgment.

Rehearing denied; SPENCE, J., dissenting.



47 Cal.2d 509

Grace T. LEONARD, Plaintiff and Appellant,

v.

WATSONVILLE COMMUNITY HOSPITAL et al., Defendants and Respondents.

S. F. 19485.

Supreme Court of California, In Bank.

Dec. 21, 1956.

Rehearing Denied Jan. 16, 1957.

Action for damages, brought by plaintiff in whose abdomen a Kelly clamp had been left during an operation. The Superior Court, Santa Cruz County, James L. Atteridge, J., rendered a judgment of nonsuit as to one surgeon, a nurse and a hospital, and plaintiff appealed. The Supreme Court, Gibson, C. J., held that evidence elicited by plaintiff from adverse witnesses could overcome res ipsa loquitur inference upon which plaintiff relied; and held that such inference had in fact been overcome as a matter of law, insofar as the one surgeon was involved; but held that it could not be said as a matter of law that the hospital and nurse had not been negligent.

Affirmed as to one defendant and reversed as to others.

Shenk, J., dissented, and Carter, J., dissented in part.

Opinion, 291 P.2d 496, vacated.

1. Physicians and Surgeons ⇐18(6)

When a foreign object is unintentionally left in a patient's abdomen, it is ordinarily result of negligence of someone, and where patient receives unusual injuries while unconscious, all of persons who had any control over his body or instrumentalities which might have caused injuries may properly be called upon to meet inference of negligence by giving an explanation of their conduct.

2. Negligence ⇐121(2)

Same test is applicable in determining when res ipsa loquitur inference is dispelled as a matter of law as in deciding when any other inference is conclusively rebutted.

3. Trial ⇐139(1)

Nonsuit may be granted only when, disregarding conflicting evidence, giving to plaintiff's evidence all of value to which it is legally entitled, and indulging in every legitimate inference which may be drawn from that evidence, court can properly determine that there was no substantial evidence to support verdict in favor of plaintiff.

4. Trial ⇐142

Where evidence raises inference that a fact exists, and either party produces evidence, of nonexistence of fact, that is

clear, positive, uncontradicted and of such a nature that it cannot rationally be disbelieved, nonexistence of fact is established as a matter of law; and, in these circumstances, inference is dispelled as a matter of law, and, if fact inferred is necessary to establish an essential element of plaintiff's case, a nonsuit or directed verdict is proper.

5. Evidence ⇐591

Rule relating to elicitation of testimony from adverse party treats evidence thus obtained as testimony obtained under cross-examination of adverse party's witnesses; and provision therein that party calling adverse witness shall not be bound by his testimony does not mean that such testimony may not be given its proper weight, but merely that party calling such witness shall not be concluded from rebutting testimony or from impeaching witness. West's Ann.Code Civ.Proc., § 2055.

6. Evidence ⇐89

As a general rule, a presumption can only be rebutted as a matter of law by evidence of party relying upon it, whereas an inference can also be rebutted by conclusive evidence of opposite party.

7. Evidence ⇐591

Evidence elicited from adverse witness may be used to dispel inference upon which plaintiff relies, provided evidence is clear, positive, uncontradicted and of such a nature that it cannot rationally be disbelieved. West's Ann.Code Civ.Proc., § 2055.

8. Evidence ⇐588, 589

A witness may be disbelieved if there is any rational ground for doing so, and interest of party in result of case will, in some circumstances, justify trier of fact in disregarding his testimony; but there are situations where interest of party in obtaining judgment favorable to himself will not render all of his testimony subject to disbelief.

9. Physicians and Surgeons ⇐18(6)

In action for damages, brought by plaintiff in whose abdomen a Kelly clamp had been left during an operation, res ipsa loquitur inference, raised against physician who had assisted in operation, was dispelled as a matter of law by testimony of his codefendants that he had not been responsible for leaving clamp in plaintiff's abdomen.

10. Evidence ⇐20(1)

It is a matter of common knowledge that no special skill is required in counting instruments.

11. Physicians and Surgeons ⇐18(8)

Proof of practice or custom of hospital nurses in community in matter of counting clamps is some evidence of what should be done and can assist in determination of what constitutes due care, but it does not conclusively establish standard of care.

12. Negligence ⇐5

General negligence cannot be excused on ground that others in same locality practice same kind of negligence.

13. Physicians and Surgeons ⇐18(9)

In action for damages, brought by plaintiff in whose abdomen a Kelly clamp had been left during an operation, it could not be said as a matter of law that there had been no duty on part of hospital and nurses to keep an instrument count in order to assist surgeons in determining whether all of instruments used had been removed from patient before final closure.

Crist, Peters & Donegan and Elton F. Martin, Palo Alto, for appellant.

Wyckoff, Parker, Boyle & Pope, McCarthy & Franich and Harry F. Brauer, Watsonville, for respondents.

GIBSON, Chief Justice.

A scissors-shaped metal instrument about six inches long, called a Kelly clamp, was left in plaintiff's abdomen when an operation was performed on her at defendant hospital. The operation was commenced by Doctors Lacy and Slegal. Kay Pogatschnik, who was an employee of the hospital, acted as surgical nurse. Doctor Eiskamp assisted in a part of the operation

at the request of Doctor Lacy. Plaintiff was unconscious during the entire operation, which lasted approximately five hours. She was in considerable pain during the ten days she remained in the hospital following the operation, and the pain persisted for several months after she returned home. X-ray pictures taken about six months after the operation revealed a clamp lodged in the upper right quadrant of her abdomen. The clamp was removed, and plaintiff brought this action to recover damages from the hospital, the doctors and the surgical nurse. At the close of plaintiff's case motions for nonsuit were granted as to Eiskamp, Pogatschnik and the hospital, and plaintiff has appealed from the ensuing judgment.[1]

The questions presented are whether an inference of negligence was raised under the doctrine of res ipsa loquitur and whether, if such an inference arose, it was dispelled as a matter of law.

Evelyn Craig, who was superintendent of the hospital, and defendants Lacy, Slegal and Eiskamp were called by plaintiff to testify under section 2055 of the Code of Civil Procedure, which provides that in a civil action a party may call and examine an adverse party.

The testimony of Lacy, who was in charge of the operation, may be summarized as follows: He scheduled the operation after deciding that an exploratory examination of the upper right quadrant of plaintiff's abdomen should be made. The hospital assigned Pogatschnik to act as surgical nurse, furnished all equipment and instruments, and charged plaintiff for the use of the room and for the services of the nurse. The operation began with Lacy and Slegal making an incision from plaintiff's navel upwards, exposing her gall bladder, which was diseased.

About forty minutes after the operation was begun, Lacy requested Eiskamp, who had been performing surgery in another part of the hospital, to look at plaintiff's gall bladder. Eiskamp made a visual inspection and recommended that the gall bladder be removed. After Eiskamp left the room, Lacy and Slegal discovered a "mass" in the sigmoid colon, which appeared to be cancerous. Lacy again consulted Eiskamp, who agreed that the mass should be removed and offered to help. The doctors decided not to operate on the gall bladder, and, while Lacy began to close the upper half of the incision, Eiskamp and Slegal prepared to remove the mass, which was in the lower left quadrant. None of Eiskamp's work was performed in the upper portion of plaintiff's abdomen, and he left the room before final closure of the incision. During the operation Lacy and Slegal used about 18 Kelly clamps which are uncurved scissors-shaped instruments. Eiskamp did not use anything but curved clamps. Lacy paid Slegal his fee but never received a bill from Eiskamp for his services.

Lacy further testified that the surgical nurse keeps a set of instruments on a tray very close to the surgical field and that one of her principal functions is to hand instruments to the doctors and take them back from him. No request for an instrument count was made by Lacy. The practice of hospitals generally is to maintain a sponge count before closure of an incision and to account for the needles used in suturing. This practice is followed by the nurses at defendant hospital.

Slegal's testimony substantially confirmed that of Lacy as to the sequence of events in the operating room. He said that Eiskamp did not take part in closing the upper portion of the incision and left before final closure of the abdomen.

Eiskamp testified that no Kelly clamps were used in his part of the operation, that he "had nothing to do with the gall bladder" and that in order to speed the operation he worked with Slegal on the tumor in the lower left quadrant of the abdomen.

Superintendent Craig testified that sur-

1. The case against Lacy and Slegal was settled after the nonsuits were granted as to the other defendants.

gical instruments are furnished by the hospital, that they are placed in sterile packs containing a specified number and that she believed there are 18 Kelly clamps in a pack. After an operation all instruments are taken directly from the operating room, cleaned and reassembled into packages by a nurse or some other hospital employee. At the time of plaintiff's operation no one person was designated as being responsible for collecting and reassembling the instruments, and none of the hospital employees reported that any instrument was missing. Hospitals in the area "have no established practice of instrument counting either before or after surgery." Sponges and needles are usually counted, and an instrument count is made if requested by the surgeon.

[1, 2] When a foreign object is unintentionally left in a patient's abdomen it is ordinarily the result of the negligence of someone. Ales v. Ryan, 8 Cal.2d 82, 64 P. 2d 409. And where a patient receives unusual injuries while unconscious, all of the persons who had any control over his body or the instrumentalities which might have caused the injuries may properly be called upon to meet the inference of negligence by giving an explanation of their conduct. Ybarra v. Spangard, 25 Cal.2d 486, 154 P.2d 687, 162 A.L.R. 1258. The evidence is sufficient to raise an inference of negligence under the doctrine of res ipsa loquitur as to Eiskamp, Pogatschnik and the hospital. Eiskamp assisted in the operation; at one time or another during the operation the control of the instrument left in plaintiff's body was in the hands of the nurse; the hospital employed the nurse and furnished and reassembled the instruments. This places upon them the burden of initial explanation. Ybarra v. Spangard, supra.

[3, 4] Plaintiff contends that the inference of res ipsa loquitur was not dispelled as a matter of law and that therefore the court erred in granting the motion for a nonsuit. The same test is applicable in determining when the res ipsa loquitur inference is dispelled as a matter of law as in deciding when any other inference is conclusively rebutted. See Rose v. Melody Lane, 39 Cal.2d 481, 487, 247 P.2d 335; Leet v. Union Pac. R. R. Co., 25 Cal.2d 605, 621–622, 155 P.2d 42, 158 A.L.R. 1008. It has long been the rule in this state that a nonsuit may be granted only when, disregarding conflicting evidence, giving to the plaintiff's evidence all the value to which it is legally entitled, and indulging in every legitimate inference which may be drawn from that evidence, the court properly determines that there is no substantial evidence to support a verdict in favor of the plaintiff. Seneris v. Haas, 45 Cal.2d 811, 821, 291 P.2d 915; In re Estate of Caspar, 172 Cal. 147, 150, 155 P. 631. There is, however, a qualification on this broad general rule. It is settled that where the evidence raises an inference that a fact exists, and either party produces evidence of the nonexistence of the fact that is clear, positive, uncontradicted and of such a nature that it cannot rationally be disbelieved, the nonexistence of the fact is established as a matter of law. See Blank v. Coffin, 20 Cal.2d 457, 461, 126 P.2d 868. In these circumstances the inference is dispelled as a matter of law, and, if the fact inferred is necessary to establish an essential element of the plaintiff's case, a nonsuit or directed verdict is proper. Engstrom v. Auburn Auto. Sales Corp., 11 Cal. 2d 64, 77 P.2d 1059 [directed verdict]; Crouch v. Gilmore Oil Co., Ltd., 5 Cal.2d 330, 54 P.2d 709 [nonsuit]; Ceranski v. Muensch, 60 Cal.App.2d 751, 141 P.2d 750 [directed verdict]; Johnston v. Black Company, 33 Cal.App.2d 363, 91 P.2d 921 [insufficiency of evidence].

[5–7] The testimony which defendants claim dispels the inference of res ipsa loquitur as a matter of law was elicited from witnesses called under section 2055 of the Code of Civil Procedure,[2] and

2. Section 2055 of the Code of Civil Procedure provides: "A party to the record of any civil action or proceeding or a person for whose immediate benefit such

plaintiff contends that such evidence cannot be used in ruling on a nonsuit to dispel an inference on which plaintiff relies. Section 2055 provides in effect that a party to a civil action may be examined as if under cross-examination by the adverse party and that the party examining such witness shall not be bound by the witness's testimony and may rebut it by other evidence. Before section 2055 was enacted, a litigant who called an adverse party to testify found that the witness was treated as his own and that his examination was restricted by the rules applicable to direct examination. See Smellie v. Southern Pacific Co., 212 Cal. 540, 555, 299 P. 529. This rule was changed by section 2055 so that testimony elicited by a plaintiff under this section is not treated as testimony of his own witnesses but as testimony obtained under cross-examination of the defendant's witnesses. Smellie v. Southern Pacific Co., 212 Cal. 540, 556, 299 P. 529; Figari v. Olcese, 184 Cal. 775, 782, 195 P. 425, 15 A.L.R. 192. It is clear, however, that all such testimony is evidence in the case and that the provision in the section that a party calling an adverse witness shall not be bound by his testimony does not mean that such testimony may not be given its proper weight, "but merely as it declares, that the party calling such witness shall not be concluded from rebutting his testimony, or from impeaching the witness." Figari v. Olcese, 184 Cal. 775, 782, 195 P. 425, 528; see Smellie v. Southern Pacific Co., 212 Cal. 540, 559, 299 P. 529; Dempsey v. Star House Movers, Inc., 2 Cal.App.2d 720, 722, 38 P.2d 825; 13 Cal. L.Rev. 302.[3]

It has been squarely held that an inference upon which a plaintiff relies may be completely dispelled as a matter of law by evidence given by witnesses called under section 2055. Crouch v. Gilmore Oil Co., Ltd., 5 Cal.2d 330, 54 P.2d 709. In the Crouch case an inference that one Smith was an agent of defendant arose from proof of the fact that the defendant's advertising insignia was painted on trucks operated by Smith. Evidence was adduced under section 2055 which the court found dispelled the inference as a matter of law, and it was held that a nonsuit was proper.

Our decision in Crowe v. McBride, 25 Cal. 2d 318, 153 P.2d 727, is not inconsistent with the holding in the Crouch case. As will be seen from an examination of the opinion in Crowe v. McBride, the point involved was whether the evidence was sufficient to present a question for the trier of fact, and in this connection we held that the testimony of the defendant given pursuant to an examination under section 2055 was evidence in the case and could be used to establish a cause of action against him. The use of evidence elicited under section 2055 to dispel an inference was not involved. Plaintiff, however, relies upon the following language in Crowe v. McBride, supra: "in considering the propriety of the nonsuit, we must accept the evidence most favorable to plaintiffs and disregard that which is unfavorable. The testimony of the

action or proceeding is prosecuted or defended, or the directors, officers, superintendent, member, agent, employee, or managing agent of any such party or person, or the agent, officer or employee of a municipal corporation which is a party to the action or proceeding, may be examined by the adverse party as if under cross-examination, subject to the rules applicable to the examination of other witnesses. The party calling such adverse witness shall not be bound by his testimony, and the testimony given by such witness may be rebutted by the party calling him for such examination by other evidence. Such witness, when so called, may be examined by his own counsel, but only as to the matters testified to on such examination."

3. In an article entitled "Some Recent Cases in Evidence," 13 Cal.L.Rev. 285, 302 (1925), Professor A. M. Kidd, in commenting on section 2055, said: "The section states that a party calling such adverse party shall not be bound by his testimony, as if a party were ever bound by the testimony of any witness. What was meant was that an adverse party called as a witness might be examined and impeached to the same extent as the ordinary witness."

defendant, who was called to testify under section 2055 of the Code of Civil Procedure, falls within this rule and is to be treated as evidence in the case insofar as it is favorable to plaintiffs." This language must, of course, be read in the light of the facts of the case and the question presented for determination. It is correct as a general proposition, and it should not be given a strained interpretation to reach a conclusion on a matter not presented to or considered by the court.

Cases involving the use of evidence adduced under section 2055 to dispel a *presumption* must be distinguished from those involving *inferences*. Generally speaking, it may be said that a presumption is dispelled as a matter of law only when a fact which is wholly irreconcilable with it is proved by the uncontradicted testimony of the *party relying on it or of such party's own witnesses.*[4] Mar Shee v. Maryland Assurance Corp., 190 Cal. 1, 9, 210 P. 269; Steward v. Paige, 90 Cal.App.2d 820, 825, 203 P.2d 858; see Chakmakjian v. Lowe, 33 Cal.2d 308, 313, 201 P.2d 801; Engstrom v. Auburn Auto. Sales Corp., 11 Cal.2d 64, 70, 77 P.2d 1059; Smellie v. Southern Pacific Co., 212 Cal. 540, 552, 299 P. 529; cf. Mundy v. Marshall, 8 Cal.2d 294, 296, 65 P.2d 65; Levin v. Brown, 81 Cal.App.2d 913, 917, 185 P.2d 329. Accordingly, it is the general rule that a *presumption* favorable to a plaintiff cannot be so dispelled by the testimony of a defendant given pursuant to section 2055 because a defendant called under that section is not treated as the plaintiff's witness. Smellie v. Southern Pacific Co., 212 Cal. 540, 559, 299 P. 529; Lopez v. Knight, 121 Cal.App.2d 387, 390–391, 263 P.2d 452; Green v. Uarte, 87 Cal. App.2d 75, 78–79, 196 P.2d 63; see Engstrom v. Auburn Auto. Sales Corp., 11 Cal. 2d 64, 70, 77 P.2d 1059. On the other hand, as we have seen, an *inference* can be dispelled as a matter of law by evidence produced by *either* party.

It follows from what has been said that the testimony of a witness called by a plaintiff under section 2055 may be used to dispel an inference upon which the plaintiff relies, provided the evidence is clear, positive, uncontradicted and of such a nature that it cannot rationally be disbelieved. It is particularly appropriate to allow such testimony to be used to rebut the inference in cases like the present where plaintiff, because she was unconscious while receiving the treatment that resulted in her injuries, is given the benefit of a liberalized test for res ipsa loquitur, and all persons who had any control over her body or the instrumentalities which might have caused her injuries are required to meet the inference of negligence by giving an explanation of their conduct. If in these circumstances evidence given by witnesses under section 2055 establishes as a matter of law that one of the defendants is free from negligence, the prima facie case against that defendant based on the inference should fall, and plaintiff's position with respect to that defendant should be the same as if she had failed to prove all the facts necessary to raise the inference.

[8] A witness may, of course, be disbelieved if there is any rational ground for doing so, and the interest of a party in the result of a case will in some circumstances justify the trier of fact in disregarding his testimony. See Hamilton v. Abadjian, 30 Cal.2d 49, 53, 179 P.2d 804; Hicks v. Reis, 21 Cal.2d 654, 659–661, 134 P.2d 788; Blank v. Coffin, 20 Cal.2d 457, 461–462, 126 P.2d

4. There is a recognized exception to the general rule where evidence of the *opposite* party is absolutely conclusive, as for instance, where the presumption of death of a person who has not been heard from in seven years is dispelled by production of the person in court. See Engstrom v. Auburn Auto. Sales Corp., 11 Cal.2d 64, 70, 77 P.2d 1059; Smellie v. Southern Pacific Co., 212 Cal. 540, 552, 299 P. 529. The general rule also is subject to the qualification that where testimony of the party relying on a presumption or of his witnesses is the product of mistake or inadvertence, such testimony will not operate to dispel the presumption. See Mar Shee v. Maryland Assurance Corp., 190 Cal. 1, 9, 210 P. 269.

868. There are situations, however, where the interest of a party in obtaining a judgment favorable to himself will not render all of his testimony subject to disbelief. For example, where part of a defendant's testimony is harmful to him but favorable to a codefendant, as where it tends to show that the witness is liable or makes it more difficult for him to establish his own lack of fault, that portion of his testimony may be used to rebut an inference unfavorable to the codefendant provided there is nothing to indicate collusion or any other reason for disbelieving the testimony.

[9] The evidence as to Eiskamp's participation in the operation consisted of the testimony of Lacy, Slegal and Eiskamp, and it was clear and uncontradicted to the effect that Eiskamp was not responsible for leaving the clamp in plaintiff's abdomen. This testimony did not in any way tend to benefit Lacy or Slegal but, to the contrary, was disadvantageous to them because the exoneration of one defendant would have the necessary effect of increasing the possibility of liability on the part of each of the other defendants. The record indicates no rational ground for disbelieving their testimony, and we hold that the inference raised against Eiskamp under the doctrine of res ipsa loquitur was dispelled as a matter of law.

The evidence, however, does not compel the conclusion that the inference of negligence on the part of the surgical nurse and the hospital has been dispelled. The testimony relied upon to absolve them was given by Craig, who was a hospital employee and who, in view of the advantages to her of maintaining a favorable relationship with the hospital, obviously had an interest in the outcome of the case. She likewise had an interest in the litigation as to the nurse because the hospital, as employer, would be liable for acts of the nurse within the scope of her employment. Craig's testimony could therefore be disbelieved by the trier of fact. See Hamilton v. Abadjian, 30 Cal.2d 49, 53, 179 P.2d 804; Hicks v. Reis, 21 Cal.2d 654, 659–661, 134 P.2d 788; Blank v. Coffin, 20 Cal.2d 457, 461–462, 126 P.2d 868.

[10–12] Moreover, if Craig's testimony were accepted by the trier of fact as being true, it is not of the character required to dispel the inference of negligence raised against the hospital and the nurse. As we have seen, Craig testified that it was the practice of hospitals in the area to count sponges and needles as part of the operative procedure, and with respect to "other implements" she stated there was "no established practice of instrument counting either before or after surgery." Even if we assume she intended to say that it was the practice *not* to count instruments, this evidence would not conclusively establish that the hospital and nurse were free from negligence. These defendants seek to avoid liability on the theory that they were required to exercise only that degree of skill employed by other hospitals and nurses in the community. It is a matter of common knowledge, however, that no special skill is required in counting instruments. Although under such circumstances proof of practice or custom is some evidence of what should be done and may assist in the determination of what constitutes due care, it does not conclusively establish the standard of care. Cf. Ales v. Ryan, 8 Cal.2d 82, 100, 64 P.2d 409; Barham v. Widing, 210 Cal. 206, 216, 291 P. 173; Anderson v. Stump, 42 Cal.App.2d 761, 765, 109 P.2d 1027; Inderbitzen v. Lane Hospital, 124 Cal.App. 462, 467, 12 P.2d 744, 13 P.2d 905. "General negligence cannot be excused on the ground that others in the same locality practice the same kind of negligence." Ales v. Ryan, 8 Cal.2d 82, 100, 64 P.2d 409, 418.

[13] We cannot say as a matter of law that there was no duty on the part of the hospital and nurses to keep an instrument count in order to assist the surgeon in determining whether all instruments used had been removed from the patient before final closure.

The judgment is affirmed as to defendant Eiskamp and is reversed as to defendants

Pogatschnik and Watsonville Community Hospital.

TRAYNOR, SCHAUER, SPENCE and McCOMB, JJ., concur.

CARTER, Justice (concurring and dissenting).

The holding of the majority opinion may be epitomized as follows: An inference of negligence which arises from testimony of adverse witnesses examined under section 2055 of the Code of Civil Procedure may be dispelled by such testimony even though plaintiff is *not bound* thereby and is entitled to rely upon all of such testimony which is favorable to her and disregard all that is unfavorable. The unsoundness of this holding is so obvious that the mere statement of it should disclose its absurdity. It is not only directly in conflict with the statutory law of this state, Code Civ.Proc., § 2055, but countless decisions of this court and of the appellate courts of the state. It is sheer double talk to say that evidence which is *not binding* upon a party may be relied upon to repel or dispel other evidence—an inference—in favor of such party.

Section 2055 of the Code of Civil Procedure provides that "A party to the record of any civil action or proceeding or a person for whose immediate benefit such action or proceeding is prosecuted or defended * * * may be examined by the adverse party as if under cross-examination, subject to the rules applicable to the examination of other witnesses. *The party calling such adverse witness shall not be bound by his testimony, and the testimony given by such witness may be rebutted by the party calling him for such examination by other evidence.* * * *" (Emphasis added.) After noting that the questions presented in the case at bar were whether an inference of negligence was raised under the doctrine of res ipsa loquitur and whether, if such an inference arose, it was dispelled as a matter of law, we find this statement in the majority opinion:

"Evelyn Craig, who was superintendent of the hospital, and defendants Lacy, Slegal and Eiskamp were called by plaintiff to testify under section 2055 of the Code of Civil Procedure, *which provides that in a civil action a party may call and examine an adverse party.*" (Emphasis added.) Section 2055 of the Code of Civil Procedure provides a great deal more than the above quoted misleading statement would lead one to believe. In discussing the effect of section 2055, the following statement from the majority opinion is of interest: "Section 2055 provides in effect that a party to a civil action may be examined as if under cross-examination by the adverse party and that the party examining such witness shall not be bound by the witness's testimony and may rebut it by other evidence. Before section 2055 was enacted, a litigant who called an adverse party to testify found that the witness was treated as his own and that his examination was restricted by the rules applicable to direct examination. See Smellie v. Southern Pacific Co., 212 Cal. 540, 555, 299 P. 529. This rule was changed by section 2055 so that testimony elicited by a plaintiff under this section is not treated as testimony of his own witnesses but as testimony obtained under cross-examination of the defendant's witnesses. Smellie v. Southern Pacific Co., 212 Cal. 540, 556, 299 P. 529; Figari v. Olcese, 184 Cal. 775, 782, 195 P. 425, 15 A.L.R. 192." The just quoted excerpt from the majority is more than misleading—and the cases cited do not stand for the proposition for which they are cited. For illustration, in the Smellie case, supra, 212 Cal. at page 556, 299 P. at page 535, we find this court stating that section 2055 "is a statute remedial in character, and as such should receive a construction by the courts which will carry into effect and accomplish the intent and purpose of the Legislature in enacting it. *This intent was, as we read the section, to enable a party to an action to call an adverse party as a witness for the purpose of eliciting such facts as said witness may testify to which are favorable to the party calling him, without being bound by any adverse testimony which said witness may give.* Only by such construction can the full remedial purposes of said legisla-

tion be effected. Not only so, but we think the express terms of said section clearly and plainly indicate that such was the purpose of the Legislature in the enactment of said section. As before noted, the adverse party, when called as a witness, is examined by the party calling him 'as if under cross-examination' *and* the party calling him 'shall not be bound by his testimony.' It is difficult to conceive of language more direct and explicit." The Smellie case involved a directed verdict. In the Figari case [184 Cal. 775, 195 P. 428], a trial on the merits was involved and the court there held that "This provision [2055] does not mean that such testimony may not be given its proper weight, but merely as it declares, that the party calling such witness shall not be concluded from rebutting his testimony, or from impeaching the witness. Dravo v. Fabel, 132 U.S. 487, 10 S.Ct. 170, 33 L.Ed. 421 [see, also, Rose's U.S. Notes]." In Daniels v. City & County of San Francisco, 40 Cal.2d 614, 625, 255 P.2d 785, 792, a majority of this court specifically held that "Plaintiffs maintain that 'the instruction should have explained that any such testimony elicited by the plaintiffs should weigh for them in so far as it was favorable, *but that it should be disregarded in so far as it was unfavorable,* if the matters to which it referred were not satisfactorily established by other evidence.' (Emphasis added.) But plaintiffs are relying upon authorities involving rulings upon a motion either for a nonsuit, Marchetti v. Southern Pac. Co., 204 Cal. 679, 686, 269 P. 529; Dempsey v. Star House Movers, Inc., 2 Cal.App.2d 720, 722, 38 P.2d 825 or for a directed verdict, Smellie v. Southern Pac. Co., 212 Cal. 540, 556, 299 P. 529; People v. Mahoney, 13 Cal. 2d 729, 736, 91 P.2d 1029. The rules therein stated have no application upon submission of the case for a determination of the factual issues on the merits. Figari v. Olcese, 184 Cal. 775, 782, 195 P. 425, 15 A.L.R. 192; Dorn v. Pichinino, 105 Cal.App.2d 796, 800, 234 P.2d 307. The distinction is noted in the Smellie case, where, after a full discussion, it is stated that testimony elicited under section 2055 'is, of course, evidence in the case and may be considered in determining the issues of the case upon the trial or final hearing by the court, or, if the case is before a jury, by the jury.' 212 Cal. 559, 299 P. 537; see, also, Green v. Newmark, 136 Cal.App. 32, 37–38, 28 P.2d 395; Balasco v. Chick, 84 Cal.App.2d 802, 808, 192 P.2d 76. Since this case was submitted to the jury on the merits, the assailed instruction was proper. Joseph v. Vogt, 35 Cal.App.2d 439, 441, 95 P.2d 947; Cloud v. Market Street Ry. Co., 74 Cal.App. 2d 92, 96, 168 P.2d 191." Dempsey v. Star House Movers, Inc., 2 Cal.App.2d 720, 38 P.2d 825, 826, was an appeal from a judgment of nonsuit. The court there, however, declared that testimony taken by plaintiff under section 2055 was not binding on the plaintiffs but could so far as it was favorable be considered together with other evidence favorable to plaintiffs. The court concluded: "There was no evidence binding on plaintiffs on the basis of which the trial court could hold that deceased was guilty of contributory negligence as a matter of law. The motion for nonsuit should have been denied. Marchetti v. Southern Pacific Co., 204 Cal. 679, 269 P. 529."

We are presently concerned with an appeal from an order granting a nonsuit.

Every member of this court has, at one time or another, relied upon and stated the rule of law applicable when a motion for a nonsuit is made: "'A motion for nonsuit may properly be granted "* * * when, and only when *disregarding conflicting evidence,* and giving to plaintiff's evidence all the value to which it is legally entitled, indulging in every legitimate inference which may be drawn from that evidence, the result is a determination that there is no evidence of sufficient substantiality to support a verdict in favor of the plaintiff." * * * "Unless it can be said as a matter of law, that * * * no other reasonable conclusion is legally deducible from the evidence, and that any other holding would be so lacking in evidentiary support that a reviewing court would be impelled to reverse it upon appeal, or the trial court to set it aside as a matter of law, the trial court is

not justified in taking the case from the jury." * * *'" Seneris v. Haas, 45 Cal. 2d 811, 821, 291 P.2d 915, 921; Carter, J. In Hinds v. Wheadon, 19 Cal.2d 458, 460, 121 P.2d 724, 725, Mr. Chief Justice Gibson in speaking for the court, said: "Where a judgment is rendered upon a motion for nonsuit, the court must assume that all evidence received in favor of the plaintiff relevant to the issues is *true*. All *presumptions, inferences* and doubtful questions must be construed most favorably to the plaintiff. * * * In such [res ipsa loquitur] cases an inference arises that the accident resulted from a want of proper care on the part of the defendants. * * * It is incumbent upon the defendant in such a case to bring forth evidence to rebut the inference of negligence, and under such circumstances a nonsuit is improper since the case should be submitted to the jury." (Emphasis added.) Mr. Justice Shenk, speaking for the court in Milana v. Credit Discount Co., 27 Cal.2d 335, 163 P.2d 869, 165 A.L.R. 621, approved and relied upon the rule; in Golceff v. Sugarman, 36 Cal.2d 152, 222 P.2d 665, and Raber v. Tumin, 36 Cal.2d 654, 226 P.2d 574, Mr. Justice Schauer, speaking for the court, approved and relied upon the rule; in Easton v. Ash, 18 Cal.2d 530, 116 P.2d 433, Mr. Justice Traynor, speaking for the court, approved and relied upon the rule; in Palmquist v. Mercer, 43 Cal.2d 92, 95, 272 P.2d 26, Mr. Justice Spence, speaking for the court, approved and relied upon the rule; in Aguirre v. City of Los Angeles, 46 Cal.2d 841, 299 P.2d 862, Mr. Justice McComb, speaking for the court, approved and relied upon the rule.

The above stated rule has been so firmly embedded in the law of this state, that I find it incomprehensible that a majority of the members of this court should fail to realize that the above cases, and those following (to cite but a *very* few) will be overruled sub silento! (For statements and restatements of the rule, see: Schaufele v. Doyle, 1890, 86 Cal. 107, 24 P. 834; Archibald Estate v. Matteson, 1907, 5 Cal.App. 441, 90 P. 723; Hercules Oil Refining Co. v. Hocknell, 1907, 5 Cal.App. 702, 91 P. 341; Leitch v. Marx, 1913, 21 Cal.App. 208, 131 P. 328; Fildew v. Shattuck & Nimmo W. Co., 1918, 39 Cal.App. 42, 177 P. 866; Scott v. Sciaroni, 1924, 66 Cal.App. 577, 226 P. 827; Dawson v. Tulare Union High School, 1929, 98 Cal.App. 138, 276 P. 424; Nicholas v. Jacobson, 1931, 113 Cal.App. 382, 298 P. 505; Green v. Newmark, 1933, 136 Cal.App. 32, 28 P.2d 395; Cash v. Los Angeles Ry. Corp., 1935, 6 Cal.App.2d 738, 45 P.2d 280; In re Estate of Cushing, 1939, 30 Cal.App. 2d 340, 86 P.2d 375; Knecht v. Lombardo, 1939, 33 Cal.App.2d 447, 91 P.2d 917; Kersten v. Young, 1942, 52 Cal.App.2d 1, 125 P.2d 501; In re Estate of Rabinowitz, 1943, 58 Cal.App.2d 106, 135 P.2d 579; MacDonald v. Jackson, 1953, 117 Cal.App.2d 598, 256 P.2d 591; Sanders v. MacFarlane's Candies, 1953, 119 Cal.App.2d 497, 259 P.2d 1010; Lehman v. Richfield Oil Corp., 1953, 121 Cal.App.2d 261, 263 P.2d 13; and, more recently, Palmquist v. Mercer, 43 Cal.2d 92, 272 P.2d 26; Dunn v. Pacific Gas & Electric Co., 43 Cal.2d 265, 272 P.2d 745; McBride v. Atchison, Topeka & S. F. Ry. Co., 44 Cal.2d 113, 279 P.2d 966; Warner v. Santa Catalina Island Co., 44 Cal.2d 310, 282 P.2d 12; Hilyar v. Union Ice Co., 45 Cal.2d 30, 286 P.2d 21; Raymond v. Independent Growers, Inc., 133 Cal.App.2d 154, 284 P.2d 57; Hale v. Safeway Stores, Inc., 129 Cal.App.2d 124, 276 P.2d 118; Copeland v. Rabing, 110 Cal.App.2d 631, 243 P.2d 119; Finley v. City and County of S. F., 115 Cal.App.2d 116, 251 P.2d 687; Turner v. Ralph M. Parsons Co., 117 Cal.App.2d 109, 254 P.2d 970; Zar v. Alafetich, 126 Cal. App.2d 643, 272 P.2d 922; Weber v. Marine Cooks' and Stewards' Ass'n, 123 Cal.App. 2d 328, 266 P.2d 801; Markwell v. Swift & Co., 126 Cal.App.2d 245, 272 P.2d 47; Powell v. Jones, 133 Cal.App.2d 601, 284 P.2d 856; Katemis v. Westerlind, 120 Cal.App. 2d 537, 261 P.2d 553; Hughes v. Oreb, 36 Cal.2d 854, 228 P.2d 550; Denbo v. Weston Investment Co., 112 Cal.App.2d 153, 245 P. 2d 650; In re Estate of Jamison, 41 Cal.2d 1, 256 P.2d 984; Howard v. General Petroleum Corp., 108 Cal.App.2d 25, 238 P.2d 145; Hellar v. Bianco, 111 Cal.App.2d 424, 244 P.2d 757; Sweet v. Markwart, 115 Cal.

App.2d 735, 252 P.2d 751; Adams v. Henning, 117 Cal.App.2d 376, 255 P.2d 456; MacDonald v. Jackson, 117 Cal.App.2d 598, 256 P.2d 591; Marino v. Valenti, 118 Cal. App.2d 830, 259 P.2d 84; Refinite Sales Co. v. Fred R. Bright Co., 119 Cal.App.2d 56, 258 P.2d 1116; Warren v. Roos, 127 Cal. App.2d 224, 273 P.2d 569.

In the case under consideration an inference of negligence arose because of the proved fact that a foreign body, a Kelly clamp, was left in plaintiff's abdomen after she had undergone surgery performed by defendants in defendant hospital. The clamp was not there prior to the surgery. That fact was proved by X-rays taken prior to the time the surgery was undertaken. In Seneris v. Haas, 45 Cal.2d 811, 825, 291 P.2d 915, 923, we said, quoting from Ybarra v. Spangard, 25 Cal.2d 486, 491, 492, 154 P.2d 687, 162 A.L.R. 1258, that "Every defendant in whose custody the plaintiff was placed for any period was bound to exercise ordinary care to see that no unnecessary harm came to him and each would be liable for failure in this regard.'" We also said, 45 Cal.2d at page 826, 291 P.2d at page 923, that "'where a plaintiff receives unusual injuries while unconscious and in the course of medical treatment, all those defendants who had *any control over his body or the instrumentalities which might have caused the injuries may properly be called upon to meet the inference of negligence by giving an explanation of their conduct.*'" (Emphasis added.) In Summers v. Tice, 33 Cal.2d 80, 86, 87, 199 P.2d 1, 4, 5 A.L.R.2d 91, speaking of an analogous situation, we said that "a patient injured while unconscious on an operating table in a hospital could hold all or any of the persons who had any connection with the operation even though he could not select the particular acts by the particular person which led to his disability." In the Ybarra case we held that the effect of the decision therein was that plaintiff had made out a case when he had produced evidence which gave rise to an inference of negligence which was the proximate cause of the injury; *that it was then up to the defendants to explain the cause of the injury.*

Plaintiff here alleged and proved that Drs. Lacy, Slegal, Eiskamp, Nurse Pogatschnik and the Watsonville Community Hospital had control of her unconscious person during abdominal surgery; that during that surgery a Kelly clamp—a foreign object—was left in her abdomen causing her pain, suffering and injury. Having proved that much, an inference of negligence arose and the duty immediately devolved upon the defendants to rebut that inference of negligence or become liable to plaintiff in damages. In order to rebut the inference of negligence, the defendants must make "an affirmative showing of a definite cause for the accident in which cause no element of negligence on the part of the defendant adheres; or (2) of such care in all possible respects as necessarily to lead to the conclusion that the accident could not have happened from want of care, but must have been due to some unpreventable cause, although the exact cause is unknown." Dierman v. Providence Hospital, 31 Cal.2d 290, 295, 188 P.2d 12, 15.

In Scott v. Burke, 39 Cal.2d 388, 247 P. 2d 313, 320, this court adopted the holding of Ales v. Ryan, 8 Cal.2d 82, 99, 64 P.2d 409, that "the inference of negligence which is created by the rule *res ipsa loquitur is in itself evidence which may not be disregarded by the jury and which in the absence of any other evidence as to negligence, necessitates a verdict in favor of the plaintiff.*" (Emphasis added.)

The majority admits, as necessarily it must, that the res ipsa loquitur rule is applicable here and that an inference of negligence arose as to *all* these defendants. Despite this admission, the majority holds that *evidence elicited under section 2055 of the Code of Civil Procedure may be considered and used to dispel the inference of negligence* which arose as to Dr. Eiskamp.

In so holding, the author of the majority opinion ignores the full impact of the rule set forth in the case of Crowe v. McBride, 25 Cal.2d 318, 319, 153 P.2d 727, in which

he, speaking for this court, said: "In considering the propriety of the nonsuit, we must accept the evidence most favorable to plaintiffs and disregard that which is unfavorable. *The testimony of the defendant, who was called to testify under section 2055 of the Code of Civil Procedure, falls within this rule and is to be treated as evidence in the case insofar as it is favorable to plaintiffs.* Anderson v. Stump, 42 Cal.App.2d 761, 109 P.2d 1027; Dempsey v. Star House Movers, Inc., 2 Cal.App.2d 720, 38 P.2d 825; cf. People v. Mahoney, 13 Cal.2d 729, 91 P.2d 1029, motion for directed verdict; Smellie v. Southern Pacific Co., 212 Cal. 540, 299 P. 529." (Emphasis added.) It has been said time and time again that the rule is well established that on appeal from judgments of nonsuit, the plaintiff has a right to rely on *such portions* of defendants' testimony elicited under section 2055 of the Code of Civil Procedure *as are favorable to her and to disregard the unfavorable portions thereof.* Code Civ.Proc., § 2055; Crowe v. McBride, supra; Karstensen v. Western Transportation Co., 93 Cal.App.2d 435, 209 P.2d 47; Williams v. Freeman, 35 Cal.App.2d 104, 94 P.2d 817; Young v. Bank of America, 95 Cal.App.2d 725, 214 P.2d 106, 16 A.L.R.2d 1155; Connors v. Southern Pacific Co., 91 Cal.App. 2d 872, 206 P.2d 31; Green v. Uarte, 87 Cal.App.2d 75, 77, 196 P.2d 63; Carlton v. Pacific Coast Gasoline Co., 110 Cal.App.2d 177, 242 P.2d 391; Marino v. Valenti, 118 Cal.App.2d 830, 259 P.2d 84; Lopez v. Knight, 121 Cal.App.2d 387, 263 P.2d 452; Refinite Sales Co. v. Fred R. Bright Co., 119 Cal.App.2d 56, 258 P.2d 1116; In re Estate of Hull, 63 Cal.App.2d 135, 146 P.2d 242; In re Estate of Burns, 26 Cal.App.2d 741, 80 P.2d 77; Hiner v. Olson, 23 Cal. App.2d 227, 72 P.2d 890, 73 P.2d 945; Whicker v. Crescent Auto Co., 20 Cal. App.2d 240, 66 P.2d 749; In re Estate of Lances, 216 Cal. 397, 14 P.2d 768; Lewis v. Southern California Edison Co., 116 Cal. App. 44, 2 P.2d 419; and others too numerous to mention.

We are now told that it has been "squarely held that an inference upon which a plaintiff relies may be completely dispelled as a matter of law by evidence given by witnesses called under section 2055. (Crouch v. Gilmore Oil Co., Ltd., 5 Cal.2d [330], 333 [54 P.2d 709].)"

In Crouch v. Gilmore Oil Co., Ltd., supra, an appeal from a judgment of nonsuit was involved. Plaintiff there sought to establish the issue of agency by defendant's testimony under section 2055. Plaintiff proved that the truck in question, while different in construction from that used by Gilmore Oil Company, was painted by Gilmore Oil with the colors used by it and 4,500 of its service station operators on the Pacific Coast. Gilmore Oil also painted the sides of the truck with the word "Gilmore" and placed its advertising insignia of the lion's head on the rear of the truck. On the doors of the truck were, however, painted the words "Owens Valley Oil Company." Gilmore Oil sold Smith, the owner of the truck, its gasoline at a lower price. Testimony elicited under section 2055 showed that the driver of the truck was paid by Smith, the owner. The court held, *specifically on the authority of* Maupin v. Solomon, 41 Cal.App. 323, 183 P. 198, that the inference of agency was rebutted by uncontradicted testimony given under section 2055.

Maupin v. Solomon, supra, involved an appeal from a judgment for the plaintiff after a trial on the merits, and the court held, merely, that an inference that the driver of defendant's car was acting within the scope of his employment could not stand in the face of uncontradicted evidence to the contrary. *Testimony adduced under section 2055 was not involved and it was not an appeal from either a nonsuit or a directed verdict.*

It is my opinion that the Crouch case was incorrectly decided. The evidence on the issue of agency was sufficiently conflicting to make it a question of fact for the jury. Plaintiff was not bound by the testimony under section 2055 which was contrary to the inference arising from the facts above set forth. Furthermore, I do not see how Mr. Chief Justice GIBSON can cite, with

approval, the Crouch case in view of his opinion in Crowe v. McBride, 25 Cal.2d 318, 319, 153 P.2d 727,* wherein he said, in speaking for the court: "In considering the propriety of the nonsuit, we must accept the evidence most favorable to plaintiffs and disregard that which is unfavorable. *The testimony of the defendant, who was called to testify under section 2055 of the Code of Civil Procedure, falls within this rule and is to be treated as evidence in the case insofar as it is favorable to plaintiffs.*" (Emphasis added.) It would appear that the Crouch case was effectively overruled for all purposes by Crowe v. McBride, supra, and the many other better reasoned cases both prior and subsequent thereto. In his analysis of Crowe v. McBride, supra, the author of the majority opinion conveniently omits any mention of the case of Burr v. Sherwin Williams Co., 42 Cal.2d 682, 688, 691, 268 P.2d 1041, 1044, wherein he, speaking for the court, said "It is settled, of course, that res ipsa loquitur raises an inference, not a presumption, and the general rule is that whether a particular inference shall be drawn is a question of fact for the jury, even in the absence of evidence to the contrary. See Code Civ. Proc., § 1958; Blank v. Coffin, 20 Cal.2d 457, 461, 126 P.2d 868; Hamilton v. Pacific Elec. Ry. Co., 12 Cal.2d 598, 602–603, 86 P.2d 829. *This, however, does not preclude the conclusion that res ipsa loquitur may give rise to a special kind of inference which the defendant must rebut, although the effect of the inference is somewhat akin to that of a presumption.*" (Emphasis added.)

Also in his endeavor to distinguish the the Crowe v. McBride case from the Crouch case (to the detriment of the Crowe case), the author of the majority opinion informs us that the quotation from the Crowe case "must, of course, be read in the light of the facts of the case and the question presented for determination. It is correct as a general proposition, and it should not be given a strained interpretation to reach a conclusion on a matter not presented to or considered by the court." This statement is grossly inaccurate. Crowe v. McBride involved an action for malpractice; defendant chiropractor's motion for a nonsuit was granted. The appeal was from the order granting the nonsuit. Defendant's testimony under 2055 was treated as evidence in the case *insofar as it was favorable to plaintiffs* and we reversed the judgment of nonsuit. It was, therefore, not necessary to give the language used there "a strained interpretation to reach a conclusion on a matter not presented to or considered by the court."

The majority opinion makes much of the fact that the doctrine of res ipsa loquitur raises an inference rather than a presumption and that a presumption may not be dispelled by evidence produced by an adverse party, whereas an inference may be so dispelled. In Burr v. Sherwin Williams Co., supra [42 Cal.2d 682, 268 P.2d 1044], the author of this opinion specifically held that the doctrine of res ipsa loquitur gave rise to a "special kind of inference" which the *defendant* must rebut and that the effect of this particular inference was "somewhat akin to that of a presumption"!

The law in this state has, until the case at bar, always been that on a motion for a nonsuit all evidence elicited under section 2055 which is unfavorable to the plaintiff must be disregarded. Green v. Uarte, 87 Cal.App.2d 75, 196 P.2d 63; Jeppi v. Brockman Holding Co., 34 Cal.2d 11, 206 P.2d 847, 9 A.L.R.2d 1297; Karstensen v. Western Transp. Co., 93 Cal.App.2d 435, 209 P.2d 47; Young v. Bank of America, 95 Cal.App. 2d 725, 214 P.2d 106, 16 A.L.R.2d 1155; Refinite Sales Co. v. Fred R. Bright Co., 119 Cal.App.2d 56, 258 P.2d 1116; Batchelor v. Caslavka, 128 Cal.App.2d 819, 276 P.2d 64; and others too numerous to mention. The *only* case relied upon by the majority for the proposition that an inference may be dispelled as a matter of law by testimony taken under section 2055 is the case of

* Even though he maintains it is *not* inconsistent.

Crouch v. Gilmore Oil Co., Ltd., 5 Cal.2d 330, 54 P.2d 709. The Crouch case did not involve the inference of res ipsa loquitur which is an inference of a character that is "akin to that of a presumption" but involved an inference that defendant truck driver was the agent of Gilmore Oil Company.

It appears to me that the majority opinion has thoroughly confused the issue. It ignores cases where the inference of res ipsa loquitur was involved and the holding therein that testimony taken under section 2055, *insofar as it is favorable to plaintiffs,* remains in the case until rebutted by the defendant; it ignores the time-honored rule where an appeal from a judgment of nonsuit is involved; it makes misleading statements and cites cases in support thereof which are not in point. As another example, the statement in the majority opinion that "The same test is applicable in determining when the res ipsa loquitur inference is dispelled as a matter of law as in deciding when any other inference is conclusively rebutted. See Rose v. Melody Lane, 39 Cal.2d 481, 487, 247 P.2d 335; Leet v. Union Pac. R. R. Co., 25 Cal.2d 605, 621–622, 155 P.2d 42, 158 A.L.R. 1008." This follows the statement of plaintiff's contention that the inference of res ipsa loquitur was not dispelled as a matter of law and that therefore the court erred in granting the motion for a *nonsuit.* Both the Rose and Leet cases were appeals from judgments rendered *after a trial on the merits.* Neither one involved an appeal from a judgment of nonsuit. Then the author of the majority opinion makes this statement: "There is, however, a qualification on this broad general rule [the rule on appeal where a nonsuit is involved]. It is settled that where the evidence raises an inference that a fact exists, and either party produces evidence of the nonexistence of the fact that is clear, positive, uncontradicted and of such a nature that it cannot rationally be disbelieved, the nonexistence of the fact is established as a matter of law. See Blank v. Coffin, 20 Cal. 2d 457, 461, 126 P.2d 868 [870]." In Blank v. Coffin, supra, an appeal from a directed verdict was reversed by this court. It was there held: "It is not always possible for a party to a lawsuit to introduce evidence directly bearing upon the existence of a fact that he is attempting to prove. The evidence available to him may serve only to establish the existence of certain primary facts that are logically connected with the material fact. If a jury can reasonably infer from these primary facts that the material fact exists, the party has introduced sufficient evidence to entitle him to have the jury decide the issue. The *jury* is not compelled to draw the inference, however, even in the absence of contrary evidence and may refuse to do so. Whether a particular inference can be drawn from certain evidence is a question of law, but whether the inference shall be drawn, in any given case, is a question of fact for the *jury.* See cases cited in 10 Cal.Jur. 738–739, § 60.

"Usually, the opposing party introduces evidence as to the nonexistence of the fact in issue, and the *jury* must then determine the existence or nonexistence of the fact from all the evidence before it. If the evidence contrary to the existence of the fact is clear, positive, uncontradicted, and of such a nature that it can not rationally be disbelieved, the court must instruct the jury that the nonexistence of the fact has been established as a matter of law." It is quite apparent that Blank v. Coffin does not stand for the proposition for which it is cited. The Blank quotation continues thus: "The *jury,* however, is the sole judge of the credibility of the witnesses (Cal.Code Civ.Proc., § 1847; see cases cited in 27 Cal.Jur. 182, § 156) and is free to disbelieve them *even though they are uncontradicted if there is any rational ground for doing so.*" The Blank case, incidentally, involved the question of whether or not it was proper for the jury to draw the inference that the automobile was being driven by an employee of the owner with his permission at the time of the accident. A majority of the court in the Blank case held that the directed verdict was improper

because there was sufficient evidence "to permit the jury to infer that the car was being driven with defendant's permission." Engstrom v. Auburn Auto. Sales Corp., 11 Cal.2d 64, 77 P.2d 1059, Crouch v. Gilmore Oil Co., Ltd., supra, and Ceranski v. Muensch, 60 Cal.App.2d 751, 141 P.2d 750 were all cases involving the inference of ownership. Johnston v. Black Company, 33 Cal.App.2d 363, 91 P.2d 921, involved the inference of res ipsa loquitur and a situation where the trial court had directed a verdict for the defendant on the ground of insufficiency of the evidence after the jury had returned a verdict for the plaintiff. The *defendants,* in the Johnston case, *had introduced evidence* at the trial which dispelled the inference (see 33 Cal.App.2d at pages 366 and 368, 91 P.2d at pages 922 and 923). *None of these cases, with the exception of the Crouch case, involved testimony elicited under section 2055 of the Code of Civil Procedure.* The Crouch case has been discussed heretofore.

Plaintiff here has proved her injury and defendants' causal connection, therewith and that inference of negligence remains undispelled until an "affirmative showing of a definite cause for the accident, in which cause no element of negligence on the part of the defendant adheres" is made. There is here, therefore, no failure of proof as in the Crouch case. Plaintiff is not bound by any adverse testimony of any defendant called under 2055. Had the case gone to the jury it was free to believe that Dr. Eiskamp may have used a Kelly clamp; that he did, at some time, during the surgery, work in the upper quadrant of plaintiff's abdomen; or that the clamp had, during the six months it remained in plaintiff's abdomen, worked its way to the position in which it was found. "* * * the inference of negligence which is created by the rule *res ipsa loquitur* is in itself evidence which may not be disregarded by the jury and which in the absence of any other evidence as to negligence, necessitates a verdict in favor of the plaintiff." Ales v. Ryan, 8 Cal.2d 82, 99, 64 P.2d 409, 417. Plaintiff here had made out her case against all defendants by proving facts which raised an inference of negligence which remained in the case as evidence until dispelled *by the defendants.*

The following statement is made in the majority opinion: "A witness may, of course, be disbelieved if there is any rational ground for doing so, and the interest of a party in the result of a case will in some circumstances justify the trier of fact in disregarding his testimony. See Hamilton v. Abadjian, 30 Cal.2d 49, 53, 179 P.2d 804 [nonsuit not involved]; Hicks v. Reis, 21 Cal.2d 654, 659–661, 134 P.2d 788 [nonsuit not involved]; Blank v. Coffin, 20 Cal.2d 457, 461–462, 126 P.2d 868 [reversal of directed verdict for defendant]." It is, of course, elementary that the trier of fact may, *on the trial of a case,* disbelieve any witness or his testimony. We are here concerned with a *nonsuit (and* testimony taken under section 2055) where *all of the plaintiff's evidence and the inferences to be drawn therefrom must be taken as true and all conflicts in the evidence must be disregarded!* Any evidence elicited under section 2055 to the effect that Dr. Eiskamp did not operate in the field where the Kelly clamp was later found merely creates a conflict with other evidence from which the evidence of his negligence may be inferred and must, under heretofore cited cases, be disregarded.

The following statement from the majority opinion is totally irrelevant where, as here, an appeal from a judgment of nonsuit is involved: "There are situations, however, where the interest of a party in obtaining a judgment favorable to himself will not render all of his testimony subject to disbelief. For example, where part of a defendant's testimony is harmful to him but favorable to a codefendant, as where it tends to show that the witness is liable or makes it more difficult for him to establish his own lack of fault, that portion of his testimony may be used to rebut an inference unfavorable to the codefendant provided there is nothing to indicate collusion or any other reason for disbelieving the testimony." *The question of*

disbelief of testimony does not enter into the case when a motion for a nonsuit is made. The defendant, in making the motion, admits that all of plaintiff's case is true. People v. One 1940 Buick Sedan, 71 Cal.App.2d 160, 162 P.2d 318; Seaford v. Smith, 86 Cal.App.2d 339, 194 P.2d 792; Mastro v. Kennedy, 57 Cal.App.2d 499, 134 P.2d 865; Moore v. Belt, 34 Cal.2d 525, 212 P.2d 509; Connors v. Southern Pac. Co., 91 Cal.App.2d 872, 206 P.2d 31; Karstensen v. Western Transportation Co., 93 Cal.App.2d 435, 209 P.2d 47; Carlton v. Pacific Coast Gasoline Co., 110 Cal.App. 2d 177, 242 P.2d 391; Baley v. J. F. Hink & Son, 133 Cal.App.2d 102, 283 P.2d 349; New Zealand Ins. Co. v. Brown, 110 Cal. App.2d 411, 242 P.2d 674; DeAryan v. Butler, 119 Cal.App.2d 674, 260 P.2d 98.

The majority opinion states: "The evidence as to Eiskamp's participation in the operation consisted of the testimony of Lacy, Slegal and Eiskamp, and it was clear and uncontradicted to the effect that Eiskamp was not responsible for leaving the clamp in plaintiff's abdomen. This testimony did not in any way tend to benefit Lacy or Slegal but, to the contrary was disadvantageous to them because the exoneration of one defendant would have the necessary effect of increasing the possibility of liability on the part of each of the other defendants. The record indicates no rational ground for disbelieving their testimony, and we hold that the inference raised against Eiskamp under the doctrine of res ipsa loquitur was dispelled *as a matter of law.*" (Emphasis added.) The lack of logic in, and the unsoundness of, the foregoing argument is so obvious that it should be apparent to the most uninformed. It is conceded by the majority that the favorable portion of this testimony gave rise to an inference of negligence against Dr. Eiskamp. If plaintiff is not bound by the unfavorable portion of the testimony of Drs. Lacy, Slegal and Eiskamp, how can it be said that such testimony can now be relied upon by Dr. Eiskamp to rebut the inference of negligence which arose as a result of the testimony of these witnesses favorable to plaintiff? I submit that the majority has not answered this question and it cannot do so except by its arbitrary ipse dixit "that the inference raised against Eiskamp under the doctrine of res ipsa loquitur was dispelled as a matter of law."

The essence of the legal theory upon which the majority holding is based is contained in the following statement from the majority opinion: "It follows from what has been said that the testimony of a witness called by a plaintiff under section 2055 may be used to dispel an inference upon which the plaintiff relies, provided the evidence is clear, positive, uncontradicted and of such a nature that it cannot rationally be disbelieved. It is particularly appropriate to allow such testimony to be used to rebut the inference in cases like the present one where plaintiff, because she was unconscious while receiving the treatment that resulted in her injuries, is given the benefit of a liberalized test for res ipsa loquitur, and all persons who had any control over her body or the instrumentalities which might have caused her injuries are required to meet the inference of negligence by giving an explanation of their conduct. If in these circumstances evidence given by witnesses under section 2055 establishes as a matter of law that one of the defendants is free from negligence, the prima facie case against that defendant based on the inference should fall, and plaintiff's position with respect to that defendant should be the same as if she had failed to prove all the facts necessary to raise the inference."

It is impossible for me to rationalize the foregoing statement as it requires the application of a brand of mental gymnastics which I do not possess. What I think it means is this: While the testimony of Drs. Lacy, Slegal and Eiskamp, taken under section 2055, established an inference of negligence against Eiskamp under the doctrine of res ipsa loquitur which, under the authorities, remains in the case until rebutted by defendants, this same testimony negatives any inference of negligence

against Eiskamp. This brain child is labelled by the majority as "a liberalized test for res ipsa loquitur." It sounds more reactionary than liberal to me. It is obvious that what the majority want to do here is to destroy the remedial effect of both section 2055 and the res ipsa loquitur doctrine. It is accomplishing this result by declaring that certain evidence—testimony here—"establishes as a matter of law that one of the defendants is free from negligence" notwithstanding the law has established an inference of negligence against him. Is this the product of rational thinking? Can legal reasoning be so obtuse? Should such conflicts exist in our law? My answer to these questions is an emphatic NO. The real difficulty is, the failure of the judicial process to function. The majority here desires to reach a result which cannot be reached by the application of legal principles. So it resorts to sophistry and it becomes enmeshed in a maze of conflicts. The judicial process operates in reverse order. It proceeds from the premise that we have a judgment which is under attack. To determine the validity of this judgment, we apply legal tests—rules of law—and we accept the result which flows from this process. In pursuit of this process, we avoid conflicts and the law becomes a smoothly operating machine geared to the efficient administration of justice.

Applying the judicial process to this case, we find that under section 2055, as construed by all of the authorities, plaintiff may establish her case by the testimony of adverse witnesses; she may do this without being bound by any testimony which is unfavorable to her. So far as her case in chief is concerned, all testimony unfavorable to her must be disregarded the same as if it were not in the record. The testimony favorable to her establishes an inference of negligence against all defendants. She may rest her case on such evidence, secure against a motion for a nonsuit. The judgment of nonsuit against her was therefore erroneous and should be reversed. This always has been the law of this state since section 2055 was enacted and would still be the law if the judicial process was followed in this case.

It would be just as honest, and do less harm to the law, if the majority, in order to reach the result it desires, would hold that no inference of negligence arose against Dr. Eiskamp because the undisputed evidence shows that he did not use a Kelly clamp in the portion of the operation he performed in plaintiff's abdomen. While I could not join in such holding, it is my opinion that it is necessary for a plaintiff to show that a defendant was an active participant in the negligent act which resulted in the injury complained of in order to establish an inference of negligence against such defendant under the res ipsa loquitur doctrine. This was the holding of this court in Seneris v. Haas, 45 Cal.2d 811, 291 P.2d 915, where a judgment of nonsuit in favor of Dr. Haas was affirmed. But the majority expressly holds that under the evidence here an inference of negligence arose against Dr. Eiskamp and I agree with this holding. It appears to be the law of this state, however, that whether a particular inference can be drawn from certain evidence is a question of law, but whether the inference shall be drawn, in any given case, is a question of fact for the *jury*. (See cases cited in 10 Cal.Jur. 738–739, § 60.)

In view of the foregoing rule it would obviously be more logical for the majority to conclude that under the evidence produced here no inference of negligence arose against Dr. Eiskamp. In so holding the majority would have at least a semblance of authority to support its otherwise wholly unfounded conclusion.

We have held Ales v. Ryan, 8 Cal.2d 82, 95, 100, 64 P.2d 409, that leaving a foreign object in a patient's abdomen does not ordinarily occur without negligence and in Ybarra v. Spangard, 25 Cal.2d 486, 154 P.2d 687, 162 A.L.R. 1258, that when a patient receives unusual injuries while unconscious, all defendants having any control over his body or the instrumentalities which might have cause the injuries may be called upon to rebut the inference of negligence by giv-

ing an explanation of their conduct. Nurse Pogatschnik, as an employee of the hospital, was one of the defendants having "control" over the unconscious body of the plaintiff. Plaintiff established through the testimony of Mrs. Evelyn Craig, superintendent of defendant hospital, who was called under section 2055, that it was not the practice of the hospital, through its nurse employees, to make an instrument count after surgery. Whether such an omission constituted negligence was answered adversely to defendant hospital in Ales v. Ryan, 8 Cal.2d 82, 100, 64 P.2d 409, 418, where this court said: "We have already held upon authority that the failure to remove a sponge from the abdomen of a patient is negligence of the ordinary type and that it does not involve knowledge of *materia medica* surgery but that it belongs to that class of mental lapses which frequently occur in the usual routine of business and commerce, and in the multitude of commonplace affairs which come within the group of ordinary actionable negligence. The layman needs no scientific enlightenment to see at once that the omission can be accounted for on no other theory than that someone has committed actionable negligence." Mrs. Craig also testified, although her testimony is not binding on plaintiff, creates merely a conflict in the evidence, and may be ignored, that it was not the custom of hospitals in the community to make an instrument count after surgery. I am of the opinion that the majority opinion incorrectly discusses this testimony as failing to "dispel" the inference of negligence as to the hospital and surgical nurse. Plaintiff is not bound by any adverse testimony elicted under section 2055, as I have heretofore pointed out. The testimony as to custom merely created a conflict in the evidence and might be considered adverse to plaintiff if it were not for cases holding that "General negligence cannot be excused on the ground that others in the same locality practice the same kind of negligence." Ales v. Ryan, 8 Cal.2d 82, 100, 64 P.2d 409. It was also said in Pauly v. King, 44 Cal.2d 649, 655, 284 P.2d 487, 490, quoting from Owen v. Rheem Mfg. Co., 83 Cal.App.2d 42, 45, 187 P.2d 785, that " 'Custom may assist in the determination of what constitutes due care. What others do is some evidence of what should be done, but custom is never a substitute for due care.' "

We have repeatedly held that a hospital must exercise reasonable care towards a patient as his known condition may require, Wood v. Samaritan Institution, 26 Cal.2d 847, 851, 161 P.2d 556; Rice v. California Lutheran Hospital, 27 Cal.2d 296, 302, 163 P.2d 860; Ault v. Ross General Hospital, 105 Cal.App.2d 78, 80, 232 P.2d 528. "If the alleged neglect relates to matters or conduct which are reasonably within the ken of the average layman the jury may determine the culpability of the person charged therewith without the aid of experts. If it relates solely to the exercise of judgment in the application of skill and learning then proof of the negligence must be made by experts." Valentin v. La Societe Francaise, 76 Cal.App.2d 1, 5, 172 P.2d 359, 362; Dean v. Dyer, 64 Cal.App.2d 646, 653, 149 P.2d 288; Stevenson v. Alta Bates, Inc., 20 Cal.App.2d 303, 309, 66 P.2d 1265; Inderbitzen v. Lane Hospital, 124 Cal.App. 462, 12 P.2d 744, 13 P.2d 905. It appears to me that the failure to make an instrument count subsequent to surgery is a matter "reasonably within the ken" of the average layman to permit the jury, without the benefit of expert evidence, to determine whether or not such failure constituted negligence, or the failure to exercise such reasonable care towards a patient as his known condition may require. Valentin v. La Societe Francaise, 76 Cal. App.2d 1, 5, 172 P.2d 359; Wood v. Samaritan Institution, 26 Cal.2d 847, 851, 161 P.2d 556. But, the inference of negligence having arisen because of the Kelly clamp having been left in plaintiff's abdomen during surgery at a time when the defendants had control of her unconscious body, the question of whether such negligence existed was for the trier of fact on a trial of the issues involved. The evidence adduced by plaintiff, together with the favorable inferences to be drawn therefrom,

when conflicting evidence is disregarded, was more than sufficient to permit the cause to be tried by the jury, or the court, as the case may be.

It is impossible to rationalize the majority opinion on any theory of law or logic. It certainly finds no support in the prior decisions of this court or the appellate courts of this state. In the absence of any basis in legal philosophy for the holding here, it is obvious that considerations of expediency have controlled. I submit that such considerations are foreign to the judicial concept. If the law is to be changed, the Legislature is the law-making body, and such change should be brought about by legislation and not by judicial fiat. In our constitutional form of government, with its system of checks and balances, the Legislature is more responsive to the will of the people than the courts and any change in public policy or statutory law should originate with it. I submit that the action of this court here invades the province of the Legislature in a most vital field of legislation and public policy as it repeals or nullifies the provision in section 2055 of the Code of Civil Procedure that a party is *not bound* by testimony elicited under this section.

I would reverse the judgments of nonsuit as to defendants Eiskamp, Pogatschnik and the Watsonville Community Hospital.

SHENK, Justice (dissenting).

I dissent. I am in agreement with the dissenting opinion of Mr. Justice Carter insofar as he concludes that the majority opinion has misapplied section 2055 of the Code of Civil Procedure and the doctrine or res ipsa loquitur. It is well established by the authorites in this state and cited by Mr. Justice Carter that the plaintiff may, under section 2055, call the defendants as adverse witnesses and examine them "as if under cross-examination" and without prejudice to his own cause. The plaintiff is not bound by that testimony. That which is unfavorable to him must, for the purposes of a motion for a nonsuit, be disregarded, however strong or persuasive or even conclusive it might be in favor of the defendants and against the plaintiff in the trial on the merits. The plaintiff is entitled to the benefit of whatever portion of that testimony is favorable to him and that portion only is to be considered in evidence for the purpose of a nonsuit. For that purpose the plaintiff's case is supported by all favorable inferences that may be drawn from that testimony. Those inferences may be in addition to the inference included in the doctrine of res ipsa loquitur which alone is sufficient to take the case to trial on the merits. The question of when an inference in favor of the plaintiff may be dispelled by the testimony of his own witnesses is not involved in this case. In law the defendants, when called by the plaintiff under section 2055, are not the plaintiff's witnesses. With the rule now announced by the majority a plaintiff may not call a defendant for examination under that section except at the peril of having the testimony so taken and which is unfavorable to him used against him in support of a motion for a nonsuit. This is an unfortunate and confusing deviation from the established rules. Under the authorities the res ipsa loquitur doctrine is applicable to this case and its beneficial purpose is effectively destroyed if in calling the defendants as adverse witnesses the plaintiff must assume the hazard of having them justify their conduct and by their own testimony obtain a judgment of nonsuit. The record shows without question that the testimony of the defendants obtained under section 2055 insofar as it is favorable to the plaintiff is in support of the inference of negligence, and that inference has not been dispelled either in fact or in law. The defendant Eiskamp took part in the operation and he should be required to defend on the merits along with his co-defendants.

147 Cal.App. 460

TRUCK INSURANCE EXCHANGE, Petitioner,

v.

INDUSTRIAL ACCIDENT COMMISSION of the State of California, and Odas W. Patterson, Respondents.

Civ. 9098.

District Court of Appeal, Third District, California.

Jan. 8, 1957.

Proceeding to review order of Industrial Accident Commission. The District Court of Appeal, Peek, J., held that employee who, while working on his employer's farm, was hit by stray bullet fired from .22 rifle by 10 year old boy on neighboring farm was entitled to workmen's compensation.

Affirmed.

1. Workmen's Compensation ⇐702

Employee who, while working on his employer's farm, was hit by stray bullet fired from .22 rifle by 10 year old boy on neighboring farm was entitled to workmen's compensation.

2. Workmen's Compensation ⇐609

Injuries occurring in the course of employment also arise out of the employment and hence are compensable under Workmen's Compensation Law although the factor which put in motion force causing injury was something over which employer had no control and with which he had no connection.

3. Workmen's Compensation ⇐998

Evidence supported award of workmen's compensation for future medical treatment which might become necessary to employee whose shoulder was injured when hit by bullet fired from .22 rifle.

Mullen & Filippi, San Francisco, for petitioner.

A. E. Corten and Daniel C. Murphy, San Francisco, for respondent Industrial Accident Commission.

PEEK, Justice.

Petitioner seeks to review an order of the respondent commission awarding benefits to respondent Patterson who, while working on his employer's farm, was hit by a stray bullet fired from a .22 rifle by a ten-year-old boy on a neighboring farm.

[1] Two contentions are made by petitioner: (1) That the injury did not arise out of the employment and was not proximately caused thereby; and (2) that the Commission erred in making an award for future medical treatment.

It would seem wholly unnecessary to discuss in detail the numerous cases from other jurisdictions cited in support of petitioner's contention that the injury is not compensable, and that therefore the rule expressed in Associated Indem. Corp. v. Industrial Acc. Comm. (Zurbuchen), 43 Cal.App.2d 292, 110 P.2d 676, is controlling. Suffice it to say that while we agree with petitioner that factually the case is substantially on all fours with the present one, we cannot agree that the Zurbuchen case has not been overruled and hence is controlling.

That case was decided in 1941. In 1950 the First District Court of Appeal, Division I, was presented with a very similar question in the case of Industrial Indem. Co. v. Industrial Acc. Comm. (Baxter), 95 Cal.App.2d 804, 214 P.2d 41. There the court, speaking through Mr. Justice Bray, ably discussed with critical particularity all of the cases in this State, beginning with Kimbol v. Industrial Acc. Comm., 173 Cal. 351, 160 P. 150, L.R.A.1917B, 595, wherein this question had been presented. The decision notes that while our courts generally have labored the problem at length in an attempt "* * * to show that the actual substance which injured the employee was an instrumentality of the employer, a real analysis of the facts and rulings in these cases shows that actually the courts were allowing compensation because his employment brought the employee into what became a position of danger even though that danger was not, and in many instances could not have been, foreseen either by

the employer or employee, and even though the risk was not peculiar to the particular location." 95 Cal.App.2d at page 810, 214 P.2d at page 45. See also 18 Cal.L.Rev. 562.

[2] The Baxter case was followed by the recent case of Madin v. Ind. Acc. Comm., 1956, 46 Cal.2d 90, 292 P.2d 892. In that opinion the court quoted with approval and at length from the Baxter case and held that "* * * injuries occurring in the course of employment also arise out of the employment and hence [are] compensable although the factor which put in motion the force causing the injury was something over which the employer had no control and with which he had no connection." 46 Cal.2d at page 93, 292 P.2d at page 894. Additionally, the court held that the Zurbuchen case was "contrary" to the rule enunciated in that it failed to give the liberal construction required of workmen's compensation laws, and was not in "accord" with the Baxter case and the other cases cited with approval in the Madin case.

[3] The petitioner's second contention, that the award for further medical treatment which might become necessary is in error, is based upon a portion of the doctor's report wherein it was stated that the applicant "* * * is in need of no additional medical care." However that is not the full context of the comment. The doctor, after noting that the progress of the patient had been satisfactory, concluded,

> "* * * It is my recommendation that this patient be reexamined in approximately two months. If at that time he has had no complication from his injury, it will probably be in order to consider a settlement of his claim.
>
> "The patient will have permanent disability consisting of limitation of motion of the right shoulder and the present measurements appear to be remaining about the same in their degree of limitation."

As respondents note, the petitioner is not aggrieved by this phase of the award and cannot be unless a claim for some specific treatment is made, in which event petitioner will have its day in court to present any legal or factual defense it may have against such a claim. Here it is quite apparent that the doctor anticipated the possibility of further examination and the possibility of future complications. Also the nature of the disability suggests the possibility of future medical needs. The contention of petitioner that the award is unsupported in this regard cannot, therefore, be sustained.

The award is affirmed.

VAN DYKE, P. J., and SCHOTTKY, J., concur.



147 Cal.App.2d 443

H. C. CROFOOT and Blanche Crofoot, his wife, Plaintiffs and Appellants,

v.

J. H. TARMAN and Bessie May Tarman, Defendants and Respondents.

Civ. 8856.

District Court of Appeal, Third District, California.

Jan. 7, 1957.

Rehearing Denied Jan. 29, 1957.

Hearing Denied March 5, 1957.

Action by trustor and another against purchaser of accommodation note and another to set aside trustee's deed, which secured the note, and to quiet title to the realty covered by the deed. The Superior Court, Butte County, J. F. Good, J., entered judgment adverse to plaintiffs, and plaintiffs appealed. The District Court of Appeal, Van Dyke, P. J., held that, where trustor stood by in purchaser's office when purchaser advised trustee to postpone his sale under trust deed to December 22, but attorney representing corporation for which the note had been executed as an accommodation was erroneously informed by secretary of purchaser's attorney that the sale had been postponed to the 29th, and neither

trustor nor representative for the corporation appeared at sale, the sale could not be set aside by reason of irregularities plus inadequacy of price, even though purchaser of note, as purchaser at the sale, obtained full title of the property, which was then valued not greater than $50,000, for about $20,000.

Judgment affirmed.

1. Mortgages ⇐369(3)

Inadequacy of price, standing alone, will not afford ground for setting aside sale of trustee under deed of trust, but gross inadequacy of price in conjunction with irregularities which had the effect of conducing to the inadequacy of price or which have in some other way contributed to injury to trustor will afford such support.

2. Mortgages ⇐369(3)

Where trustor stood by in office of purchaser of note secured by the deed of trust when purchaser advised trustee to postpone his sale under trust deed to December 22 but attorney representing corporation for which the note had been executed as an accommodation was erroneously informed by secretary of purchaser's attorney that the sale had been postponed to the 29th, and neither trustor nor representative for the corporation appeared at sale, the sale could not be set aside by reason of irregularities plus inadequacy of price, even though purchaser of note, as purchaser at the sale, obtained full title of the property, which was then valued not greater than $50,000, for about $20,000.

3. Mortgages ⇐247

Where, pursuant to urgent solicitation of trustor and by written agreement, defendant purchased accommodation note, which had been executed by trustor, and which was secured by the deed of trust, under express agreement with trustor that he would be subrogated to all rights of seller of the note, defendant was entitled to have the property subject to the deed of trust sold at public auction just as person who had sold the note to him was in process of doing unless trustor themselves or through the accommodated party should pay the accommodation note.

Spurr & Brunner, E. N. Funk, Ukiah, for appellants.

Raymond A. Leonard, Oroville, for respondents.

VAN DYKE, Presiding Justice.

This is an appeal from a judgment denying plaintiffs and appellants any relief in an action brought by them to set aside a trustee's deed to real property and to quiet title to the real property against respondents.

Appellants, hereinafter called Crofoot, were the owners of real property in Butte County, California, consisting of about 1,575 acres of land. They had encumbered the title by executing a deed of trust covering the same to secure the payment of an indebtedness of $10,000. Thereafter, in December of 1951, they executed a second deed of trust securing payment of a promissory note payable to Black Rock Mineral Company, a corporation, hereinafter called Black Rock. They did this in order to enable Black Rock to develop certain mining properties on other lands, by negotiating the secured note. As between Crofoot and Black Rock the note was accommodation paper, and Black Rock had promised Crofoot it would pay and discharge the indebtedness secured by the deed of trust. Black Rock negotiated the note to one Allen, and thereafter failed to make payments due. Allen instructed the trustee to begin proceedings to sell the property. The sale was set for November 10, 1952. In the meantime, and on October 31, 1952, Crofoot had entered into a written contract with respondent J. H. Tarman, hereinafter called Tarman, in which Tarman agreed to buy the real property for a price of $78,750. Tarman went into possession of the property and has remained in possession ever since. During the interim between the execution of the purchase contract and the date of sale under the deed of trust, Tarman, at the solicitation of

Crofoot, purchased the accommodation note from Allen in order to postpone the sale. He then instructed the trustee to postpone the sale to the 15th of December following. The transaction between Crofoot and Tarman covering Tarman's purchase of the note from Allen was the subject of a written agreement, the substance of which was as follows: The agreement recited the necessity of obtaining and paying to Allen forthwith the sum of $33,704.97 in order to prevent the trustee's sale on December 15th. It declared that Allen held additional security for the payment of the sum owing to him consisting of a certain lease of property, a chattel mortgage executed by Black Rock upon personal property and also 150,000 shares of the capital stock of Black Rock. It was then stated that if Tarman should procure the necessary funds and pay them to Allen he would be entitled to receive from Allen all the above security; that Tarman had agreed to arrange a continuance of the trustee's sale for not less than 30 days from November 7, 1952; that Tarman should be subrogated to all the rights of Allen. Tarman did postpone the sale to December 15th. Crofoot applied for, and received, a further postponement to December 22d. On the last mentioned date the trustee sold the subject property at public sale to Tarman for the sum of $10,000 and gave him a trustee's deed. Between December 15th and December 22d, the attorney representing Black Rock, which corporation was endeavoring to obtain funds to pay the accommodation note, attempted to contact Tarman's attorney to ascertain the exact date of sale and on failing to reach him was told by his secretary that the sale had been postponed to the 29th of December, which information was erroneous. Black Rock's attorney acquainted Crofoot with the information the secretary had given. Neither Crofoot nor a representative for Black Rock appeared at the sale, and testimony was introduced that Black Rock and Crofoot relied upon the mistaken information they had received as to the date of sale even though, as to Crofoot, he had himself obtained the last postponement to December 22d. They learned of the sale a day or so after it occurred and protested that they should be allowed to pay off the obligation and restore the title to appellants. They caused a notice to be recorded declaring the sale invalid. Tarman, on December 30th, offered, to Black Rock's attorney, to set aside the sale if the money he had paid Allen was returned to him by January 3, 1953. This offer was conveyed by letter and brought the immediate telephonic response that it would be impossible to raise the money in the time allowed. However, no further offer was made and neither Black Rock nor Crofoot tendered any payment to Tarman. Black Rock continued its endeavors to raise money, and by January 15th it placed in the trust account of its attorney the sum of $35,000. On January 16th the attorney paid Tarman $22,500 for the release of the chattel mortgage which was then in process of foreclosure and offered to pay the balance of the total sum he had expended in purchasing the accommodation note, but Tarman refused to accept it and since has maintained his position as owner of the real property. Tarman never paid to Crofoot any part of the purchase price of the property in accordance with the contract of purchase. In December of 1953 appellants brought the present action.

[1] Appellants first contend that the trustee's sale should be set aside upon grounds of irregularity. They preface their argument by stating the well-settled rule that, although inadequacy of price standing alone will not afford ground for setting aside a trustee's sale, yet gross inadequacy of price in conjunction with irregularities which have the effect of conducing to the inadequacy of price or which have in some other way contributed to the injury to the trustor will afford such support. Bank of America Nat. Trust & Savings Ass'n v. Century Land & Water Co., 19 Cal.App.2d 194, 196, 65 P.2d 109; Sargent v. Shumaker, 193 Cal. 122, 129, 223 P. 464.

They point to the following testimony as to inadequacy of price: There was the contract by which respondent, within 60

days of the sale, had agreed to pay appellants $78,750 for the land. Tarman himself testified at the trial that on the day of sale the property was worth $40,000 to $50,000. H. C. Crofoot testified that on the sale date it was worth $50 an acre. A real estate broker testified to the same value. Another real estate broker, testifying as a witness for Tarman, said the land was worth from $25 to $50 an acre. The trial court found that the reasonable market value was "not in excess of $50,000." At the time of the sale the property was encumbered by tax liens in the amount of less than $1,000, and by the first lien deed of trust upon which there was nearly $10,000 owing. Adding these sums to Tarman's bid of $10,000, we see that Tarman got the full title for about $20,000.

[2] Turning now to the alleged irregularities in the sale and their effect upon the sale, Crofoot argues concerning the fact and the effect of the misinformation as to the date of sale which emanated from the secretary of Tarman's attorney. It appears that they do not in fact claim there were irregularities in the trustee's conduct of the sale, nor that anything done or left undone by the trustee was in violation of the trustee's authority or contrary to the trustee's duties. Indeed, it appears without conflict that the postponement from December 15th to December 22d was made by Tarman upon the personal application of Crofoot who stood by in Tarman's office when Tarman telephoned the trustee, advising it to postpone the sale to the 22d. There is nothing in the record to the effect that anything done or left undone by the trustee prevented the public from attending at the sale or in anywise discouraged bidding. Therefore, the trustee's sale cannot be set aside by reason of irregularities plus inadequacy of price. Crofoot's contention that the sale should be set aside is in reality based upon matters de hors the sale proceedings, that is, upon a claim of fraud or mistake inhering in the misinformation as to the date of sale.

It is admitted by all parties that shortly before December 22d the attorney for Black Rock did call the office of the attorney for Tarman, who was absent; that Black Rock's attorney then talked to the secretary in his office, inquiring as to the correct date to which the sale had been postponed; that, as the court found, the secretary innocently stated the sale had been postponed until the 29th. There is no evidence whatever that the misinformation was fraudulently given, and as noted the court found otherwise.

Crofoot alleged that the representations as to the date of sale were made to the attorney for Black Rock with the fraudulent intent of misleading Crofoot into a false sense of security, preventing appearance at the sale to bid, and preventing Crofoot from paying and discharging the indebtedness. The trial court found against all of these allegations, and specifically found that Crofoot's failure to pay Tarman was not by reason of any misapprehension as to the date of sale, but was because Crofoot relied upon other persons to pay him. This latter finding is supported by the testimony of appellant H. C. Crofoot, who testified that he considered it was up to Black Rock to take care of the matter and that he had their assurance that they had the money; that he himself had arranged a continuance to the 22d and on receiving information from the attorney for Black Rock that the sale had been set forward to the 29th he did not contact respondent to ascertain the correctness of that statement, even though it conflicted with the arrangements he had personally made with Tarman. When asked by the trial court to tell the court why he waited for a year to bring this action when he knew shortly after December 22, 1952 that the sale had been made, he replied that Black Rock was taking care of the matter, that he did not negotiate with Tarman at any time after January of 1953 and up to the time of filing this action, because it was not up to him to do that, that he had relied on Black Rock to do that, that he had never, between December 22, 1952 and the time of filing this action, made any tender or payment of money to Tarman, because he did not owe him anything.

The most that can be said concerning the fact and the effect of the misinformation as to the date of sale, conveyed to the attorney for Black Rock and by him to Crofoot, is that the facts would have supported a determination by the trial court that the sale ought to be set aside but that such a holding was not compelled. The secretary of Tarman's attorney stated that she had called Tarman's office and was told that the sale had been postponed to the 29th of December. The trial court was not required to hold that that information came from Tarman or was authorized by him. He testified to the contrary and said that he did not know anything about how that information was obtained, if, in fact, the secretary had called his office about the date of sale. The trial court was fully justified in holding, as it did, that there was neither actual nor constructive fraud involved in the matter and was equally justified in holding that Crofoot's allegation that the practical result was to prohibit them or Black Rock from attending the sale and bidding thereat was not supported by the evidence and was untrue. There was testimony that almost immediately after respondent purchased the accommodation note from Allen he began pressing appellants to restore the money to him, because he had had to find the funds necessary and had had to complete the acquisition of the funds from his own private resources which left his business short of operating capital. There was testimony of many promises, made and broken by Crofoot, that they would be able to restore Tarman's money to him if he would grant one more postponement. There was a like history of promises made and not kept on the part of Black Rock in its endeavors to get the money from parties interested in that corporation. There was evidence that Black Rock did not succeed in gathering the money until about the middle of January following the sale. The trial court was fully justified in refusing the equitable relief of setting the sale aside.

Crofoot contends that because Tarman was in possession of the real property under an executory contract of sale he could not dispute the title of his vendors, and that he acquired and held the title conveyed to him by the trustee for Crofoot's benefit for all the purposes of the executory contract. Reliance is placed upon such cases as Garvey v. Lashells, 151 Cal. 526, wherein at page 531, 91 P. 498, at page 501, it is said:

> "* * * 'A purchaser of land in possession thereof under a contract of sale, by the terms of which the vendor is to give a warranty deed of the property, conveying a good and perfect title thereto, cannot, upon the vendor's failure and inability to convey a good and perfect title, retain both the land and the purchase money until a perfect title shall be offered him, but he must pay the purchase price according to the contract, and receive such title as the vendor is able to give, if he chooses to retain the possession of the land, or he may rescind * * *.'
>
> * * * * * *
>
> "* * * The generally accepted rule is to the effect that, if the purchaser in possession perfects the title of the vendor pending the executory contract by buying in an outstanding claim, the perfected title inures to the benefit of the vendor for all the purposes of the agreement, and the utmost that the vendee can ask is to be reimbursed for his outlay in obtaining such title, with interest thereon."

[3] We think this rule, under the facts of this case, has no such application to the case at bar as compelled the trial court to enter a decree based thereon. As has been stated, it appears that Tarman did not voluntarily purchase any outstanding claim of title. On the contrary, by a written agreement and at Crofoot's urgent solicitation he purchased the accommodation note held by Allen and received an assignment thereof, and of the other security held by Allen, under an express agreement with Crofoot that by doing so he would be subrogated to all the rights of Allen thereunder. This meant, of course, that, unless appellants

themselves or through Black Rock should pay the note, Tarman was entitled to have the property sold at public auction just as Allen was in the process of doing. That such was the true meaning of the contract is further evidenced by the conduct of Crofoot who continually sought postponements of the trustee's sale initiated by Allen. Tarman took no action with respect to the trustee's sale of the property except what the parties had agreed he might take. By that agreement he stepped into the shoes of Allen; he had the right to have the trustee make the sale; he agreed thereby to postpone the sale for more than 30 days and this he did; and though not compelled to bid, he was entitled to do so. Implicit in the bargain he made with Crofoot was his right, if he bid the property in at public sale, to keep the title he thus acquired.

The judgment is affirmed.

SCHOTTKY and PEEK, JJ., concur.



147 Cal.App.2d 107

Arthur James MILLS, Virginia Marsh Gerace, Robert Mills Marsh, Betty Jane Marsh, Plaintiffs and Appellants,

v.

Ethel Marie MILLS and Florence Mills Tripp, a/k/a Mrs. Gene Tripp, Defendants and Respondents.

Civ. 21521.

District Court of Appeal, Second District, Division 3, California.

Dec. 20, 1956.

Action for declaratory relief. From a judgment of dismissal entered after an order sustaining defendants' demurrer to the third amended complaint in the Superior Court of Los Angeles County, A. Curtis Smith, J., the plaintiffs appealed. The District Court of Appeal, Vallée, J., held that the Superior Court had jurisdiction of the count relating to the respective rights of the parties in Illinois realty and to declare a vendor's lien; that the causes of action in counts one and two were not barred by limitations and that the count three and four were demurrable.

Judgment reversed.

1. Declaratory Judgment ⇐385, 386

Both declaratory and coercive relief may be granted in the same action for declaratory relief. West's Ann.Code Civ. Proc., § 1060.

2. Declaratory Judgment ⇐318

Where an actual controversy allegedly existed between the parties relating to their respective rights in Illinois realty, declaration seeking an adjudication of the rights of the parties stated a cause of action for declaratory relief. West's Ann.Code Civ. Proc., § 1060.

3. Declaratory Judgment ⇐390

An action for declaratory relief is a suit in equity, and jurisdiction of a court of equity to enforce its decrees is coextensive with its jurisdiction to determine the rights of the parties, and it can enforce its decrees as a necessary incident to its jurisdiction. West's Ann.Code Civ.Proc., § 1060.

4. Declaratory Judgment ⇐271

If a complaint for declaratory relief pleads facts sufficient to entitle plaintiff to some equitable relief, court will assume jurisdiction of the entire controversy. West's Ann.Code Civ.Proc., § 1060.

5. Declaratory Judgment ⇐253

Equity will not deny declaratory relief simply because it cannot afford the full measure of relief plaintiff may need or because it cannot act directly on the premises to which the relief relates. West's Ann. Code Civ.Proc., § 1060.

6. Equity ⇐36, 63

Equity acts in personam, not in rem, and after the court has obtained jurisdiction of parties it may by a decree in personam control their actions with respect

to property situated without its jurisdiction whenever such action is necessary to effect a complete disposition of the controversy.

7. Declaratory Judgment ⇐273

The superior court was not without jurisdiction of a declaratory action to determine the rights of parties in Illinois realty on the ground that the court did not have jurisdiction of the res, since equity acts in personam. West's Ann.Code Civ. Proc., § 1060.

8. Judgment ⇐903

While the decree of a California court directing conveyance of realty outside the state does not of itself affect the title of the realty in the latter state it is sufficient basis for a suit in California courts to compel such conveyance.

9. Venue ⇐22(1)

Where plaintiffs sought a declaration of rights between themselves and defendants with respect to Illinois property and the declaration would not operate directly on the property or affect the title, action was transitory and properly maintainable in the county where the defendants resided. West's Ann.Code Civ.Proc., § 1060.

10. Equity ⇐54

Equity does not wait on precedent which exactly squares with the facts in controversy but will adjust itself to those situations where right and justice would be defeated but for its intervention.

11. Vendor and Purchaser ⇐246

A vendor's lien after an actual conveyance is not a specific and absolute charge on the realty, but a mere equitable right to resort to it on failure of payment by the vendee. West's Ann.Civ.Code, § 3046.

12. Vendor and Purchaser ⇐269

Right to a vendor's lien must be established by suit, and the lien is not of operative force until established by a decree of court, and it may be asserted only by a suit in equity for the purpose of obtaining such a decree. West's Ann.Civ.Code, § 3046.

13. Vendor and Purchaser ⇐266(1)

An extension of time for payment of the purchase money does not extinguish a vendor's lien, and the vendee is regarded as holding the realty in trust for the benefit of the vendor to the extent of the unpaid purchase money, and the trust descends to the representatives and heirs of the vendee against whom the lien for the purchase money will be enforced. West's Ann.Civ. Code, § 3048.

14. Courts ⇐7

In suit to adjudicate the rights of parties in Illinois realty, superior court had jurisdiction of the cause of action though plaintiffs, on proof of facts alleged, would be entitled to a decree that they had a vendor's lien on the Illinois property, where the cause of action averred was to establish the lien, and not to foreclose it. West's Ann.Civ.Code, § 3046.

15. Limitation of Actions ⇐2(1)

The barring of a claim by limitations is a procedural matter governed by the law of the forum regardless of where the cause of action arose.

16. Limitation of Actions ⇐16

The nature of the right sued on, and not the form of action or relief demanded, determines the applicability of the statute of limitations.

17. Limitation of Actions ⇐13, 104(1)

Where a party fraudulently conceals the existence of a cause of action against him, the statute of limitations is tolled and the guilty party is estopped to plead the limitations.

18. Limitation of Actions ⇐13

Doctrine of equitable estoppel may be invoked to prevent a defendant from relying on the statute of limitations.

19. Limitation of Actions ⇐13, 99(1)

When a defendant who sets up the statute of limitations has previously, by fraud or any violation of duty to plaintiff, caused him to subject his claim to the statutory bar, he must be charged with having wrongfully obtained an advantage which the courts will not allow him to hold.

20. Estoppel ⇐98(1)

An estoppel of a party ordinarily is operative against his privies in estate.

21. Limitation of Actions ⇐13

Rule that fraud may serve as basis of estoppel against asserting bar of limitations applies irrespective of whether action claimed to be barred is itself based on fraud.

22. Liens ⇐16

A court of equity will keep alive or restore a lien where the equities require it and the parties intended that it should not be extinguished, as where it has been discharged by fraud or mistake.

23. Limitation of Actions ⇐199(1)

Whether an estoppel exists, whether acts, representations, or conduct lulled a party into sense of security preventing him from instituting proceedings before the running of the statute of limitations and whether the party relied thereon to his prejudice is a question of fact, not of law.

24. Limitation of Actions ⇐104(1)

Where a party is guilty of fraudulent concealment of the cause of action, the statute of limitations is deemed not to become operative until the aggrieved party discovers the cause of action. West's Ann. Code Civ.Proc., §§ 312, 338, subd. 4.

25. Limitation of Actions ⇐192(3)

To bring oneself within the statute respecting fraudulent concealment of a cause of action as respects limitations, a party must allege when the fraud was discovered, circumstances and what the discovery was and why it was not discovered sooner. West's Ann.Code Civ.Proc., §§ 312, 338, subd. 4.

26. Limitation of Actions ⇐199(2)

When facts with respect to discovery of fraud tolling limitations are susceptible to opposing inferences, whether a party had notice of circumstances sufficient to put a prudent man on inquiry as to the particular fact and whether by prosecuting such inquiry he might have learned such fact are questions of fact for the trial court. West's Ann.Code Civ.Proc., §§ 312, 338, subd. 4.

27. Limitation of Actions ⇐192(3)

In action seeking a declaration that plaintiffs had a vendor's lien on Illinois realty, complaint was not barred by limitations where the count alleged facts showing when the alleged fraud was discovered, circumstances of the discovery, what the discovery was and why it was not discovered sooner, so as to toll limitations. West's Ann.Code Civ.Proc., §§ 336a, 337, subd. 1.

28. Courts ⇐7

In suit for a decree that defendants held title to Illinois realty in trust for the benefit of plaintiffs, superior court had jurisdiction of the cause of action.

29. Fraud ⇐7

If there is a duty to speak because of a confidential relation, a failure to do so is a species of fraud for which equity will afford relief.

30. Pleading ⇐214(1)

Averments of a count must be assumed true on demurrer thereto.

31. Limitation of Actions ⇐102(11)

Ordinarily, in a suit to establish an involuntary trust, the statute of limitations begins to run when the trust relation is terminated. West's Ann.Civ.Code, § 2217.

32. Limitation of Actions ⇐100(3)

In suit for a decree that defendants held title to Illinois realty in trust for plaintiffs, grounded on fraud, the statute began to run on the date the plaintiffs discovered the fraud, and where the action was brought within three years thereafter, it was not barred by limitations. West's Ann. Civ.Code, §§ 2217, 2223, 2224, 2243; West's Ann.Code Civ.Proc., §§ 338, subd. 4.

33. Pleading ⇐35

Where, in so far as a count sought a decree that defendants held title to Illinois realty in trust for the benefit of plaintiffs, it was no different from count two, it was surplusage.

34. Trusts ⇐91
Vendor and Purchaser ⇐250

Where count of complaint sought a decree that the property received by defend-

ants as distributees of the estate of the alleged trustee was held in trust for plaintiff, to extent that realty was insufficient to provide restitution of the amount due plaintiffs under terms of note executed by the alleged trustee, no theory existed on which it could be decreed that the defendants held the property so received from the estate of the alleged trustee in trust for benefit of the plaintiffs, and the plaintiffs were not entitled to a vendor's lien on such other property.

35. Pleading ⇐204(2)

A general demurrer to a complaint containing more than one count should be overruled if there is a good count stating a cause of action, and if it is erroneously sustained, the judgment of dismissal should be reversed.

Robert J. Johnston, Brooks Gifford, Sidney H. Wyse and Henry W. Cutter, Pasadena, for appellants.

Burr & Smith, Los Angeles, for respondents.

VALLÉE, Justice.

Appeal from a judgment of dismissal entered after an order sustaining defendants' demurrer to the third amended complaint, to be referred to as the complaint.

The complaint is in four counts. Count I alleges:

In May 1929 Oscar L. Mills, now deceased, purchased from Thomas O. and Annie E. Mills, his father and mother, a parcel of realty located in the county of Will, state of Illinois, and agreed in writing to pay $27,800 therefor. Oscar Mills received a deed to the property, subject to a deed of trust for $14,000, and executed an unsecured promissory note for $13,109.46 payable on demand to the order of "Thomas O. Mills and Annie E. Mills, or Survivor of either" at California Bank, Los Angeles, with interest at 7 per cent, representing the balance of the purchase price.

Oscar Mills did not pay the note, and no part of it has ever been paid. Thomas O. Mills died June 13, 1932. Annie E. Mills died March 28, 1938. After her death the will of Thomas O. Mills was admitted to probate in Illinois and on June 23, 1939 his estate was distributed directly to the heirs at law of Annie E. Mills, who were Oscar L. Mills, her son, plaintiff Arthur James Mills, her son, and plaintiffs Virginia Marsh Gerace, Robert Mills Marsh and Betty Jane Marsh, children of Irma Amber Marsh, her predeceased daughter.

A relation of trust and confidence existed between Oscar Mills on the one hand and Thomas O. and Annie E. Mills on the other hand in that: Oscar was the son of Thomas and Annie; for more than 10 years prior to 1926 plaintiff Arthur Mills had managed the farm and business affairs of Thomas and Annie; about June 1, 1926 Oscar represented to them that it would be to their best interest to turn the management of their property and business affairs over to him, that he was the most successful member of the family, and they could rely on him, that he was in a better position to do so, Arthur had not had the business experience or ability to look after their affairs and he should no longer be imposed on; in 1929 when Oscar gave his parents the note Thomas was 79 and Annie was 77 years of age, both had had attacks of thrombosis, were in ill health physically and mentally, and were no longer engaged in business of any kind; Thomas and Annie relied on the representations and turned over to Oscar the management of their property and affairs and sought, obtained, and relied on his advice and counseling. Such relation continued during the lifetimes of Thomas and Annie.

A confidential relation existed between Oscar and plaintiff Arthur Mills in that: they were brothers; Oscar, by words, acts, and representations, had assumed a position of trust and confidence with Arthur, advised and counseled him on business affairs, and Arthur relied on and looked to him for advice and counseling from 1926 to the date of Oscar's demise; Oscar advised Arthur to leave the farm and come to work for him, that he would look after their parents

and their business affairs; Arthur went to work for Oscar and his continued employment was dependent on Oscar's discretion.

A confidential relation existed between Oscar and plaintiffs Virginia Marsh Gerace, Robert Mills Marsh, and Betty Jane Marsh in that: they are nieces and nephew of Oscar; they were born on February 12, 1919, February 17, 1921, and May 21, 1923, respectively; their mother, Oscar's sister, died September 22, 1934; their father was suffering from a fatal illness at the time; he died September 10, 1938; during the illness of their father Oscar represented to him that in the event his illness caused his demise he (Oscar) would look after and care for Virginia, Robert, and Betty the same as if they were his own children; at the death of their father, on the invitation and suggestion of Oscar, they moved to California and lived with him about two months, and thereafter at his suggestion they established a separate residence.

Oscar fraudulently and deceitfully concealed the indebtedness for the unpaid purchase price of the Illinois realty in that: at the time of the purchase he stated to plaintiff Arthur Mills he had paid cash to his father and mother for the property at about $100 an acre; on information and belief, after the death of Thomas he stated to Annie he was unable to make payments on the note but that as soon as his money became available he would make payment, that it would cause him considerable embarrassment in his business ventures in California if demand for payment was made on him at that time, that he would pay it to her or his brothers and sisters at the first opportunity; Annie was old and infirm and likely to be imposed on by artful and designing persons at the time; she relied on the representations and was induced thereby to withhold demand for payments; he represented in a verified petition in the proceeding for probate of the estate of Thomas that the only assets of the estate at the time of his father's death were government bonds of an estimated value of $500; he stated to Arthur at the time of his father's death and again at the time of his mother's death that he was fully familiar with their affairs and that they left no estate of value; he stated to Arthur and to Virginia at the time of his mother's death that his father left no money or property and that it had been necessary for him to advance sums for his father's benefit during his lifetime and to pay the funeral expenses; he stated to Arthur at the time of his father's death and again at the time of his mother's death that he would personally take care of any necessary matters and that it would be unnecessary, detrimental, and a waste of time for Arthur to assist him in any way in settlement of their affairs; he stated to his mother and Arthur that nothing should be done regarding the probate of his father's estate since if any interest should inure to Arthur, his (Arthur's) wife from whom he was separated, would claim her share to the detriment of all concerned, and in any event it would be of no avail as there was no property; about December 28, 1939 plaintiff Virginia Gerace told Oscar she wanted to look over the personal effects, papers, and photographs of Thomas and Annie; Oscar stated to her that neither Thomas nor Annie had any property or effects of value; on information and belief, Oscar knew of the location of a safe deposit box of Thomas during the latter's lifetime and at the time of his death; the identity and location of the box was at no time disclosed to Arthur, and it remained sealed until after the death of Annie when it was opened by an agent of Oscar; Oscar told Arthur the box contained miscellaneous papers of no value. At no time after the death of Annie did Oscar disclose to any one of plaintiffs the fact that the balance of the purchase price of the Illinois property represented by the note had not been paid.

All of the statements and representations made by Oscar were false and untrue; they were made for the purpose of deferring action to enforce collection of the purchase price of the property and of concealing the existence of the indebtedness from plaintiffs; by reason of such concealment plaintiffs were induced to and did refrain from further investigation and inquiry into the

assets of Thomas and Annie and their respective estates.

It is alleged that because of the aforesaid acts, statements, and representations of Oscar, plaintiffs did not discover the existence of the note until January 20, 1952; it was discovered in a locked strongbox among the personal effects, papers, and photographs in a trunk which was moved to California after the death of the father of Virginia, Robert, and Betty, placed in storage for about six months, and thereafter stored among the personal effects of his deceased parents for the use of Oscar and Arthur; the existence of the strongbox was unknown to Arthur until January 20, 1952; neither the existence of the note nor any other fact or circumstance of the indebtedness was in any manner suggested to plaintiffs until that time; they then made an investigation as to the status of the indebtedness and the note.

Defendants are residents of the County of Los Angeles. They are the distributees under the will of Oscar Mills, who died June 10, 1947 and whose will was admitted to probate in the Superior Court of the County of Los Angeles, in which proceeding the time within which a creditor's claim might be filed expired prior to the discovery by plaintiffs of the existence of the note and in which a decree of distribution was made on May 16, 1951. It is further alleged summary probate proceedings were had in Illinois whereby title to the realty was and is now vested in defendants as distributees under the will of Oscar Mills.

At the time the Illinois realty was deeded to Oscar he took possession of the property and retained possession until his death. Since his death defendants have had possession. Since Oscar took possession the value of the property has depreciated. On information and belief, the present value of the property is less than the amount of the note with interest.

Plaintiffs are the equitable owners of an undivided two-thirds interest in the Illinois realty. They have a lien as heirs of the grantors on the property in the amount of the note with interest.

An actual controversy exists between plaintiffs and defendants relating to their respective rights, titles, and interest in the Illinois realty. Plaintiffs' claim of rights in the property is denied and disputed by defendants.

The prayer of Count I is for declaratory relief.

Counts II, III, and IV reallege the allegations of Count I except those with respect to plaintiffs having a lien on the Illinois property as heirs of the grantors and with respect to an actual controversy existing between the parties. Count II further alleges that at the time Oscar purchased the property and promised to pay the balance of the purchase price he made the promise without any intent to perform it, and defendants hold title to the property in trust for the use and benefit of plaintiffs. The prayer of Count II is for a decree that defendants hold title on a constructive trust for the use and benefit of plaintiffs.

Count III is on the theory defendants are not only constructive trustees of the realty but also of other property received by them as distributees of the estate of Oscar Mills to the extent that the realty is insufficient to provide restitution for the amount of the note. Count IV seeks an adjudication that plaintiffs are the owners of an undivided two-thirds interest in the note and that it be enforced against defendants by requiring them to make restitution of enough assets received by them from the estate of Oscar Mills as that estate would have to do if the note had been discovered and claim filed prior to the expiration of the time for filing claims.

The record does not disclose the ground on which the demurrer was sustained, a practice we have heretofore had occasion to criticize.

Count I

[1] An actual controversy is alleged to exist between plaintiffs and defendants relating to their respective rights in the

Illinois realty. Defendants assert the superior court is without jurisdiction of the cause of action averred because an adjudication of title in realty situated outside the state is sought. Any person who desires a declaration of his rights "in respect to, in, over or upon property," may in cases of actual controversy relating to the legal rights and duties of the respective parties, bring an action in the superior court for a declaration of his rights in the premises, and the court may make a binding declaration of such rights and duties. Code Civ. Proc., § 1060. Both declaratory and coercive relief may be granted in the same action. Staley v. Board of Medical Examiners, 109 Cal.App.2d 1, 6, 240 P.2d 61; Knox v. Wolfe, 73 Cal.App.2d 494, 505, 167 P.2d 3.

[2–4] Count I states a cause of action for declaratory relief. Maguire v. Hibernia Sav. & Loan Soc., 23 Cal.2d 719, 728, 146 P.2d 673, 151 A.L.R. 1062; Lord v. Garland, 27 Cal.2d 840, 851–852, 168 P.2d 5; Kessloff v. Pearson, 37 Cal.2d 609, 613, 233 P.2d 899; Chas. L. Harney, Inc. v. Contractors' State License Board, 39 Cal.2d 561, 564, 247 P.2d 913. An action for declaratory relief is a suit in equity. The jurisdiction of a court of equity to enforce its decrees is coextensive with its jurisdiction to determine the rights of the parties, and it has power to enforce its decrees as a necessary incident to its jurisdiction. Klinker v. Klinker, 132 Cal.App.2d 687, 694, 283 P.2d 83. If a complaint for declaratory relief pleads facts sufficient to entitle the plaintiff to some equitable relief, the court will assume jurisdiction of the entire controversy. Jones v. Feichtmeir, 95 Cal.App.2d 341, 344, 212 P.2d 933.

[5–7] Defendants argue the superior court is without jurisdiction of the cause of action pleaded because the court does not have jurisdiction of the *res*—the realty in Illinois. Equity will not deny any relief whatever to a plaintiff simply because it cannot afford him the full measure of the relief he may need, or because it cannot act directly on the premises to which that relief relates. Tully v. Bailey, 46 Cal.App. 2d 195, 200, 115 P.2d 542. Equity acts *in personam*, not *in rem*. After the court has obtained jurisdiction of the parties it may, by a decree operating *in personam* against them, control their actions with respect to property situated without its jurisdiction whenever such action is necessary for it to effect a complete disposition of the controversy. Thus when realty is situated outside the state and the court has jurisdiction of the parties in the state it can: compel a conveyance of the realty, Tomaier v. Tomaier, 23 Cal.2d 754, 760, 146 P.2d 905; Chamberlain v. Wakefield, 95 Cal.App.2d 280, 291–292, 213 P.2d 62; declare and impose a trust relating to the realty, Caldwell v. Ulsh, 184 Ind. 725, 112 N.E. 518; Watkins v. Watkins, 160 Tenn. 1, 22 S.W.2d 1; order a cancellation of deeds to the realty and require a waiver of a party's interest therein, Tully v. Bailey, 46 Cal.App.2d 195, 198, 115 P.2d 542; order an accounting by a mortgagee in possession of the realty, Peninsular Trading & Fishing Co. v. Pacific S. W. Co., 123 Cal. 689, 695–697, 56 P. 604; appoint a trustee of the realty and direct him to execute the trust, Smith v. Davis, 90 Cal. 25, 29, 27 P. 26; decree a rescission of a contract of sale of the realty, order an accounting of the lands and proceeds received therefrom, and direct a reconveyance to the plaintiffs, Promis v. Duke, 208 Cal. 420, 428, 281 P. 613; decree specific performance of a contract to convey the realty, Redwood Investment Co. of Stithton, Ky. v. Exley, 64 Cal.App. 455, 458–459, 221 P. 973; decree the appropriation of the realty to the payment of a debt and set aside a conveyance thereof as in fraud of creditors. Berger v. Loomis, 169 Or. 575, 131 P.2d 211, 144 A.L.R. 636.

Smith v. Davis, supra, 90 Cal. 25, at page 30, 27 P. 26, at page 27, says:

> "In Wimer v. Wimer, 82 Va. [890] 901, 5 S.E. 536, we find this language of the court: 'But, while this is true, it is undoubtedly well settled that, in cases of fraud, trust, or contract, courts of equity will, whenever juris-

diction over the parties has been acquired, administer full relief without regard to the nature or situation of the property in which the controversy had its origin, and even where the relief sought consists in a decree for the conveyance of property which lies beyond the control of the court, provided it can be reached by the exercise of its powers over the person, and the relief asked is of such nature as the court is capable of administering.' * * * [90 Cal. at page 32, 27 P. at page 27.] The decrees of courts of equity primarily and properly act *in personam,* and, at most collaterally only *in rem.* If the parties are within the jurisdiction of the court, an injunction will be granted to stay proceedings in a suit in a foreign country. *A trust will be enforced pertaining to realty, regardless of the situation of the property.* [Italics added.] Courts of equity have, as between the parties, reviewed the judgments of foreign courts, and even sales made under those judgments, when fraud or undue advantage was shown. A specific performance of a contract of sale of lands situated in a foreign country will be decreed in equity. * * * A decree to convey land lying in another state does not affect the title; it only operates upon the person who is to make the conveyance, and it is his act in making the deed that affects the title."

[8] While the decree of a court directing the conveyance of realty outside the state does not of itself affect the title of the realty in the latter state, it is a sufficient basis for a suit in the courts of the sister state to compel such conveyance. Spalding v. Spalding, 75 Cal.App. 569, 580, 243 P. 445.

[9] Plaintiffs do not seek a decree operating directly on the Illinois property or one affecting the title. Cf. Getty v. Getty, 130 Cal.App. 519, 20 P.2d 82. What they seek is a declaration of rights between themselves and defendants to the property. Such a declaration will not operate directly on the property or affect the title. The cause of action averred is not for the recovery of the possession of, or to quiet the title to, or for the enforcement of a lien on, realty. It is for a declaration of the rights of the parties in realty. It is transitory and properly maintainable in the county where the defendants reside. See Vaughan v. Roberts, 45 Cal.App.2d 246, 251–256, 113 P.2d 884.

[10–14] Plaintiffs argue that on proof of the facts alleged in Count I they will be entitled to a decree that they have a vendor's lien on the Illinois property. We agree. They do not contend the court has jurisdiction to foreclose the lien. Equity does not wait on precedent which exactly squares with the facts in controversy, but will adjust itself to those situations where right and justice would be defeated but for its intervention. United States Cas. Co. v. Industrial Acc. Comm., 122 Cal.App. 2d 427, 434, 265 P.2d 35. The cause of action averred is to establish the lien, not to foreclose it. "One who sells real property has a vendor's lien thereon, independent of possession, for so much of the price as remains unpaid and unsecured otherwise than by the personal obligation of the buyer." Civ.Code, § 3046. A vendor's lien, after an actual conveyance, is not a specific and absolute charge on the realty but a mere equitable right to resort to it on failure of payment by the vendee. The right must be established by suit. Longmaid v. Coulter, 123 Cal. 208, 212, 55 P. 791. The lien is of no operative force or effect until established by a decree of court, and may be asserted only by a suit in equity for the purpose of obtaining such a decree. 25 Cal.Jur. 756, § 224. The right passes to the representatives and heirs of a deceased vendor. Selna v. Selna, 125 Cal. 357, 361, 58 P. 16. An extension of time for payment of the purchase money does not extinguish a vendor's lien. 25 Cal.Jur. 750, § 217. A vendee is regarded as holding the realty in trust for the benefit of the vendor to the extent of the unpaid

purchase money, and the trust descends to the representatives and heirs of the vendee against whom the lien for the purchase money will be established and enforced. Civ.Code, § 3048; Burt v. Wilson, 28 Cal. 632, 638; 25 Cal.Jur. 749, § 216. The superior court has jurisdiction of the cause of action averred in Count I.

[15, 16] Defendants assert the cause of action averred in Count I is barred by the statute of limitations. As we have noted, by Count I plaintiffs seek a declaration that they have a vendor's lien on the Illinois realty. The barring of a claim by the statute of limitations is a procedural matter governed by the law of the forum, regardless of where the cause of action arose. Biewend v. Biewend, 17 Cal.2d 108, 114, 109 P.2d 701, 132 A.L.R. 1264. A suit for declaratory relief is governed by the same limitations as are applicable to other forms of relief. The nature of the right sued on, and not the form of action or relief demanded, determines the applicability of the statute of limitations. Leahey v. Department of Water and Power, 76 Cal.App.2d 281, 286, 173 P.2d 69.

[17–23] Where a party fraudulently conceals the existence of a cause of action against him, the statute of limitations is tolled and the guilty party is estopped to plead the limitations. Kimball v. Pacific Gas & Elec. Co., 220 Cal. 203, 30 P.2d 39; Pashley v. Pacific Elec. Ry. Co., 25 Cal.2d 226, 153 P.2d 325; Benner v. Industrial Acc. Comm., 26 Cal.2d 346, 159 P.2d 24. The doctrine of equitable estoppel may be invoked to prevent a defendant from relying on the statute of limitations. When a defendant who sets up the statute has previously by fraud or any violation of duty to the plaintiff caused him to subject his claim to the statutory bar, he must be charged with having wrongfully obtained an advantage which the courts will not allow him to hold. Stafford v. Shultz, 42 Cal.2d 767, 775–779, 270 P.2d 1; Carruth v. Fritch, 36 Cal.2d 426, 429–434, 224 P.2d 702, 24 A.L.R.2d 1403; Sears v. Rule, 27 Cal.2d 131, 145–148, 163 P.2d 443; Pashley v. Pacific Elec. Ry. Co., 25 Cal.2d 226, 228–235, 153 P.2d 325; Adams v. California Mut. B. & L. Ass'n, 18 Cal.2d 487, 488–489, 116 P.2d 75; Strangman v. Arc-Saws, Inc., 123 Cal.App.2d 620–624, 267 P.2d 395; United States Cas. Co. v. Indem. Acc. Comm., 122 Cal.App.2d 427, 433–434, 265 P.2d 35; Industrial Indem. Co. v. Industrial Acc. Comm., 115 Cal.App.2d 684, 689–692, 252 P.2d 649; Schaefer v. Kerber, 105 Cal.App.2d 645, 647, 234 P.2d 109; Berkey v. Halm, 101 Cal.App.2d 62, 68, 224 P.2d 885; Herman v. Brown, 91 Cal.App.2d 758, 761, 205 P.2d 1086; Anderson v. Thacher, 76 Cal.App.2d 50, 69–72, 172 P.2d 533; Twining v. Thompson, 68 Cal.App.2d 104, 111–113, 156 P.2d 29; Laraway v. First Nat. Bank of La Verne, 39 Cal.App.2d 718, 726–731, 104 P.2d 95; Miles v. Bank of America, etc., Ass'n, 17 Cal.App.2d 389, 397–399, 62 P.2d 177; annotations: 130 A.L.R. 8, 49; 24 A.L.R.2d 1413, 1435. Thus it has been held that a defendant may be estopped to plead limitations where he had induced inaction on the part of the plaintiff by his false representations or fraudulent concealment. Sears v. Rule, 27 Cal.2d 131, 145–148, 163 P.2d 443; Pashley v. Pacific Elec. Ry. Co., 25 Cal.2d 226, 228–235, 153 P.2d 325; Anderson v. Thacher, 76 Cal.App.2d 50, 69–72, 172 P.2d 533; Twining v. Thompson, 68 Cal.App.2d 104, 111–113, 156 P.2d 29. And an estoppel of a party ordinarily is operative against his privies in estate. In re Mohr's Estate, 212 Wis. 198, 248 N.W. 143, 148, 249 N.W. 517; Izard v. Mikell, 173 Miss. 770, 163 So. 498, 499. The rule that fraud may serve as the basis of estoppel against asserting the bar of limitations applies irrespective of whether or not the action claimed to be barred is itself based on fraud. Carruth v. Fritch, 36 Cal.2d 426, 224 P.2d 702, 24 A.L.R.2d 1403; Pashley v. Pacific Elec. Ry. Co., 25 Cal.2d 226, 153 P.2d 325; Sibert v. Shaver, 111 Cal.App.2d 833, 840, 245 P.2d 514. A court of equity will keep alive or restore a lien where the equities of the case require it and the parties intended that it should not be extinguished, as where it has been discharged by fraud

or mistake. Kern v. A. P. Hotaling Co., 27 Or. 205, 40 P. 168, 170; Seymour v. Alkire, 47 W.Va. 302, 34 S.E. 953, 954; Drake Lumber Co. v. Semple, 100 Fla. 1757, 130 So. 577, 581, 75 A.L.R. 687; Backer v. Pyne, 130 Ind. 288, 30 N.E. 21, 22, 30 Am.St.Rep. 231; 33 Am.Jur. 438, § 38. Cf. Richards v. Griffith, 92 Cal. 493, 496, 28 P. 484. Whether an estoppel exists—whether the acts, representations, or conduct lulled a party into a sense of security preventing him from instituting proceedings before the running of the statute, and whether the party relied thereon to his prejudice—is a question of fact, not of law. Industrial Indem. Co. v. Industrial Acc. Comm., 115 Cal.App.2d 684, 690, 252 P.2d 649.

Posey v. Brixey, 133 Okl. 98, 271 P. 230, on its facts is on all fours with the case at bar. It was an action by a vendor against a vendee to recover the balance of the purchase price of realty and for foreclosure of a vendor's lien thereon. By fraud of the vendee, the vendor did not bring the action within the statutory period for bringing an action on the principal obligation. The court held that, 271 P. 232:

> "[T]he vendee by his demurrer to vendor's evidence admits that he has not paid the full consideration money, under circumstances that show a want of fidelity on his part in the transaction sufficient to constitute fraud, as in this case, though the cause be barred as a law action on contract by two years, under the first subdivision of section 185, C.O.S.1921, but brought by the vendor within two years after discovery of nonpayment of the full purchase money under the third subdivision of said section 185, equity will interfere to prevent the vendee from reaping the benefit of the advantage thus unfairly gained and sought to be held under a defense based on the statute barring an action on contract after five years of the accrual of the cause."

It is argued that section 337(1) of the Code of Civil Procedure governs.[1] This is not an action on the note and it is not an action on a contract, obligation or liability founded on an instrument in writing. The gist of the cause of action averred is fraud allegedly perpetrated by Oscar Mills. Section 337(1) has no application.

[24–26] When a party is guilty of fraudulent concealment of the cause of action the statute is deemed not to become operative until the aggrieved party discovers the cause of action. Code Civ. Proc., §§ 312, 338(4); Stafford v. Schultz, 42 Cal.2d 767, 778, 270 P.2d 1; Hansen v. Bear Film Company, Inc., 28 Cal.2d 154, 178, 168 P.2d 946; Sears v. Rule, 27 Cal. 2d 131, 149, 163 P.2d 443; Pashley v. Pacific Elec. Ry. Co., 25 Cal.2d 226, 229, 232, 153 P.2d 325; Twining v. Thompson, 68 Cal.App.2d 104, 111, 156 P.2d 29; Laraway v. First Nat. Bank of La Verne, 39 Cal. App.2d 718, 726 et seq., 104 P.2d 95. To bring himself within section 338(4) a party must allege when the fraud was discovered, the circumstances of the discovery, what the discovery was, and why it was not discovered sooner. Tognazzini v. Tognazzini, 125 Cal.App.2d 679, 686–687, 271 P.2d 77. When the facts are susceptible to opposing inferences, whether a party had notice of circumstances sufficient to put a prudent man on inquiry as to a particular fact, and whether by prosecuting such inquiry he might have learned such fact, are questions of fact to be determined by the trial court. Hobart v. Hobart Estate Co., 26 Cal.2d 412, 440, 159 P.2d 958; Bowman v. McPheeters, 77 Cal.App.2d 795, 798, 802–803, 176 P.2d 745; Blackman v. Howes, 82 Cal.App.2d 275, 278–279, 185 P.2d 1019, 174 A.L.R. 1004.

[27] Count I sufficiently pleads facts showing when the fraud was discovered,

1. "Within four years: 1. An action upon any contract, obligation or liability founded upon an instrument in writing, except as provided in Section 336a of this code * * *."

the circumstances of the discovery, what the discovery was, and why it was not discovered sooner. Hobart v. Hobart Estate Co., 26 Cal.2d 412, 436–444, 159 P.2d 958.

Count II

[28, 29] In Count II a decree is sought that defendants hold title to the Illinois realty in trust for the benefit of plaintiffs. It is evident from what has been said with respect to Count I that the court has jurisdiction of the cause of action averred. Defendants assert the cause of action is barred by the provisions of section 338(4) of the Code of Civil Procedure. Facts showing that a confidential relation existed between Oscar Mills on the one hand and his father, mother, and plaintiffs on the other are alleged. If there is a duty to speak because of a confidential relation, a failure to do so is a species of fraud for which equity may afford relief. Larrabee v. Tracy, 21 Cal.2d 645, 651, 134 P.2d 265.

Civil Code, section 2217, reads:

"An involuntary [constructive] trust is one which is created by operation of law."

Civil Code, section 2223, reads:

"One who wrongfully detains a thing is an involuntary trustee thereof, for the benefit of the owner."

Civil Code, section 2224, provides:

"One who gains a thing by fraud, * * * the violation of a trust, or other wrongful act, is, unless he has some other and better right thereto, an involuntary trustee of the thing gained, for the benefit of the person who would otherwise have had it."

Civil Code, section 2243, reads:

"Everyone to whom property is transferred in violation of a trust, holds the same as an involuntary trustee under such trust, unless he purchased it in good faith, and for a valuable consideration."

In Bainbridge v. Stoner, 16 Cal.2d 423, at page 428, 106 P.2d 423, at page 427, the court stated:

"The theory of a constructive trust was adopted by equity as a remedy to compel one to restore property to which he is not justly entitled, to another. The person holding the property may have acquired it through *fraud,* undue influence, *breach of trust, or in any other improper manner* and he is usually personally liable in damages for his acts. But the one whose property has been taken from him is not relegated to a personal claim against the wrongdoer which might have to be shared with other creditors; he is given the right to a restoration of the property itself. The title holder is, therefore, said to be a constructive trustee holding title to the property for the benefit of the rightful owner, but he is not charged with responsibility based upon either the actual or presumed intention of the parties. (Sec. 2224, Civ.Code; Burns v. Ross, 190 Cal. 269, 212 P. 17; Restatement, Restitution, sec. 160.)" [Italics added.]

See also Rankin v. Satir, 75 Cal.App.2d 691, 695, 171 P.2d 78; Scott on Trusts, 2317, § 462.2.

[30–32] Assuming the averments of Count II to be true, as we must, the conduct, acts, and representations of Oscar Mills amounted to fraudulent concealment and a violation of his trust. Defendants who received the Illinois property in violation of the trust are involuntary trustees of the property for the benefit of plaintiffs. Civ. Code, § 2243. Ordinarily in a suit to establish an involuntary trust, the statute of limitations begins to run when the trust relation is terminated. Knapp v. Knapp, 15 Cal.2d 237, 241, 100 P.2d 759. But Count II is grounded in fraud. The applicable statute is, as defendants apparently concede, section 338(4) of the Code of Civil Procedure, and under the principle stated at length in Hobart v. Hobart Estate Co., 26 Cal.2d 412, 436–444, 159 P.2d 958, which need not be repeated, the statute began to run in January 1952, at the time plaintiffs discovered the fraud. The action was filed

on July 27, 1953, within three years after discovery.

Plaintiffs have shown by the allegations of Count II that a confidential relation existed between Oscar Mills and his parents and plaintiffs; that they had no notice or knowledge of any suspicious facts or circumstances prior to January 1952; that at that time plaintiffs were first put on notice of possible fraud and then made discovery. It follows that the cause of action averred in Count II is not barred by section 338(4) of the Code of Civil Procedure. Knapp v. Knapp, supra, 15 Cal.2d 237, 241–242, 100 P.2d 759.

Count III

[33, 34] This count seeks to have it decreed that defendants hold title not only to the Illinois property in trust for the benefit of plaintiffs but also of other property received by them as distributees of the estate of Oscar Mills to the extent the Illinois realty is insufficient to provide restitution of the amount due plaintiffs under the terms of the note. It is averred the value of the Illinois property is not sufficient to provide restitution of the amount due on the note and that defendants received sufficient therefor from the estate of Oscar Mills. Insofar as Count III seeks a decree that defendants hold title to the Illinois realty in trust for the benefit of plaintiffs, it is no different from Count II and is surplusage. We know of no theory on which it can be decreed that defendants hold property received by them from the estate of Oscar Mills other than the Illinois realty in trust for the benefit of plaintiffs. None is advanced and no authority is cited in support of the proposition. Plaintiffs have no lien on such other property. 25 Cal.Jur. 746, § 213. The demurrer to Count III was properly sustained.

Count IV

Plaintiffs say Count IV "only seeks to impress with a trust, for the benefit of appellants, the real property located in Illinois or the proceeds thereof and such other property which descended to the respondents from the estate of Oscar L. Mills if such other property is necessary to make complete restitution for the fraud of said Oscar L. Mills." We see no difference between Count IV and Count III. The demurrer to Count IV was properly sustained.

[35] A general demurrer to a complaint containing more than one count should be overruled if there is a good count stating a cause of action. If it is erroneously sustained, the judgment of dismissal should be reversed. Lord v. Garland, 27 Cal.2d 840, 850, 168 P.2d 5; Shook v. Pearson, 99 Cal. App.2d 348, 351, 221 P.2d 757; Armstrong v. Adams, 102 Cal.App. 677, 681, 283 P. 871; 21 Cal.Jur. 117, § 76.

Judgment reversed.

SHINN, P. J., and PARKER WOOD, J., concur.

147 Cal.App.2d 395

AMERICAN TRUST COMPANY, as Administrator of the Estate of Romelda Bacciocco, Deceased, Plaintiff and Respondent,

v.

TRUCK INSURANCE EXCHANGE, Truck Underwriters Association, Farmers Insurance Group, T. E. Leavey, Maurice V. Pew, Joseph R. Quinn, Parker S. Holt, City and County of San Francisco, et al., Defendants,

and

Joseph R. Quinn, Appellant.

Civ. 17048.

District Court of Appeal, First District, Division 1, California.

Jan. 2, 1957.

Action for declaratory relief to determine rights and duties under the indemnity provisions in lease. Judgment for respondent in the Superior Court, City & County of San Francisco, William F. Traverso, J., and the defendant appeals. The District Court of Appeal, Agee, J. pro tem., held that a clause in the lease did not require lessee to indemnify lessor against a claim for liability made by an injured pedestrian but that lessee was required to pay cost and expenses of pedestrian's action against lessor where lessee failed to take out as required by lease, a public liability policy covering both liability of lessor as well as lessee.

Judgment modified and affirmed.

1. Landlord and Tenant ⇐152(3)

Under terms of a lease requiring the lessee to "maintain" the sidewalk, the word "maintain" means to repair or keep in good condition things that exist and not the creation of something new.

See publication Words and Phrases, for other judicial constructions and definitions of "Maintain".

2. Indemnity ⇐8

Where lease required lessee to indemnify lessor on account of injury to any person arising from use of premises by lessee or from failure of lessee to keep premises in good condition and repair, lessee was not required to indemnify lessor because of pedestrian's claim of injury based on alleged faulty construction of a sidewalk in front of leased premises, where lessee had nothing to do with construction and there was nothing to indicate that sidewalk was in any different condition on date of injury than it was at the time of entry by lessee.

3. Landlord and Tenant ⇐156

Where lease required lessee to take out a public liability policy covering liability of lessor as well as lessee and policy which lessee took out and in effect at time of injury to pedestrian did not cover liability of lessor but pedestrian's action for injuries was dismissed because barred by limitations, lessee must reimburse lessor for cost, expenses and fees reasonably incurred in the defense of pedestrian's action.

Clark, Heafey & Martin, Oakland, Jack L. Blaine, San Francisco, Gerald P. Martin, Oakland, for appellant.

Christin & Davis, San Francisco, for respondent.

AGEE, Justice pro tem.

Defendant Joseph R. Quinn appeals from a judgment in a declaratory relief action brought by plaintiff to have declared certain rights and duties under indemnity provisions in a lease.

On March 25, 1951, appellant was the tenant in possession of premises known as the "Aetna Garage," 525 Jones Street, San Francisco, under a written lease executed by the owner, Romelda Bacciocco. Appellant had acquired the lease by assignment and was obligated by written agreement to comply with the terms thereof. On the date stated, one Holt was walking in front of the premises and was injured when he fell upon the sidewalk. He filed an action on July 10, 1951 for damages against the City and County of San Francisco, Romelda Bacciocco and appellant, claiming that his fall was caused "because of the dangerous

construction of said sidewalk abutting said premises." On October 23, 1951, Holt filed an amended complaint, to which separate answers were filed by these three defendants. Romelda Bacciocco thereafter died and the American Trust Company, respondent herein, was appointed the administrator of her estate and substituted in the Holt action in her place.

The amended complaint in the Holt action is in three counts. The first is against the City, the second against decedent, and the third against appellant. The second count alleges that decedent was the owner of the premises and that she "carelessly and negligently allowed and permitted the sidewalk abutting said premises to be constructed and caused to be constructed in an unsafe and defective condition and to remain in said unsafe and defective condition, in that said sidewalk was constructed with elevations in portions of said sidewalk leading into said 525 Jones Street, creating contours in said sidewalk's normal flat surface; that cement guards were attached to said building and said guards projected into the sidewalk and were attached to said sidewalk and that said * * * [owner] well knew or in the exercise of ordinary care should have known of said dangerous and defective and unsafe condition of said sidewalk at said point."

On December 8, 1954, respondent commenced this action to have its rights and duties declared with relation to the Holt action. The controversy between respondent and appellant is over the indemnity provisions in the lease as the same relate to the Holt action. The only evidence introduced at the trial was the lease, the written agreement by appellant to be and remain bound by the lease, and the County Clerk's file in the Holt action. Judgment in favor of respondent was rendered in substance as follows: That appellant shall undertake on behalf of respondent the defense of the Holt action; that appellant shall reimburse respondent for all costs, expenses and fees reasonably incurred by decedent and/or respondent in the defense of said Holt action; and that appellant shall pay any judgment rendered against respondent in said Holt action.

Clause 8 in the lease provides as follows: "* * * the lessee will hold the lessor exempt and harmless for and on account of any damage or injury to any person * * * *arising from the use of the premises by the lessee, or arising from the failure of the lessee to keep the premises in good condition and repair, as herein provided.*" (Emphasis added.)

It is apparent that Holt's claim of injury is based upon the alleged faulty construction of the sidewalk and not upon anything "arising from the use of the premises by the lessee, or arising from the failure of the lessee to keep the premises in good condition and repair."

There is no claim that the lessee had anything to do with the construction of the sidewalk or that any use he made of it had anything to do with Holt's alleged injuries. The lessee did agree in the lease that he would keep and maintain the premises (including the sidewalk) in good order and repair. However, the lease also provided that he could not make any alterations of the premises or any part thereof without the written consent of the lessor. Again, there is no claim of any such alterations. The lease did state that lessor would give her consent under certain conditions to enlarge the main entrance to the premises, but this did not eventuate.

[1] It is thus clear that all that the lessee was required to do under the lease was to "maintain" the sidewalk. To *maintain* means to repair or keep in good condition things that *exist,* and not the creation of something new. Holman v. County of Santa Cruz, 91 Cal.App.2d 502, 519, 205 P.2d 767; Hoel v. City of Los Angeles, 136 Cal.App.2d 295, 304, 288 P.2d 989. There is nothing to indicate that the sidewalk was in any different condition on March 25, 1951, than it was at the time of entry by the lessee.

[2] We conclude that Clause 8 did not require appellant to indemnify the lessor

against liability for a claim such as that made by Holt.

[3] Clause 24 of the lease provides as follows: "The lessee shall take out and maintain at her own cost and expense public liability insurance against accidents of every character to persons and property, death to persons and destruction and injury to property covering the premises, *and the said policy shall cover the liability of the lessor, as well as the lessee,* and the said policy shall be fifty thousand ($50,000) Dollars as to one person and one hundred thousand ($100,000) Dollars as to one accident." (Emphasis added.)

Appellant admitted in his answer that the only insurance policy which he took out and had in effect at the time of the Holt incident did not cover the liability of the lessor. Appellant also admitted in his answer that respondent has been refused a defense in the Holt action. If appellant had complied with Clause 24, the respondent would have been entitled to a defense under the insurance policy. It so happens that no further defense is now needed because, on August 2, 1956, the Superior Court, on its own motion and under the provisions of section 583 of the Code of Civil Procedure, dismissed the Holt action for failure to bring it to trial within five years after it was filed. (Stipulated at oral argument to so augment the record.) Consequently, the only provision in the declaratory relief judgment now affecting the parties is that which requires appellant to reimburse respondent for all costs, expenses and fees reasonably incurred by decedent and/or respondent in the defense of the Holt action. If appellant had complied with Clause 24, respondent would not have had to incur these expenses and appellant should be and is required in equity to reimburse respondent accordingly.

The judgment is modified by striking therefrom the paragraphs therein designated as (1), (2) and (4) on the ground that these provisions have become moot because of the dismissal of the Holt action, leaving the paragraphs designated as (3) and (5) in full force and effect, which said paragraphs are as follows:

"(3) Defendant, Joseph R. Quinn, shall reimburse and pay to Plaintiff herein all costs, expenses and fees reasonably incurred by said decedent and/or Plaintiff herein in the defense of said action No. 408641. [The Holt action]

"(5) Plaintiff shall have its costs herein taxed at $35.03."

As so modified, the judgment is affirmed and the lower court is directed to take such further proceedings as are necessary to determine the amount to be paid by appellant under said paragraph (3). Respondent shall recover its costs on appeal.

BRAY, Acting P. J., and FRED B. WOOD, J., concur.



147 Cal.App.2d 176

Pearl E. MURRAY, Plaintiff and Respondent,

v.

Kenneth C. LURE and Gladys Lure, Defendants and Appellants.

Civ. 5520.

District Court of Appeal, Fourth District, California.

Dec. 21, 1956.

Hearing Denied Feb. 13, 1957.

Action by house trailer seller against buyers for specific performance of a conditional sales contract wherein buyers agreed to convey certain realty to seller as a down payment on the sale price of a trailer. The Superior Court, Riverside County, Hilton H. McCabe, J., entered judgment for seller and buyers appealed. The District Court of Appeal, Barnard, P. J., held that evidence sustained findings that amounts stated in contract were based on fair and reasonable value of the trailer and the realty at the time in question, and that the con-

tract was in compliance with statute regulating conditional sales of motor vehicles and that the charge was not usurious.

Judgment affirmed.

1. Specific Performance ⇐121(3)

In action by house trailer seller against buyers for specific performance of a conditional sales contract wherein buyer agreed to convey certain realty to seller as a down payment on the sales price of a trailer, evidence sustained finding that amounts stated in contract were based on fair and reasonable value of the trailer and the realty at the time in question, and that the contract was in compliance with statute regulating conditional sales of motor vehicles and that the charge was not usurious. West's Ann.Civ.Code, § 2982.

2. Sales ⇐90

Whether or not exact figures used in a conditional sales contract are agreed upon in preliminary negotiations, they are deemed to be finally agreed upon when the contract is signed, as anything said in preliminary negotiations must be considered as having been merged in the written contract, which governs.

Simon, Brown & Arnold, Palm Springs, for appellants.

Leonard A. Bock, Palm Springs, for respondent.

BARNARD, Presiding Justice.

This is an action for specific performance. The plaintiff was engaged in the business of selling house trailers, in which she was assisted by her husband. On January 17, 1955, the defendants bought a trailer from her. This trailer had been priced for sale at $2,995, and the defendants offered to buy the trailer by deeding a vacant lot in "Rancho Mirage" to the plaintiff as a down payment, and by paying a balance of $1,600 in monthly installments. On that day the parties signed a conditional sales contract in the usual form, and the defendants also, in writing, authorized the procuring of insurance on the trailer. This contract fully described the trailer and recited the cash price as $2,395, sales tax $71.85, D.M.V. fees $24, making a total cash price of $2,490.85. It also listed the down payment as $890.85, and the unpaid balance as $1,600, with insurance $181.50, making a total unpaid balance of $1,781.50. The time price differential was then stated to be $535.10, and the contract balance $2,316.60. It then provided that the balance should be paid in 36 equal monthly installments beginning on March 1, 1955. On the same day, January 17, an escrow was started at a bank and the defendants signed escrow instructions in which they agreed to put into escrow any papers necessary to vest title to the described lot in the plaintiff within thirty days. The defendants were given a copy of the contract and they took and retained possession of the trailer. They continued to pay the installments on the contract, which the plaintiff had assigned to a bank, but notified the escrow holder not to deliver the deed and refused to convey the real property to the plaintiff. There was also other evidence that the trailer was worth $2,995 at the time of the sale, that the lot was then worth $1,500, and that the value of lots in that area had increased at the time of the trial.

The complaint in this action alleged, among other things, the written agreement to sell and buy this trailer for the total of $2,490.85; that the defendants agreed to transfer this lot to the plaintiff in part payment of said purchase price; the opening of the escrow for that purpose; that the value of the lot was $890.85; that the contract of sale was fair and reasonable to defendants; that the plaintiff has fully performed; and that the defendants have refused to permit the closing of the escrow so that the deed covering this lot might be recorded. The answer of the defendants admitted that they had agreed to purchase this trailer from the plaintiff on January 17, and denied most of the other allegations of the complaint. As affirmative defenses they alleged that this

lot is now and at the time of the sale was reasonably worth $2,000, and it would be unjust and inequitable to compel them to convey it to the plaintiff for a consideration of $890.85; that at the time of entering into the contract the plaintiff had falsely represented to the defendants that the trailer was worth $2,995 when in fact its value was not in excess of $1,800; and that the defendants did not realize that plaintiff had inserted the figure $2,395 in the contract as the purchase price, and did not become aware of such fact until they were served with the complaint herein. The court found in all respects in favor of the plaintiff, finding that the material allegations of the complaint were true and the material allegations of the answer, including the affirmative defenses, were not true. It was also found that the defendants accepted the trailer and occupied it until about November 1, 1955; that the reasonable value of the lot was $890.85 at the time in question; that the written contract was fair, just and equitable; that the value of the trailer at the time of the sale was $2,995; that at no time was a rescission effected; and that the conditional sales contract and the escrow agreement were both legal in all respects, fair and reasonable to all parties concerned, and a proper subject for specific performance. A judgment was entered ordering the defendants to specifically perform the contract and to complete the escrow. The defendants have appealed from that judgment.

The appellants' sole contention is that the conditional sales contract is unenforceable because it did not comply with Section 2982 of the Civil Code. It is argued that the amounts stated in the contract, as required by Section 2982, are all fictitious except for the cost of the insurance and the fees of the Department of Motor Vehicles; that the amount of the cash price of the trailer and the amount of the down payment were fabrications; that the sales tax was computed on an imaginary sales price; that the amount stated to be unpaid on the cash price was the difference between the imaginary cash price and the imaginary down payment; that the sales tax was computed on an imaginary sales price; that the time price differential was necessarily computed on an imaginary unpaid balance; and that this time price differential was thus usurious.

[1, 2] The findings of the court are sufficiently sustained by the evidence. Disregarding any conflicts in the evidence with respect to the preliminary negotiations, it appears that the appellants offered to buy this trailer by giving this lot as a down payment and agreeing to pay an additional $1,600 to be paid on monthly installments. Before this offer was accepted, the respondent's husband looked at the lot and observed that adjoining lots had signs on them pricing those lots at $1,000 each. The parties seemed to have been not too particular about fixing the exact price for the lot, or for the trailer, in advance of entering into the written contract. In any event, the respondent's husband prepared the conditional sales contract, which the appellants agreed to and signed. He inserted the figures therein, making the cash price of the trailer $2,395 which, with the other charges listed, resulted in the balance of $1,600 which was agreed upon. The appellants read the contract before signing, agreed to the terms, and were given a copy thereof. They took the trailer, occupied it as a home, and made the payments on the contract for some eight or nine months. During that interval, they decided that the lot they had agreed to convey was worth more than the price agreed upon at the time the contract was entered into, and refused to permit the escrow to be closed. The statements set forth in the conditional sales contract complied with the requirements of Section 2982 of the Civil Code, and the amounts stated therein are those agreed upon by the parties at the time the contract was entered into and signed. Whether or not the exact figures to be used were agreed upon in the preliminary negotiations they were finally agreed upon when the contract was signed, and anything said in the pre-

liminary negotiations must be considered as having been merged in the written contract, which governs. The result is that no usurious charge appears, and the record fully supports the court's findings and judgment insofar as any contention raised on this appeal is concerned.

The judgment is affirmed.

GRIFFIN and MUSSELL, JJ., concur.



Larry FRICKER and A. V. Smith, partners under the firm name and style of Larry Fricker Company, Plaintiffs and Respondents,

v.

UDDO & TAORMINA COMPANY, a co-partnership, Defendant and Appellant.*

Civ. 5539.

District Court of Appeal, Fourth District, California.

Dec. 21, 1956.

Hearing Granted Feb. 14, 1957.

Action by fertilizer company against tomato canner to recover for fertilizer furnished tomato farmer, brought on theory canner had promised to pay company for fertilizer from moneys due farmer by canner. The Superior Court, Orange County, John Shea, J., entered judgment for fertilizer company and canner appealed. The District Court of Appeal, Griffin, J., held that canner's letter which acknowledged that fertilizer company was to be paid from the return due farmer, did not constitute an unconditional acceptance of an assignment by farmer, which in effect, guaranteed payment of fertilizer company's claim, but merely authorized canner to pay fertilizer company in the event there was a net return due to farmer from tomato crop.

Judgment reversed.

* Opinion vacated 312 P.2d 1085.

1. Assignments ⇐58
Guaranty ⇐6

Where tomato canner agreed to accept a "crop order" against farmer's tomato crop for fertilizer furnished to farmer by fertilizer company and company failed to furnish canner with "crop order" but sent to canner bill made out to farmer, and after receipt of bill canner secured farmer's approval thereof, and thereafter canner sent letter to company acknowledging that fertilizer company would be paid "from returns due to farmer", letter did not constitute an unconditional acceptance of farmer's assignment and canner did not, in effect, guarantee payment of fertilizer company's claim.

2. Assignments ⇐84

Where tomato canner agreed to accept a "crop order" against farmer's tomato crop on behalf of fertilizer company which had furnished fertilizer to farmer, fertilizer company did not furnish canner "crop order," but sent to canner bill made out to farmer, and canner sent letter to company acknowledging that fertilizer company would be paid "from the returns to farmer" for tomato crop, and where other authorized advancements made by canner on behalf of farmer exceeded tomato crop proceeds, in absence of a finding of fraud in reference to priority of payment of advances, canner was not liable to company for fertilizer furnished farmer.

3. Estoppel ⇐58

An essential element of the doctrine of estoppel is that the party claiming its protection was intentionally or deliberately led into a course of conduct to his detriment by the party against whom he seeks to apply the doctrine.

4. Estoppel ⇐118

In action by fertilizer company to recover for fertilizer furnished a bankrupt farmer brought against canning company, which was authorized to make advancements on behalf of farmer against farmer's tomato crop, fertilizer company failed to show that it was intentionally or deliberately led into a course of conduct to its

detriment by conduct of canner in acknowledging by letter that it would pay company from "any funds due" farmer for fertilizer furnished by company to farmer, when it developed that farmer was not due any proceeds from canner due to fact that other advancements made by canner exceeded farmer's proceeds for tomato crop.

5. Estoppel ⇐52

The doctrine of estoppel is strictly applied, and will not be enforced unless substantiated in every particular.

Rimel & Johnston, Santa Ana, for appellant.

Mize, Larsh, Mize & Hubbard, Santa Ana, for respondents.

GRIFFIN, Justice.

Plaintiffs and respondents Larry Fricker and A. V. Smith, doing business as Larry Fricker Company, manufacturers and distributors of fertilizer, brought this action against defendant and appellant Uddo & Taormina Company, a copartnership, canners of tomatoes (hereinafter referred to as defendant) and defendant George Kikuchi, grower, for $4,074.91, alleging that on November 1, 1952, defendants were indebted to plaintiff for money had and received, and defendants promised in writing to pay said money on request.

Defendant Kikuchi was never served and he was dismissed from the action on account of bankruptcy. The case went to trial upon a stipulation of facts which shows Kikuchi leased 160 acres of land to grow tomatoes and was under written contract to sell them to defendant canning company; that during the *1951* crop year, Kikuchi grew and sold to defendant the crop and plaintiff supplied the soil fumigant; that plaintiff was requested by defendant to supply on credit and to take a written crop order; that after first agreeing to this credit arrangement, plaintiff finally refused to supply on crop order and demanded instead a written promissory note signed by Kikuchi and guaranteed by defendant, which was done and the note was paid in full; that the proceeds from the sale of Kikuchi's 1951 crop were sufficient to cover all charges made by defendant against Kikuchi for advances, payments, etc. for his benefit, and after all such charges were deducted, there was a net balance of crop proceeds due Kikuchi; that prior to the commencement of the *1952* tomato crop season Kikuchi again contracted with defendant to grow and sell to it a crop of canning tomatoes; that this contract authorized, but did not require, defendant to make advances, payments, and/or loans to, or for the use and benefit of Kikuchi, and to charge the same against his account; that in April, 1952, Kikuchi again requested plaintiff to supply soil fumigant in the amount prayed for in plaintiff's complaint; that plaintiff orally asked defendant if it would again guarantee the bill as in 1951, and defendant company said that it would not guarantee the bill, but would accept a crop order against the 1952 crop returns "which would become due from defendant to Kikuchi"; that the form of crop order used in 1952 by defendant, which is the same as used in 1951, read as follows: "Uddo-Taormina Cannery * * You are hereby authorized to pay to the" Fertilizing Company "for material supplied by them, from ——— to ——— from the moneys due or to become due to me from you, and charge the same to my account". Then follows the grower's signature and the following: "The above order is accepted, but is payable out of moneys due or to become due to: grower after first deducting all advances made to grower by us, and after paying any orders given by him and received by us prior to the date of receipt of" fertilizer company "invoices". Accepted by ———.

It was then stipulated that plaintiff had never done business before 1952 by means of a crop order upon defendant, and had no knowledge of others who had, and was not acquainted with the form of crop order used by defendant; that after defendant promised to accept a crop order, and prior to April 5, 1952, plaintiff supplied Kikuchi

with soil fumigant, and about April 25, 1952, plaintiff made out a bill to Kikuchi for the same in the amount prayed for in the complaint, and sent said bill to defendant; that after the receipt of said bill defendant checked with and secured Kikuchi's approval thereof, and about May 2, 1952, defendant executed and delivered to plaintiff a written instrument dated May 2, 1952, as follows:

"Larry Fricker Co.

"Gentlemen:

"This will confirm that we have accepted a crop order instructing us to pay to you $4,074.91 from the return due to George Kikuchi from Tomatoes delivered by him to us during the 1952 season." Signed by the defendant company.

It was then agreed that no written crop order was ever given by Kikuchi directly to plaintiff covering the bills sued for in the complaint; that on May 2, 1952, defendant had already charged against Kikuchi's 1952 tomato crop account the sum of $27,000 for monies theretofore advanced to and for Kikuchi, and that of said amount $18,000 had been advanced and paid out for the rent upon the tomato crop land; that after May 2 and up to December 31, 1953, when the Kikuchi account was closed, defendant from time to time made further advances and loans for his benefit and charged the same to his account; that the total amount so charged after May 2, 1952, was $53,668, and that the total amount charged, both before and after May 2, was $80,668; that the first tomatoes were harvested from Kikuchi's land in August, 1952, and commencing with August 30, Kikuchi's crop account was credited from time to time as tomatoes were harvested, with the amount of gross crop proceeds, price adjustments, and other miscellaneous credits; that the total amount so credited was $77,013; that a detailed statement of Kikuchi's tomato crop account for the 1952 season with defendant, commencing December 18, 1951, and ending December 31, 1953, showing all charges and credits was received into evidence and marked defendant's Exhibit A; that the 1952 tomato crop production and crop returns therefrom proved to be smaller than either Kikuchi or defendant had anticipated and when the Kikuchi account was closed on December 31, 1953, the total sums of money advanced and paid out to and for Kikuchi exceeded by $3,655.19 the total of all the credit to his account, and Kikuchi was still indebted to defendant in that amount upon the date he was adjudicated a bankrupt; that at all times after December 18, 1951, Kikuchi had no funds or credits out of which to pay the cost of land rent, planting and harvesting of the 1952 tomato crop except such sums as would be advanced or loaned by defendant for such purposes; that at all times during the growing and harvesting Kikuchi devoted his entire time to said crops and worked personally in the field; that he used, in the crop production and hauling, farm equipment and trucks either owned by him or being purchased by him on conditional sales contracts; that had said equipment not been available for use it would have been necessary to rent equivalent equipment; that in April, 1952, at the time when plaintiff elected to supply Kikuchi upon crop order, he knew and believed that Kikuchi had no funds, assets or ability to pay for the soil fumigant except out of the crop proceeds which Kikuchi could expect to receive from the prospective tomato crop; that at such time plaintiff did ascertain the approximate amount of the charges which had theretofore been charged by defendant against Kikuchi's said prospective tomato crop; that those items of the charges shown on defendant's Exhibit A were in the main used by him to pay necessary crop production expenses, and such payments were made only in cases where the party furnishing the labor, materials, etc. demanded payment and would not extend credit; that on each occasion when Kikuchi requested "advances" to be paid directly to himself, the defendant, before making said advances, inquired of Kikuchi the purpose for which the money was to be used, and they were advised that it was

needed and was to be used to pay various items of crop production expense; that Kikuchi did use some of the money so advanced to him for his family and himself to live on, and that he had no other source of income or funds out of which to support himself and his family; that Kikuchi used some of the money so advanced to him to make installment payments which were due on farm equipment which he was purchasing under conditional sales contracts, but that he was using said machinery full time in the production of said crop; that the moneys so advanced were necessary to the production of the tomato crop; that there never was a time during the 1952 season (from December 18, 1951, when the first charge for advance rent was made, to December 31, 1953, when the account was closed with a debit balance of $3,655.19) when the credit balance of the Kikuchi account with defendant exceeded the debit balance; and that the plaintiff's bill remains wholly unpaid. Findings were entered accordingly. Judgment went against defendant for said amount.

A similar action was before this court for decision in Garner v. Uddo & Taormina Co., 137 Cal.App.2d 819, 290 P.2d 967, where plaintiff, a liquid fertilizer distributor, brought an action against this same defendant for fertilizer sold to Kikuchi, the grower, on a crop order wherein he authorized Uddo & Taormina Company to pay plaintiffs from the balance of money due him from after deducting all advances made. The trial court found against plaintiffs and this finding was sustained on appeal. The facts related therein are quite similar to those in the instant case except there was another fertilizer company involved, and in the instant action there never was produced a signed crop order, as was done in the cited case. We are unable to perceive any material distinction which would attach any personal liability upon defendant for fertilizer furnished to Kikuchi. It is plaintiff's claim that by the transaction defendant company unconditionally accepted an assignment by the grower in the sum of $4,074.91, to be paid from the returns due grower for tomatoes delivered by him to defendant during the 1952 season; that the claimed assignment to plaintiff by the grower had precedence over any and all advances made to or on behalf of the grower subsequent to May 2, 1952, and that defendant is estopped to assert or maintain otherwise, citing such authority as Baumgarten v. California Pacific Title & Trust Co., 127 Cal.App. 649, 657, 16 P.2d 332; A. Farnell Blair Co. v. Hollywood State Bank, 102 Cal.App.2d 418, 227 P.2d 529; and Klein v. Farmer, 85 Cal.App.2d 545, 552, 194 P.2d 106.

[1, 2] It affirmatively appears from the stipulation that defendant's only obligation and duty to plaintiff was to "accept a crop order against the 1952 crop returns which would become due from defendant to Kikuchi". Plaintiff, upon whom the burden rested, never furnished defendant with such a crop order and it would be unreasonable to believe that defendant intended to accept a crop order couched in other language than that required of it and ordinarily used by it in such cases. At least there was no meeting of the minds of the parties as to its terms and plaintiff may not now argue, on appeal, that a more stringent liability was imposed on defendant than the crop order form indicated. If the general form used was in fact signed by plaintiff and Kikuchi, as defendant may well believe, then no recovery could be had under the case of Garner v. Uddo & Taormina Co., supra. If a different obligation arose, plaintiff failed to establish that fact. Plaintiff relies on the letter of May 2, 1952, as establishing an unconditional acceptance of an assignment by the grower. This letter specifically recited that plaintiffs were to be paid "from the return due to George Kikuchi". Plaintiff argues that the return referred to does not mean "net return" but any return from the sale of the tomatoes. This sentence cannot reasonably be so construed under the circumstances. Under the stipulation defendant was authorized, but not obligated, to advance costs and deduct the same from the crop sales proceeds. It therefore clearly appears that defendant

was authorized to make advances necessary to the production of the crop, deduct those sums from the gross returns, and pay the balance to the grower. There never was a time after the opening of the account and the payment of the $18,000 property rental, that the returns exceeded the authorized deductions. Accordingly, there never was a time when any return was "due" to George Kikuchi, from which plaintiff's claim could be paid. The letter itself specifies and limits the fund from which it was to be paid and such fund never came into existence. This coincides with the stipulation of facts. There is no indication or finding of fraud in reference to the priority of payment of advances and charges against the fund. It further appears that defendant refused to guarantee payment of this account by endorsing a note of the grower as in the past, and plaintiff relied upon the crop agreement arrangement. If plaintiff's claim were correct, that the letter of May 2, 1952, constituted an unconditional assignment, then defendant would be, in effect, guaranteeing payment of plaintiff's claim. This is entirely contrary to the intention of the parties as reflected in the stipulation of facts. We must therefore conclude that no personal liability against defendant attached. Lindley v. Fay, 119 Cal. 239, 243, 51 P. 333; Vatcher v. Grier, 50 Cal.App. 39, 41, 195 P. 75; Parker v. Herndon, 19 Cal.App. 451, 455, 126 P. 183; Sawyer v. Colgan, 102 Cal. 283, 292, 36 P. 580, 834; Tatsuno v. Pedersen, 21 Cal.App. 585, 132 P. 608. In fact, defendant was compelled to assume an indebtedness of $3,655.91 by reason of the failure of the crop to produce the amount anticipated by all of the parties and from which plaintiff apparently intended to rely for payment of the obligation.

[3–5] As to the claimed estoppel, the facts indicated do not show that the party claiming its protection was intentionally or deliberately led into a course of conduct to his detriment by the party against whom he seeks to apply the doctrine. This is an essential element. The defense of estoppel often means that the party against whom it is invoked is deprived of the right to prove the truth as to a matter involving a substantial right and may thereby be divested of a substantive right of property; and since, as a general proposition, the great end of judicial inquiry is to ascertain the truth, the law does not favor estoppel. The doctrine is strictly applied, therefore, and will not be enforced unless substantiated in every particular. Lake v. O'Brien, 54 Cal.App. 543, 202 P. 158; City of San Diego v. Cuyamaca Water Co., 209 Cal. 105, 287 P. 475; 18 Cal.Jur.2d 406, secs. 4 and 5.

Judgment reversed.

BARNARD, P. J., and MUSSELL, J., concur.



147 Cal.App.2d 417

The PEOPLE of the State of California, Plaintiff and Respondent,

v.

Clayton Roland JOHNSON and Herbert Gene French, Defendants and Appellants.

Cr. 5655.

District Court of Appeal, Second District, Division 3, California.

Jan. 3, 1957.

Rehearing Denied Jan. 17, 1957.

Defendants were convicted of having in their possession parts of the plant of the genus Lophophora. The Superior Court of Los Angeles County, Thomas L. Ambrose, J., entered judgments on the verdicts and orders denying motions for new trial, and defendants appealed. The District Court of Appeal, Shinn, P. J., held that the use of the words "genus Lophophora" in section of the Health and Safety Code defining as a narcotic all parts of the plant of the "genus Lophophora" whether growing or otherwise, is not a

violation of section of the constitution requiring that all legislative proceedings shall be in the English language.

Judgments and orders affirmed.

Vallée, J., dissented.

1. Statutes ⇐40

The use of the words "genus Lophophora" in section of the Health and Safety Code defining as a narcotic all parts of the plant of the "genus Lophophora" whether growing or otherwise, is not a violation of section of the constitution requiring that all legislative proceedings shall be in the English language. West's Ann.Health & Safety Code, § 11001(*l*); West's Ann. Const. art. 4, § 24.

2. Statutes ⇐40

The requirement of the constitution that legislative acts shall be written in the English language does not forbid the use of Latin words, and if a Latin word has been in common use and has been carried in English dictionaries for many years, with a sure and settled meaning, it is proper for the Legislature to put it into a statute. West's Ann.Const. art. 4, § 24.

3. Statutes ⇐40

Fact that a Latin word has no English equivalent, or no convenient one, does not bar its use under constitutional provision requiring that all legislative proceedings shall be in the English language. West's Ann.Const. art. 4, § 24.

4. Criminal Law ⇐13

Section of the Health and Safety Code defining as a narcotic all parts of the plant of the genus Lophophora whether growing or otherwise is not indefinite, on ground that one reading the statute would not know what genus Lophophora was. West's Ann.Health & Safety Code, § 11001(*l*).

5. Poisons ⇐4

It is no defense to the charge of possession of a narcotic plant that the possessor does not know that its possession is forbidden. West's Ann.Health & Safety Code, §§ 11001(*l*), 11500.

Forno & Umann, Los Angeles, for appellants.

Edmund G. Brown, Atty. Gen., Robert S. Rose, Deputy Atty. Gen., for respondent.

SHINN, Presiding Justice.

Clayton Roland Johnson and Herbert Gene French were accused by information of having in their possession "parts of the plant Genus Lophophora and the buttons thereof, also known as Peyote" in violation of section 11500 of the Health and Safety Code. In a court trial they were convicted and, after their motions for new trial were denied, they appealed from the judgments and the orders. The first contention of appellants is "that the word 'lophophora' is a Latin term, and a botanical term, which is not used in common every-day ordinary English", and that the use of the word in the statute contravenes Section 24 of Article IV of the Constitution which requires, in part, that all legislative proceedings shall be in no other than the English language.

Section 11001(*l*) of the Health and Safety Code defines as a narcotic "all parts of the plant of the genus Lophophora whether growing or otherwise; the buttons thereof, the alkaloids extracted from any such plant; and every compound, salt, derivative, mixture or preparation of such plant." The information was in the terms of the statute except for the addition of the words "also known as Peyote." The definition of "narcotics" contains numerous chemical and botanical terms. The laws are replete with Latin terms that have been adopted as a part of the English language. It is unnecessary to mention instances in which adoption has been preferred to the devising of definitions expressed in English words more commonly used and understood.

[1–3] We look first to the dictionaries to ascertain whether a given word is recognized as a part of the English language. Although that may not always be an infallible test it is, in the present case, a sat-

isfactory one. "Lophophora" is defined in Webster's New International Dictionary, Second Edition, Unabridged: "A genus of spineless cacti, family Cactaceae, having as the only known species the mescal (L. Williamsii)." "Peyote" is defined: "A stimulant drug from mescal buttons." The latter term is recognized in section 11530 of the Health and Safety Code as a common name of "the geni of the Lophophora." In using the words "Genus Lophophora" in section 11001 the legislature did not depart from the use of the English language; it recognized them as words that had been adopted as a part of that language. The requirement that legislative acts shall be written in the English language does not forbid the use of Latin words. If a Latin word has been in common use and carried in the English dictionaries for many years, with a sure and settled meaning, it is proper for the legislature to put it into a statute. It may have no English equivalent, or no convenient one, but this would not bar its use. The laws relating to *habeas corpus* are in the English language, and so is section 11001 (*l*) of the Health and Safety Code.

[4] The second argument is that "Any person who is told that he is prohibited from possessing the genus Lophophora would undoubtedly laugh since he could not possibly know what the genus lophophora was." Appellants expressly concede "that 'peyote' is a word commonly known in the west and south west, citing People v. Beesly, 119 Cal.App. 82, at p[age]. 88 [6 P.2d 114, 970]." It is also conceded by appellants that if the statute used the word "peyote" this "would be enough to inform any person what the prohibited offense was." If appellants, as they concede, knew what peyote is and were interested to ascertain whether its possession was unlawful they could have done what their counsel have done, namely, consult the dictionaries and the Health and Safety Code and thereby have become sufficiently informed that it was Lophophora and that they should leave it alone.

[5] It is no defense to the charge of possession of a narcotic plant that the possessor does not know that its possession is forbidden. Appellants do not deny that they knew they had peyote in their possession and that it had narcotic properties. Their contentions are wholly without merit.

The judgments and orders are affirmed.

PARKER WOOD, J., concurs.

VALLÉE, J., dissents.



147 Cal.App.2d 325

Albert J. BATINI and Dolindo Massel, Plaintiffs and Respondents,

v.

Louis HOFFMAN and Harold Stelling, Individually, and as copartners d/b/a The Royal Showcase Company, Defendants and Appellants.

Civ. 8880.

District Court of Appeal, Third District, California.

Dec. 28, 1956.

Action by refrigeration equipment buyers against sellers for amount allegedly paid by buyers on behalf of sellers in paying judgment obtained against buyers alone in prior actions by third party against buyers, sellers, and sellers' supplier and subcontractor for services rendered in installing the equipment on buyers' premises. The Superior Court, Humboldt County, Carl L. Christensen, J., entered judgment adverse to sellers, and sellers appealed. The District Court of Appeal, Van Dyke, P. J., held that sellers' obligation to buyers had not been litigated in third party's action against buyers, and therefore defense

of res judicata as between buyers and sellers was not available to sellers.

Judgment affirmed.

Opinion, 303 P.2d 583, vacated.

1. Judgment ⇐956(5)

In action by refrigeration equipment buyers against sellers for amount allegedly paid by buyers on behalf of sellers in paying judgment obtained against buyers alone in prior action by third party against buyers, sellers, and sellers' supplier and subcontractor for services rendered in installing the equipment on buyers' premises, where judgment roll showed third party's action against sellers was dismissed at close of third party's evidence in chief, issue of sellers' obligation to buyers had not been adjudicated and defense of res judicata was not available to sellers.

2. Money Paid ⇐9

In action by refrigeration equipment buyers against sellers for amount allegedly paid by buyers on behalf of sellers for services rendered in installing the equipment on buyers' premises, evidence was sufficient to sustain trial court's finding that, by terms of the agreement, sellers had promised to install the equipment on buyers' premises.

3. Money Paid ⇐1

One who is compelled, by reason of a legal liability to pay an obligation for which another in equity and good conscience should pay may recover from such other the money so paid, and it is not necessary that the payment should have been coerced by actual legal proceedings, but the mere existence of the legal liability is sufficient.

4. Money Paid ⇐1

Where third party, in action against refrigeration equipment buyers, sellers, and sellers' supplier and subcontractor for services rendered in installing the equipment on buyers' premises, recovered judgment against buyers, but sellers had promised to install the equipment at sellers' cost, buyers, in paying such judgment, were forced to lay out money for benefit of sellers, and, therefore, sellers were obligated to repay such money to buyers.

5. Money Paid ⇐9

In action by refrigeration equipment buyers against sellers for amount allegedly paid by buyers on behalf of sellers for services rendered in installing the equipment on buyers' premises, evidence was sufficient to establish that amount paid by buyers was the reasonable value of work done by third party.

G. H. Van Harvey, San Francisco, for appellants.

Falk & Falk, Eureka, for respondents.

VAN DYKE, Presiding Justice.

Opinion after rehearing granted.

This is an appeal from a money judgment in an action brought upon a common count for an amount alleged to have been paid by respondents on behalf of the appellants.

The money paid by respondents was paid in satisfaction of a judgment recovered against respondents by one Nelson Rossig. In that prior action Rossig sued respondents herein, appellants herein, and Marine Electric Company, a corporation, for the reasonable value of his services in installing on the property of respondents certain refrigeration equipment which respondents had purchased from appellants, and which appellants in turn had purchased from Marine Electric Company. In the Rossig action appellants herein and Marine Electric Company were granted nonsuits at the close of Rossig's case in chief. The action then proceeded against respondents herein, and Rossig obtained a judgment against them. Respondents paid the judgment and then brought this action to recover from appellants the money so paid out by respondents, alleging it to have been paid out on behalf of appellants and at their request. In response to the common count pleaded against them by respondents the appellants generally denied the allegations

of the complaint and pleaded a special defense of res judicata, alleging that in the prior action brought by Rossig all issues as between respondents and appellants herein, codefendants in the Rossig action, had been litigated, and that it had thus been adjudged as between the parties to this action that any sums that may have been paid by respondents upon the demand of Rossig were as between the parties hereto the sole obligation of respondents herein and not money laid out for appellants' benefit.

[1] The judgment roll in the prior action was introduced in evidence at the trial of this action, and an inspection thereof reveals the following: By his complaint Rossig made the following allegations against respondents herein, appellants herein, and Marine Electric Company: That within four years last past the defendants and each of them became indebted to Rossig for services and material and parts furnished them in the installation of a refrigeration system in a building owned by Batini and Massei in Eureka, California, which services, material and parts were of the reasonable value of $641.97. Judgment was prayed against all of the defendants. Respondents herein answered, denying generally said allegations. Marine Electric Company likewise answered, denying the allegations and alleging affirmatively that it had sold certain machinery and equipment to appellants herein and had shipped the same to Eureka. Appellants herein answered, denying generally said allegations. Upon these pleadings the cause went to trial.

The judgment of nonsuit recites that after the evidence of plaintiff had closed, Marine Electric Company and appellants herein moved for a judgment of nonsuit upon the ground that the plaintiff had failed to prove a sufficient case as to each of said defendants. It was then recited that the motions for nonsuit were granted. Judgment of nonsuit followed. The judgment rendered against respondents herein on the merits appears to have been made after written waiver of findings of fact and conclusions of law and is simply a money judgment that Rossig recover of respondents herein the sum of $641.97, plus interest and costs.

The record of Rossig v. Batini, et al. introduced in evidence does not establish the defense of res judicata. The judgment of nonsuit in favor of Marine Electric Company and appellants herein, coming at the close of Rossig's evidence in chief, came at a time in the trial of that case when for aught that appears from the judgment roll Rossig had simply failed for some reason to make a prima facie case against respondents' codefendants. At that point in the case respondents herein had not been called upon to rebut anything placed in evidence by Rossig. When their codefendants moved for nonsuits they were in no position to oppose and when their codefendants were, at their own solicitation, excluded from further proceedings it is patent that there could not thereafter have been any adjudication of rights and obligations between themselves and respondents. Indeed, our recital of the pleadings shows that they had tendered no such issues in the Rossig action. It is obvious that appellants herein by the introduction in evidence of the judgment roll in the prior action wholly failed to establish the defense of res judicata.

Appellants further contend that there is not sufficient evidence in the record to sustain the trial court's findings of fact. These findings may be summarized as follows: That on October 16, 1946, the respondents and appellants entered into an agreement providing in part that appellants would furnish to respondents certain refrigeration equipment; that by the terms of that agreement appellants agreed to install the equipment in the premises of respondents; that thereafter appellants engaged the services of Marine Electric Company as subcontractors to install said equipment; that Marine Electric Company engaged Rossig to do the work; that Rossig did the work and presented his charges therefor to respondents herein, which charges were reasonable for the work done;

that respondents paid the charges of Rossig in accordance with the judgment rendered in favor of Rossig against respondents herein in an action brought by Rossig against respondents herein; that in said action appellants herein were joined as codefendants with respondents, but that during the course of the trial a nonsuit was granted in appellants' favor. In the findings the trial court stated further that the judgment in the Rossig action did not constitute an adjudication of the issues pleaded in the present action between respondents and appellants, nor present any issue as to any liability of appellants to respondents for the charges of Rossig. The court further found that upon payment of the Rossig judgment, appellants herein became indebted to respondents for the money so laid out.

[2-4] As to the terms of the agreement between respondents and appellants, Mr. Batini, testifying at the trial of the action herein, said that the agreement placed upon appellants the burden not only of furnishing the refrigeration equipment, but also that of installing it and all for the agreed price which respondents paid to appellants. That testimony sufficiently supports the trial court's finding that by the terms of the agreement appellants promised to install the refrigeration equipment in the premises of respondents. There was other evidence to the same effect. Thus, when Rossig threatened to sue respondents, Mr. Batini forwarded the demand to Mr. Stelling, one of appellants, appending the following notation: "Are you going to pay your Bills—With Our Money—or have us *sewed*. This is not our way of doing Business. We paid you promptley." Stelling wrote in reply that the Marine Electric Company was responsible for the bill as "The supplying of the refrigeration equipment and its installation was a sub-contract between ourselves and the Marine Electric Company of San Francisco." The situation presented then is this: Appellants agreed to sell and, at their cost, to install on the premises of respondents certain refrigeration equipment. So far as respondents were concerned appellants performed that agreement, Mr. Rossig doing the work of installation. The contract was completed and no breach thereof occurred. Nevertheless, Rossig was able to obtain a judgment against respondents. We are not here concerned with the circumstances under which that occurred, for as between appellants and respondents the money respondents were forced to pay Rossig ought to have been paid by appellants. Respondents, therefore, were compelled to lay out money for the benefit of appellants, and the trial court correctly adjudged that appellants were thereupon obligated to repay the moneys so laid out. It was said in Weaver v. Fickett, 82 Cal.App. 116, 120, 255 P. 257, 259:

> "* * * 'One who is compelled, by reason of a legal liability therefor, to pay an obligation for which another in equity and good conscience should pay, may recover from that other the money so paid. It is not necessary that the payment should have been coerced by actual legal proceedings; the mere existence of the legal liability is sufficient.'"

We quote the following from Page v. Podol, 4 Cal.App.2d 229, 231, 41 P.2d 167, 168:

> "Plaintiff relies upon the equitable doctrine that one who is compelled to pay a debt or whose property is made liable for a debt which another in good conscience ought to pay is entitled to recover against that other the amount so paid. In commenting upon this rule the Supreme Court said in Finnell v. Finnell, 159 Cal. 535, 539, 114 P. 820, 821: 'The soundness of this doctrine has been upheld by innumerable decisions of courts of the highest authority in many jurisdictions, and it is so obviously just and reasonable that it is matter of wonder that it should ever have been called in question.'"

[5] Appellants contend that there was in the record no evidence that the amount

paid by respondents was the reasonable value of the work of installing the refrigeration equipment. Assuming that such proof was necessary, the assignment is not supported by the record. During the trial Mr. Stelling admitted that if all of the equipment, including tubing and gas, which was itemized in the statement from Mr. Rossig, had been necessary for the job then the charges would not have been unreasonable; and Mr. Batini testified directly that all of the items itemized had actually been used in the installing of the equipment.

The judgment appealed from is affirmed.

PEEK and SCHOTTKY, JJ., concur.



147 Cal.App.2d 259

The PEOPLE of the State of California, Plaintiff and Respondent,

v.

James Jefferson BRYANT, Defendant and Appellant.

Cr. 5710.

District Court of Appeal, Second District, Division 3, California.

Dec. 27, 1956.

Rehearing Denied Jan. 11, 1957.

Hearing Denied Jan. 23, 1957.

Prosecution for receiving a money bet on the result of a horse race, and for bookmaking. The Superior Court, Los Angeles County, H. Burton Noble, J., entered judgment of conviction for bookmaking and denied defendant's motion for new trial, and defendant appealed. The District Court of Appeal, Vallée, J., held that evidence sustained conviction.

Judgment and order affirmed.

Shinn, P. J., dissented.

1. Gaming ⇐98(3)

Evidence sustained conviction for bookmaking. West's Ann.Pen.Code, § 337a, subd. 1.

2. Criminal Law ⇐200(1)

Acquittal of the violation of subdivision of gaming statute by receiving money bet on result of horse race did not prevent the facts relating to acts condemned by such subdivision from being used to convict defendant of violation of subdivision of such statute proscribing bookmaking, and acquittal of the one charge did not amount to acquittal of the other charge. West's Ann. Pen.Code, §§ 337a, subds. 1, 3, 954.

John H. Marshall, Los Angeles, for appellant.

Edmund G. Brown, Atty. Gen., and Norman H. Sokolow, Deputy Atty. Gen., for respondent.

VALLÉE, Justice.

[1] Defendant was convicted of bookmaking, Pen.Code, § 337a, subd. 1, by the court sitting without a jury. He appeals from the judgment and from the order denying his motion for a new trial. He contends first that the evidence is insufficient to support the judgment.

About 10:30 a. m. on November 26, 1955 Deputy Sheriff Lee and other officers observed defendant in front of the Hide Out Café on Whittier Boulevard in Los Angeles County. An elderly gentleman approached defendant and began a conversation with him. Defendant took a National Daily Reporter from his pocket and the two looked at it together. The gentleman then handed defendant a small piece of paper and some money. Defendant put the piece of paper in his right-hand pants pocket and the money in his left-hand pants pocket.

Within ten minutes thereafter Murray Bane approached defendant and had a conversation with him. Defendant took the National Daily Reporter from his pocket and he and Bane scanned it. Bane took a card from his pocket and they looked at it.

Bane put the card back in his shirt pocket and handed defendant some money.

The officers then approached defendant and placed him under arrest. They took the card from Bane's shirt pocket and the small piece of paper and the National Daily Reporter from defendant's hand. The National Daily Reporter was dated November 26, 1955. The card and the small piece of paper were betting markers. Notations on the card referred to a $2 win, $2 place bet on Gaviota Pass in the third race to be run that day at Tanforan. Notations on the small piece of paper referred to a $1 win, $1 place, and $1 show bet on Dauber Chickle in the second race and to a $2 win, $2 place, and $2 show bet on Turk's Delight in the eighth race, to be run that day at Tanforan.

Bane told Officer Lee in defendant's presence that he had given defendant a $5 bill, for which he received $1 in change for a $2 win, $2 place bet on Gaviota Pass. Defendant said he had taken the bet, he intended calling it in to a bookmaker, he had not taken any other bets, and that he did not know how he had the small piece of paper in his possession.

There was evidence in contradiction of the foregoing to the effect that defendant did not see the small piece of paper until it was shown him by the officers, that the money handed him by Bane was in payment of a debt, and that the notations on the small piece of paper and on the card were not in defendant's handwriting.

We think it manifest the evidence is sufficient to support the judgment. Cf. People v. Meade, 109 Cal.App.2d 306, 240 P.2d 680; People v. Burch, 118 Cal.App.2d 122, 257 P.2d 44. Resolution of the conflict in the evidence was for the trial court.

[2] Defendant was also charged with a violation of subdivision 3 of section 337a of the Penal Code, receiving money bet on the result of a horse race. He was found not guilty of that offense. He contends that acquittal of a violation of subdivision 3 prevents the facts relating to acts condemned by that subdivision from being used to convict him of a violation of subdivision 1; in effect, that an acquittal of a violation of subdivision 3 was an acquittal of a violation of subdivision 1. The point is untenable. A verdict of acquittal of one count may not be deemed or held to be an acquittal of any other count. Pen.Code, § 954. "Section 337a of the Penal Code contains six subdivisions, and is so framed that one set or series of acts might constitute a violation of each or all of said subdivisions. By its provisions the following acts are made felonies: In subdivision 1, bookmaking or poolselling; in subdivision 2, occupying a room with bookmaking paraphernalia for the purpose of recording bets on races; 3, receiving bets on races; 4, recording bets on races; 5, owner permitting room or building to be used for any of the preceding purposes; 6, making or accepting bets on races. Each of these constitutes a separate offense, as if it had been enacted in a separate section of the Code." People v. Ghio, 82 Cal.App. 28, 32, 255 P. 205, 206. "[T]he acquittal of an alleged violation of one of the subdivisions of section 337a, Penal Code, does not prevent the facts relating to acts condemned by that subdivision from being used with reference to another subdivision." People v. Smith, 113 Cal. App.2d 416, 420, 248 P.2d 444, 447. Also see People v. Meade, 109 Cal.App.2d 306, 309, 240 P.2d 680.

People v. Coppla, 100 Cal.App.2d 766, 224 P.2d 828, relied on by defendant, is not in point. The judgment in that case was reversed because the evidence was insufficient.

The judgment and the order denying a new trial are affirmed.

PARKER WOOD, J., concurs.

SHINN, Presiding Justice.

I dissent. The evidence was that defendant received money and a slip of paper which indicated that the money was placed as a bet or bets. The acquittal under subdivision 3 means that the court determined that he did not receive a bet on a race. If there was no betting the evidence as to pos-

session of the National Daily Reporter, and what could have been a betting marker if a bet had been made, was meaningless and there was no evidence of bookmaking. I think a reversal is required.

Hearing denied; CARTER and SCHAUER, JJ., dissenting.



147 Cal.App.2d 243

The PEOPLE of the State of California, Plaintiff and Respondent,

v.

Cesario FLORES, Defendant and Appellant.

Cr. 5691.

District Court of Appeal, Second District, Division 2, California.

Dec. 27, 1956.

Hearing Denied Jan. 23, 1957.

Defendant was convicted on plea of guilty of kidnapping and rape, and judgment was entered. Thereafter the defendant filed a petition for writ of error coram nobis, on ground that he was fraudulently induced to employ certain attorney, and on ground that he was induced to plead guilty by reason of coercion and duress on part of his attorneys. The Superior Court of Los Angeles County, Herbert V. Walker, J., entered an order denying writ of error coram nobis, and defendant appealed. The District Court of Appeal, Fox, J., held that there was no abuse of discretion on part of the Superior Court in denying writ of error coram nobis.

Affirmed.

1. Criminal Law ⇐997(6)

The office of a writ of error coram nobis is to bring attention of court to facts which existed at time of trial, and which would have constituted a valid defense, but which, without negligence on part of defendant, were not presented, either through duress, fraud, or excusable mistake, and which, not appearing on face of record, would have effected an acquittal of defendant or, at least, would have caused a more favorable judgment to have been entered against him.

2. Criminal Law ⇐997(15)

On writ of error coram nobis, there is a strong presumption that judgment of conviction is correct.

3. Criminal Law ⇐997(15)

To prevail in a coram nobis proceeding, a defendant has the burden of establishing by a preponderance of the credible evidence that he was deprived of substantial legal rights by extrinsic causes.

4. Criminal Law ⇐997(6)

On writ of error coram nobis, defendant must show that facts on which he relies were not known to him and could not, in exercise of due diligence, have been discovered at any time substantially earlier than the time of filing his petition.

5. Criminal Law ⇐997(1), 1147

The granting of relief in a coram nobis proceeding rests largely in the sound discretion of the trial court, and its decision will not be reversed except for an abuse of that discretion.

6. Criminal Law ⇐558

Trial court is not required to accept as true the testimony of a witness, even though the testimony is not contradicted.

7. Criminal Law ⇐1159(4)

The trial court's determination of the truth or veracity of a witness is final.

8. Criminal Law ⇐997(5)

Defendant's claim that his counsel did not competently represent him could not be considered in coram nobis proceeding.

9. Criminal Law ⇐997(15)

In coram nobis proceeding, trial court properly excluded evidence of defendant that he was allegedly induced to employ certain counsel through capping activities on her behalf.

10. Criminal Law ⇐997(15)

In coram nobis proceeding, record did not support charge of defendant that he was denied the right to subpoena witnesses.

11. Criminal Law ⇐997(15)

Failure of defendant to explain his delay in seeking relief from asserted imposition of his counsel was a factor for the trial court's consideration in passing on petition for writ of error coram nobis.

12. Criminal Law ⇐997(5, 9)

On petition for writ of error coram nobis, on ground that defendant was fraudulently induced to employ certain attorney, and on ground that he was induced to plead guilty by reason of coercion and duress on part of his attorneys, superior court did not abuse its discretion in denying writ of error coram nobis. West's Ann.Pen. Code, §§ 209, 261, subd. 3, 286, 288a.

Cesario Flores, in pro. per., and John E. Glover, Los Angeles, for appellant.

Edmund G. Brown, Atty. Gen., and William E. James, Deputy Atty. Gen., for respondent.

FOX, Justice.

Defendant appeals from the denial of his petition for writ of error coram nobis.

Defendant was charged with the commission of seven felonies: four were kidnapping for the purpose of robbery; one was rape, Pen.Code, sec. 261(3); the other two were, respectively, violations of Penal Code sections 286 and 288a. In all counts its was alleged that defendant was armed with a deadly weapon,—a knife. In each of the kidnapping counts it was alleged that the victim was subjected to bodily harm by defendant.

At defendant's arraignment on September 20, 1954, E. D. McPherson, Esq., appeared as counsel for defendant for the purpose of arraignment only. Arraignment and plea were continued to December 27. On December 14, defendant appeared by the Public Defender. Thereafter he was represented by Gladys Towles Root, and Herbert Grossman and Joseph M. Rosen of her office. On January 13, 1955, with Mr. Grossman at his side, he entered a plea of not guilty.

Investigation disclosed that asserted alibi witnesses would not support defendant's claim of an alibi. Mr. Grossman advised defendant that in his opinion "it is a very bad case from your standpoint. The evidence here is against you, and you have no evidence in your behalf, or very little evidence." Mr. Grossman also told him "there is a possibility of a death penalty in this case." Later, defendant told Mr. Rosen: "The truth of the matter is that I committed these offenses that I am charged with. I have denied it up to now * * * because I don't want my wife to know." Thereupon Mr. Grossman, with defendant's consent, sought approval of the district attorney for pleas of guilty to two counts of robbery. The district attorney would not accept such pleas. He insisted on a plea to one count of kidnapping for the purpose of robbery, with an admission that the victim was subjected to bodily harm, and to one other count. Defendant inquired about the possibility of the death penalty being imposed. Grossman replied: "I will not permit you to enter that [plea] unless I am certain in my mind, as much as it is possible for anyone to be certain * * * that you will not receive the death penalty." Defendant thereupon entered a plea of guilty to one of the kidnapping counts and to the charge of rape. On the kidnapping charge the court sentenced him to life imprisonment without possibility of parole, Pen.Code, sec. 209, and on the rape count to the state prison for the term prescribed by law, that sentence to run concurrently with the other.

Some ten months after sentence defendant filed this petition. He offered no explanation for his delay.

Defendant was returned to court for the hearing and acted as his own counsel. He did not, however, take the witness stand.

The burden of defendant's complaint is that he was fraudulently induced to employ Mrs. Root; that she and her associates did not competently represent him; that he was induced to plead guilty by reason of coercion and duress on their part; and

that the trial court committed prejudicial error in certain of its rulings.

We find nothing in the record that justifies a reversal.

[1–5] In discussing the function of writ of error *coram nobis*, this court recently pointed out, in People v. Hayman, 145 Cal. App.2d 620, 302 P.2d 810, 812, that "The office of that writ is to bring the attention of the court to such facts as existed at the time of the trial that would have constituted a valid defense, but which, without negligence on the part of the defendant, were not presented, either through duress, fraud or excusable mistake and which, not appearing on the face of the record, would have effected an acquittal of the petitioner or, at least, have caused a more favorable judgment to be entered against him [citations]." There is a strong presumption that the judgment is correct. People v. Bobeda, 143 Cal.App.2d 496, 300 P.2d 97; People v. Shorts, 32 Cal.2d 502, 508, 197 P.2d 330. To prevail in a *coram nobis* proceeding a defendant has the burden of establishing by a preponderance of credible evidence that he was deprived of substantial legal rights by extrinsic causes. People v. Devora, 105 Cal.App.2d 457, 459, 233 P.2d 653; People v. Bible, 135 Cal.App.2d 65, 67, 286 P.2d 524. Also, the petitioner must show that the facts upon which he relies were not known to him and could not in the exercise of due diligence have been discovered at any time substantially earlier than the time of filing his petition. People v. Ayala, 138 Cal.App.2d 243, 246, 291 P.2d 517. Finally, granting relief in such a proceeding rests largely in the sound discretion of the trial court and its decision will not be reversed except for an abuse of that discretion. People v. Bible, supra, 135 Cal.App.2d at page 68, 286 P.2d 524; People v. Devora, supra.

[6, 7] The questions of fraud, coercion and duress are essentially factual. All three attorneys testified at length as to their professional relationships with defendant and as to what was done by them in the handling and disposition of his case. At the conclusion of the hearing the trial court indicated he believed their testimony rather than the story of defendant as revealed by his verified petition and his supporting witnesses. The trial court "is not required to accept as true the testimony of a witness even though not contradicted." People v. Bobeda, supra [143 Cal.App.2d 500, 300 P.2d 99]; People v. Curtis, 104 Cal. App.2d 219, 223, 230 P.2d 877; People v. Kirk, 98 Cal.App.2d 687, 692, 220 P.2d 976. In this connection defendant charges Mrs. Root with giving perjured testimony on the hearing. The trial court, however, believed her and its "determination of the truth or the veracity of a witness is final." People v. Bobeda, supra [143 Cal.App.2d 500, 300 P.2d 99]. Thus the factual questions have been resolved against defendant. Such resolution, being supported by substantial evidence, is binding on appeal.

[8] Defendant's claim that his counsel did not competently represent him cannot be considered in a *coram nobis* proceeding. People v. James, 99 Cal.App.2d 476, 479, 222 P.2d 117; People v. Krout, 90 Cal. App.2d 205, 208, 202 P.2d 635; People v. Ayala, supra, 138 Cal.App.2d at page 249, 291 P.2d 517.

[9] Defendant predicates error on the court's exclusion of evidence that he was induced to employ Mrs. Root through capping activities on her behalf. The ruling was correct. Such evidence was immaterial in this proceeding.

[10] Defendant asserts that he was denied the right to subpoena witnesses. The record does not support his charge. In this connection the court made the following inquiry of defendant: "The Court: Do you know whether the subpoenas were delivered to the Sheriff or the police for the purpose of showing serving? Defendant Flores: I gave them to my wife to give them to the County Clerk, but as far as them being issued, I don't know." Although defendant's wife was a witness in this hearing, she gave no testimony relative to delivering any subpoenas to the County Clerk to be issued by him. It does not appear

from her testimony or otherwise that the clerk refused to issue any subpoenas for defendant.

[11] Defendant's failure to explain his delay in seeking relief from the asserted imposition of his counsel was a factor for the trial court's consideration in passing on this petition. People v. Ayala, supra, 138 Cal.App.2d at page 246, 291 P.2d 517; People v. Krout, supra, 90 Cal.App.2d at page 209, 202 P.2d 635.

[12] Defendant had a full and fair hearing. There was no abuse of discretion on the part of the trial court.

The order (identified in the notice of appeal as "Judgment" and "order denying petitioner a new trial") is affirmed.

MOORE, P. J., and ASHBURN, J., concur.



147 Cal.App.2d 263

The PEOPLE of the State of California, Plaintiff and Respondent,

v.

Willie Lloyd CARTWRIGHT, Defendant and Appellant.

Cr. 2670.

District Court of Appeal, Third District, California.

Dec. 27, 1956.

Defendant was convicted of murder in the first degree. The Superior Court, San Joaquin County, M. G. Woodward, J., entered judgment on the verdict and an order denying motion to modify the judgment for first degree murder to second degree murder, and defendant appealed. The District Court of Appeal, Schottky, J., held that evidence sustained conviction for first degree murder.

Judgment affirmed.

1. Homicide ⇐146, 147

Proof of deliberation, premeditation, willfulness and malice may be inferred in murder prosecution from the facts and circumstances surrounding the homicide and furnishing a reasonable ground for such conclusion. West's Ann.Pen.Code, § 189.

2. Homicide ⇐253(1)

Evidence sustained conviction of murder in the first degree. West's Ann.Pen. Code, §§ 189, 1181, 1260.

3. Homicide ⇐345

Though District Court of Appeal, on appeal, has authority under the Penal Code to modify a judgment of murder in the first degree by reducing the degree of the crime to murder of the second degree, such authority should only be exercised where evidence fails to support a judgment of murder in the first degree. West's Ann. Pen.Code, §§ 189, 1181, 1260.

John L. Briscoe, Public Defender, Stockton, for appellant.

Edmund G. Brown, Atty. Gen., by Doris H. Maier, Deputy Atty. Gen., for respondent.

SCHOTTKY, Justice.

Willie Lloyd Cartwright was charged by information with the crime of murder. He pleaded not guilty, waived a trial by jury and requested the court to try his case sitting without a jury. At the conclusion of the trial the court found the defendant guilty of murder in the first degree. Defendant's motion to modify the judgment from first degree to second degree was denied and judgment was pronounced that defendant be imprisoned in the state prison for life.

Defendant has appealed from the judgment and from order denying his motion to modify the judgment. Appellant's sole contention is that the evidence is insufficient to support a finding of deliberation and premeditation and hence that the trial court's determination that the killing was murder in the first degree is erroneous, and

therefore the judgment of conviction should be modified to fix the degree of the homicide as murder in the second degree. In view of this contention we shall summarize the evidence as shown by the record.

On the evening of August 25, 1955, the appellant shot and killed his estranged wife, Eula Bernice Cartwright. This tragedy climaxed several years of marital discord, which included two separations and two divorces. Soon after the interlocutory decree of divorce in 1953, the couple became reconciled until early in August of 1955 when, after a long period of disharmony concerning the late hours kept by the decedent the couple again separated and the decedent obtained another interlocutory decree of divorce on the 18th day of August, 1955.

On the day of the murder the defendant spent most of the afternoon and early evening hours drinking. At about 9:30 p. m. he telephoned his twelve-year-old daughter, Mary Louise, at the home of his estranged wife. The conversation which ensued disturbed the defendant greatly. He asked the child whether she liked the man his wife was going out with and the reply was that the child preferred that man to the defendant. The defendant angrily informed the child that they would never have the man as a father. By the time the child hung up on him the defendant was in the state of tears. He thereupon went to his parents' home and got and loaded a rifle. From there he drove to Dick's Drive-In where his estranged wife was working as a car hop.

After being parked in the lot of the drive-in for about 15 minutes the defendant called Lena Byrd, another car hop, over to his car and told her he wanted to talk to his wife. Miss Byrd related this to the decedent and she came over to the defendant's car. After a brief conversation during which, according to the defendant's statement, his temper had cooled down he started to question the woman concerning her new boy friend. She informed him that it was none of his business, and seeing the rifle on the floor-boards of the car she whirled and started to run away. The defendant thereupon grabbed the loaded rifle, jumped from the car and shot his wife in the back. He fired three initial shots and then pumped two more bullets into his wife's body as she lay on the ground a few feet away. She died as a result of the wounds thus received.

The defendant returned to his car and drove to the 21 Club where he had been earlier and informed James Pollanda, an employee of the bar, that he had just shot his wife. He took Pollanda out to the car and gave him the rifle. He asked Pollanda to "call the law" and offered no resistance.

Shortly after his arrest defendant made a free and voluntary statement concerning the events which had transpired. This statement was substantially in keeping with his testimony at the trial. He admitted that he had made threats concerning his wife and the other man during his telephone conversation with his daughter. He stated that he knew the rifle was a dangerous lethal weapon and that it was on the floor-boards of his car during his conversation with the decedent at the drive-in. In the statement he admitted that he had obtained the gun and taken it to the drive-in with the intention of killing his wife.

Defendant took the stand and testified to the events which had transpired in substantial conformity with the testimony of the prosecution witnesses. He stated that when he got the gun he didn't know whether he intended to shoot himself or his wife or the other man. He stated that at the drive-in his temper "cooled down" while he was talking to his wife, but then he "just went crazy."

Upon cross-examination defendant was confronted with his prior statement that he had in fact intended to kill his wife. He was asked, "Do you remember that answer, sir?" He responded, "I wouldn't—I wouldn't say I remembered it and I wouldn't say I wouldn't."

Geraldine Cartwright, the defendant's sister-in-law, was called as a defense witness

and testified that the decedent had been going around with other men while married to the defendant. It was stipulated that a physician, if called, would testify to the fact that the decedent had been pregnant and had suffered a miscarriage in the spring of 1955. The defendant had been sterilized by surgery some two and a half years previously.

Dr. John A. Malloy, a licensed physician and surgeon specializing in psychiatry, was called by the defense. He testified that he found the defendant to have been very emotionally disturbed, feeling depressed, lonely, nervous and very much upset for several weeks prior to the shooting. It was his opinion that at the time of the shooting the defendant was "very, very disturbed," and he had strong reason to suspect that the defendant had been severely ill mentally. He further testified that he was of the opinion that the defendant was not able to deliberate at the time of the shooting, if by the word "deliberate", thinking rationally and clearly is meant. Upon cross-examination the doctor testified that he had relied heavily upon the truth of the defendant's statements to him.

The prosecution called Lt. Esau of the Sheriff's Department who testified that the defendant, shortly after the crime, had admitted to him that an intent to kill his wife had been formed after the telephone call to his daughter.

Appellant contends most earnestly that the evidence in the instant case does not establish that the homicide committed by appellant was a willful and deliberate murder within the meaning of section 189 of the Penal Code, which reads:

> "All murder which is perpetrated by means of poison, or lying in wait, torture, or by any other kind of wilful, deliberate, and premeditated killing, or which is committed in the perpetration or attempt to perpetrate arson, rape, robbery, burglary, mayhem, * * * is murder of the first degree; and all other kinds of murders are of the second degree."

He cites People v. Bender, 27 Cal.2d 164, at page 183, 163 P.2d 8, at page 19, where the court said:

> "It is asserted that 'There is nothing in the sections of the Penal Code which relate to this subject, which indicates that the Legislature meant to assign any particular period to this process of deliberation or premeditation, in order to bring the act within the first degree.' This latter assertion is eminently correct. (See People v. Thomas (1945), supra, 25 Cal.2d 880, 900, 156 P.2d 7.) But likewise there is nothing in the sections of the Penal Code which indicates that the Legislature meant to give to the words 'deliberate' and 'premeditate' any other than their common, well-known dictionary meaning.
>
> "The adjective 'deliberate' means 'formed, arrived at, or determined upon as a result of careful thought and weighing of considerations; as a *deliberate* judgment or plan; carried on coolly and steadily, esp. according to a preconceived design; * * * Given to weighing facts and arguments with a view to a choice or decision; careful in considering the consequences of a step; * * * unhurried; * * * Characterized by reflection; dispassionate; not rash.' (Webster's New Int. Dict. (2d ed.).) The word is an antonym of 'Hasty, impetuous, rash, impulsive.' (Id.) It has been judicially declared that 'Deliberation means careful consideration and examination of the reasons for and against a choice or measure.' People v. Richards (1905), 1 Cal.App. 566, 571 [82 P. 691]. The verb 'premeditate' means 'To think on, and revolve in the mind, beforehand; to contrive and design previously.' (Webster's New Int. Dict. (2d ed.).)"

Appellant argues that the evidence establishes that appellant was grieving over his broken home and the fact that his daughter told him over the telephone that she preferred the man her mother was going out with to him, and that he fired the fatal shots in a sudden transport of passion, excited

by what his wife said to him as he sat talking with her in the parking area of the drive-in restaurant where she worked. Appellant asserts that the only evidence from which the court could infer deliberation was essentially circumstantial and is as consistent with the contention of appellant that the killing was the result of passion and severe emotional strain, negativing deliberation, as it was with any theory that appellant deliberated upon the slaying.

While there is some force in appellant's argument, yet it is clear that the conclusion of appellant that there was no deliberation or premeditation is not the only logical conclusion that can be drawn from the evidence. Viewing the evidence in the light most favorable to respondent, the evidence indicates that the defendant harbored considerable animosity and resentment against his wife for some time. By his own admission the intention to kill his wife was formed just after his telephone conversation with his daughter. Furthermore, during his statement to the sheriff's office shortly after the crime, which was introduced into evidence, the defendant admitted that he obtained the rifle that evening and drove to the drive-in for the purpose of killing his wife. He remained seated in his parked car for 15 minutes or so before speaking to his wife. According to his own statement he had "cooled down" during the brief conversation with the decedent which ensued. These facts negate a killing done hastily and rashly in the heat of sudden provocation and support a conclusion that it was a murder executed after considerable reflection.

[1, 2] Proof of deliberation, premeditation, willfulness and malice may be inferred from the facts and circumstances surrounding the offense which furnish a reasonable ground for such conclusion. People v. Caritativo, 46 Cal.2d 68, 72, 292 P.2d 513; People v. Byrd, 42 Cal.2d 200, 213, 266 P.2d 505; People v. Eggers, 30 Cal.2d 676, 685, 185 P.2d 1. From the foregoing résumé of the facts of the instant case it is evident that the trial court could properly determine that the slaying was the willful and malicious product of premeditation and deliberation. People v. Caldwell, 43 Cal.2d 864, 279 P.2d 539; People v. Byrd, supra; People v. Daugherty, 40 Cal.2d 876, 256 P.2d 911; People v. Webb, 143 Cal.App.2d 402, 300 P.2d 130; People v. Pope, 130 Cal.App. 2d 321, 279 P.2d 108.

Murder is the unlawful killing of a human being, with malice aforethought. Penal Code, sec. 187. All murder which is willful, deliberate and premeditated is murder of the first degree. Penal Code, sec. 189. The evidence as indicated provides strong support for the inference that the slaying in this case was a killing with malice aforethought as a result of premeditation and deliberation. People v. Sutic, 41 Cal. 2d 483, 261 P.2d 241; People v. Daugherty, supra; People v. Webb, supra; People v. Pope, supra.

[3] While this court, upon appeal, has authority under sections 1181 and 1260 of the Penal Code to modify a judgment of murder of the first degree by reducing the degree of the crime to murder of the second degree, yet this authority should only be exercised where the evidence fails to support a judgment of murder of the first degree.

We think it is clear that in the instant case the question of whether or not there was a deliberate and premediated killing was one for the trial court to decide, and that the evidence was sufficient to support the determination of the trial court that it was such a killing.

Here, the evidence indicates that the intent to kill his wife was formulated by the appellant during and immediately after his telephone conversation with his daughter. The trial court sitting as the trier of fact could validly infer this from the threats made by the appellant during that conversation and from his admissions after being arrested. Furthermore, his conduct supports the conclusion since it can be readily inferred that he was acting in line with this intent to kill when he obtained a rifle from his home and took it with him to the drive-in where his wife worked.

Appellant concedes that malice may be inferred from proof of the commission of a homicide by the accused, but argues that deliberation and premeditation may not be inferred from the existence of malice. He further argues that proof of an opportunity to deliberate is not proof of deliberation. However, here deliberation and premeditation are not based merely upon proof that the defendant committed a homicide. Rather, the existence of these elements is logically derived by inference from defendant's words and conduct prior to the shooting. The evidence goes far beyond merely showing an opportunity to deliberate. The circumstances indicate that defendant did in fact premeditate and deliberate.

The judgment is affirmed.

VAN DYKE, P. J., and PEEK, J., concur.



147 Cal.App.2d 319

The PEOPLE of the State of California, Plaintiff and Respondent,

v.

Albert John BAKER, Defendant and Appellant.

Cr. 5660.

District Court of Appeal, Second District, Division 3, California.

Dec. 28, 1956.

Defendant was convicted of unlawfully selling heroin. The Superior Court of Los Angeles County, Aubrey N. Irwin, J., imposed sentence, and defendant appealed. The District Court of Appeal, Parker Wood, J., held that where deputy district attorney, who had been admonished by court that testimony of police officer to effect that defendant, who admitted allegations of information charging sale of heroin, that he had been convicted of addiction, had admitted to officer that he had been previously addicted, was improper, thereafter asked other police officer to relate conversation with defendant other than what other officer had related, though court had stricken testimony of other officer, deputy district attorney committed prejudicial misconduct.

Judgment reversed and cause remanded for retrial.

1. Criminal Law ⇐406(1)

Statement by police officer that defendant had admitted to him that he had been addicted previously to use of narcotics was not admission tending to prove charge of selling narcotics, and was inadmissible in prosecution for selling narcotics.

2. Criminal Law ⇐706

Deputy district attorney, who undoubtedly had discussed with police officer what officer's testimony would be as to his conversation with defendant accused of selling narcotics, and who knew that testimony would include defendant's admission of prior addiction to narcotics, deputy district attorney had duty to instruct witness not to relate alleged admission because of its inadmissibility.

3. Criminal Law ⇐706, 1171(1)

Where deputy district attorney, who had been admonished by court that testimony of police officer to effect that defendant, who had admitted allegations of information charging sale of heroin, that he had been convicted of addiction, had admitted to him that he had been previously addicted, was improper, thereafter asked other police officer to relate conversation with defendant other than what other officer had related, though court had stricken testimony of other officer, deputy committed prejudicial misconduct.

4. Criminal Law ⇐1023(10)

Purported appeal from sentence would be dismissed.

Ernest L. Graves, Long Beach, for appellant.

Edmund G. Brown, Atty. Gen., and Robert S. Rose, Deputy Atty. Gen., for respondent.

PARKER WOOD, Justice.

Defendant Baker and one Gonzales and one Penalver were charged with unlawfully selling heroin. Baker and Gonzales admitted allegations of the information that they had been convicted of being addicted to the unlawful use of narcotics, a misdemeanor. Penalver pleaded guilty. In a jury trial, Baker and Gonzales were found guilty. Baker appeals from the sentence and judgment.

Appellant contends that there was prejudicial misconduct on the part of the deputy district attorney; that the judge erred in rulings regarding admissibility of evidence; and that the evidence was insufficient.

On August 6, 1955, from noon until 1 p. m., deputy sheriffs Natividad and Sperry, who were in a room in the Burlington Hotel in Los Angeles, observed Baker, Gonzales and Penalver who were at the Alan Hotel across the street from the Burlington. About noon the officers saw Baker standing outside the Alan Hotel, where Baker met a man. About 15 minutes later, Officer Natividad saw another man hand something to Baker. Then the officer saw Baker enter the Alan Hotel, return within a few minutes, and touch the man's hand. A few minutes later, Officer Natividad saw a third man touch Baker's hand. Then the officer saw Baker enter the hotel, return within a few minutes, and touch the third man's hand. The officer also saw Penalver meet Baker outside the hotel. Baker then entered the lobby of the hotel and sat in a chair next to a chair where Gonzales was sitting. Officer Natividad, after marking the serial number of a $10 bill (his own bill) on a match book cover, went across the street and talked to Penalver who was in front of the Alan Hotel. Then the officer and Penalver went into a cafe (near the hotel) and approached Baker and Gonzales who were sitting, side by side, at the counter. Officer Natividad testified further, as follows: Penalver told Baker that Natividad (officer) wanted to purchase three capsules of heroin for $9; Baker asked Penalver if Natividad was all right; Penalver replied that he was all right; Baker said, "Give me the money"; Penalver handed the marked $10 bill to Baker, who returned $1 in change; Baker told Gonzales to go upstairs and get three "caps"; then Gonzales left the cafe; Baker told the officer to wait outside; Penalver and the officer went outside, and approximately two minutes thereafter Gonzales came from the Alan Hotel and entered the cafe; Penalver and the officer followed him into the cafe; Gonzales handed a piece of rubber balloon to Penalver; the officer, in the presence of Baker and Gonzales, extended his hand and asked Penalver to give him (officer) the caps; Penalver handed the piece of balloon to the officer and stated: "There are three caps inside, next time you trust me"; the officer then returned to the Burlington Hotel and had a conversation with Officer Sperry; both officers then crossed the street and arrested Penalver, who was near the cafe; while Officer Sperry remained with Penalver, Officer Natividad went into the lobby of the Alan Hotel, where Baker and Gonzales were sitting, and arrested them; the officer took them to the place where Officer Sperry and Penalver were; Officer Natividad searched Baker and found $78 or $178 on his person; the officer compared a $10 bill, which was found in the search, with the number he had made on the match book cover; the number on the bill and the number on the cover were the same.

The three capsules, received in evidence as Exhibit 1, contained heroin.

Officer Natividad testified further that, after the defendants had been taken to the narcotic bureau, the officers had a conversation with them individually and collectively. The attorney for Gonzales objected to testimony by Officer Natividad as to his conversation with Gonzales. The judge asked the deputy district attorney if he intended "to produce some conversation that would

amount to either a confession or—." The deputy replied in the affirmative. The judge then said that a motion to strike the testimony might be renewed if the deputy did not "connect it up." The deputy asked Officer Natividad to relate the conversation he had with Baker. The officer testified that: he asked Baker if he was selling or had sold heroin; he replied in the negative; the officer told him that the officers had watched from across the street and that Baker sold narcotics to three individuals and "we [officers] know" that he was selling narcotics; Baker made no response; "I [officer] asked defendant [Baker] if he was addicted to the use of narcotics and *he told me that he had been previously addicted to the use of narcotics* but he was not using narcotics at the time"; the officer told Baker that the $10 bill, which the officer took from him, was a marked bill; the officer asked Baker where he secured the bill; he replied that he received it in the cafe from someone who owed him money, but he did not know the persons' name. The attorney for Baker and the attorney for Gonzales moved to strike out all the testimony regarding the conversations upon the ground that the conversation did not constitute a confession or admission. The motions were granted, except as to the portion of the conversation relating to the $10 bill. The judge instructed the jury to disregard all the conversation except the portion relating to the $10 bill.

Officer Sperry testified, in substance, the same as Officer Natividad had testified with respect to: observing the three defendants from the Burlington Hotel; marking the serial numbers of the $10 bill on the match book cover; comparing the serial numbers after the arrests. He testified further that the amount of money taken from Baker, when he was searched, was $178. He also testified that after the defendants were arrested, the officers had a conversation with them wherein the three defendants were present. The deputy district attorney asked him to relate the conversation. At the request of the judge the attorneys approached the bench, and then the judge said that the only part of the conversation that would be in the category of an admission was the part relating to the $10 bill, that the rest of the conversation was a denial of accusatory statements, and that the testimony as to the conversation should be confined to that part relating to the $10 bill, and only that part should be referred to. After the conference at the bench, the deputy asked the witness to relate the conversation concerning the bill. The officer testified that Officer Natividad asked Baker where he got the $10 bill; Baker replied that he got it as payment of a debt. Then the deputy asked the witness if he recalled any other conversation *"other than what Mr. Natividad has testified to?"* The witness replied, "Merely that Mr. Penalver" stated that he (Penalver) was not selling narcotics at that corner, that he had no narcotics of his own, and he had obtained them from someone else.

Defendant testified to the effect that he did not sell heroin or anything to the officer; that he was not implicated in the matter charged against him; that Penalver, who owed him $15, paid $9 of the indebtedness while Baker and Gonzales were having lunch in the cafe.

[1] Appellant contends, as above stated, that there was prejudicial misconduct on the part of the deputy district attorney. This contention is based upon questions by the deputy wherein he asked the officers to relate conversations which they had with Baker. When the deputy asked Officer Natividad to relate such a conversation, he (deputy) stated in effect that he intended to show a confession or admission. A part of the conversation, as related by that officer, was: "I asked the defendant if he was addicted to the use of narcotics and he told me that he had been previously addicted to the use of narcotics but he was not using narcotics at the time." All the testimony as to that conversation, except as to the $10 bill, was stricken out. Thereafter the deputy asked Officer Sper-

ry to relate the conversation which he and Officer Natividad had with Baker. Thereupon, in a conference with the attorneys at the bench, the judge asked the deputy if "this conversation" was the same conversation that Officer Natividad had testified to. The deputy replied in the affirmative. The judge admonished him to confine the testimony, regarding that conversation, to the part of the conversation relating to the $10 bill. The deputy asked the officer to relate the conversation concerning that bill. After the officer had answered that question, the deputy asked him if he recalled any other conversation "other than what Mr. Natividad has testified to?" That question and the answer thereto implied that Officer Sperry did recall the conversation which Natividad had related and which had been stricken out—the conversation wherein Baker said that he had been previously addicted to the use of narcotics. In view of the previous order striking out the same testimony, and in view of the admonition of the court restricting the subsequent testimony as to the conversation, that question should not have been asked. The statement that Baker had been addicted to the use of narcotics was not an admission tending to prove the charge of selling narcotics, and the statement was inadmissible. Furthermore, as above stated, Baker had admitted the allegation of the information that he had been convicted of being addicted to the unlawful use of narcotics. The statement (in the conversation) that he had been addicted to the use of narcotics was not a statement that he had been convicted of being so addicted, but is was closely related thereto, was inadmissible, and tended to prejudice the defendant. Although the improper statement with respect to addiction, as originally included in the testimony of Officer Natividad, was stricken out and the jury instructed to disregard it, it is doubtful if the prejudicial effect of the statement was removed. In Helton v. United States, 5 Cir., 221 F.2d 338, 340, wherein the charge was possession of marijuana, an officer testified that the accused told him that " 'he had been smoking marihuana intermittently very seldom for the past four or five years.' " The trial court therein, upon request of the prosecuting attorney, ordered the statement stricken out. The court said at page 340: "It is true that here the trial court ordered the improper evidence stricken from the record, but he gave no instruction whatever to the jury to disregard the improper testimony. In fact, in the circumstances of this case, it is doubtful that any instruction, however strong, would have succeeded in destroying the picture which this remark created in the jury's mind * * *." In the present case the improper statement regarding addiction, which had been made by Officer Natividad, was again impliedly placed before the jury by the deputy's question as to whether Officer Sperry recalled any other conversation other than what Officer Natividad had testified to. Although no objection was made to the question, the court had theretofore ruled that such statement as to addiction was inadmissible and had ordered, in effect, that the testimony of Officer Sperry exclude reference to addiction.

[2, 3] It is of frequent occurrence in criminal trials that police officers, in relating conversations with the defendant, testify to statements by the latter that are detrimental to him and inadmissible as evidence, thus necessitating a motion to strike the evidence, the granting of the motion, and an admonition to the jury to disregard it. This was true of the testimony of Officer Natividad as to Baker's admission of the use of narcotics. We said in People v. Bentley, 131 Cal.App.2d 687, 690, 281 P.2d 1, 3: "The district attorney knew, or should have known, the testimony the officer was going to give and should have warned him not to make the statement. Every prosecutor who offers a witness to testify to conversations with an accused should know what the witness will relate if given a free hand. The prosecutor has the duty to see that the witness volunteers no statement that would be inadmissible and especially careful to guard against statements that would also be prejudicial."

It must be presumed here that the deputy district attorney had discussed with Officer Natividad what his testimony would be as to his conversation with defendant and knew that it would include defendant's admission of prior addiction to narcotics. If so, it was his duty to instruct the witness not to relate that alleged admission. A claim of ignorance on the part of the prosecutor as to the testimony the witness would give cannot be reconciled with the affirmative duty of fairness in the trial to which prosecutors must be alert at all times.

The deputy district attorney was guilty of prejudicial misconduct.

In view of the above conclusion, it is not necessary to determine other contentions on appeal.

[4] The judgment is reversed and the cause is remanded for a retrial. The purported appeal from the sentence is dismissed.

SHINN, P. J., and VALLÉE, J., concur.



147 Cal.App.2d 300

The PEOPLE of the State of California, Plaintiff and Respondent,

v.

Julius SHANNON, Jr., Defendant and Appellant.

Cr. 5694.

District Court of Appeal, Second District, Division 2, California.

Dec. 28, 1956.

Defendant was convicted of burglary. The Superior Court, Los Angeles County, Charles W. Fricke, J., entered judgment, and defendant appealed. The District Court of Appeal, Moore, P. J., held that, where evidence of defendant's guilt was, on a review of the whole case, overwhelming, the judgment of conviction could not be reversed.

Affirmed.

1. Criminal Law ⇐1036(1)

Upon appeal in burglary prosecution, defendant, who did not make objection at trial to evidence obtained upon his arrest, could not, for the first time on appeal, urge the doctrine of illegal search and seizure but would be deemed to have waived all possible objections by his silence at the trial.

2. Witnesses ⇐345(1), 350

Witness may be impeached by proof of his conviction of a felony, and errors or falsehoods in his explanations may be exposed by contradictory proof, and the district attorney on cross-examination is allowed to show that, under such circumstances, defendant has attempted to deceive the court and is, therefore, untrustworthy.

3. Witnesses ⇐350

Prosecutor was not foreclosed from further inquiry by fact that he had asked accused whether he had been convicted of a felony, but prosecutor could proceed to inquire into the nature of the crime.

4. Criminal Law ⇐1036(2)

Where, while under cross-examination in regard to his felonies, defendant made no objection to any of the questions claimed on appeal to have been prejudicial, defendant thereby waived all right to complain thereof on appeal.

5. Criminal Law ⇐814(17)

Where any circumstantial evidence is merely incidental and corroborative of the direct evidence, an instruction on circumstantial evidence is not necessary.

6. Criminal Law ⇐1173(2)

Where, in burglary prosecution, direct evidence established defendant's presence and participation at scene of the burglary, and defendant, who was caught in the act, subsequently fabricated a falsehood to explain how he had gained possession of property taken and then confessed, propri-

ety and correctness of instructions became matter of no importance, in view of the overwhelming proof of defendant's guilt, and, therefore, refusal to give instruction on jury's duty when the evidence is susceptible of two reasonable theories was not error.

7. Criminal Law ⇐825(1)

Having covered the general, applicable principles in the charge, court was not obliged to give, sua sponte, a more specific instruction as to defendant's theory of the case.

8. Criminal Law ⇐800(5)

Giving of instruction pertaining to credibility of witnesses without defining term "impeach" used in such instruction was not error.

9. Criminal Law ⇐741(1), 742(1)

The jury are the sole and exclusive judges of effect and value of evidence addressed to them and of credibility of witnesses who have testified in the case.

10. Witnesses ⇐333

Witnesses' character as shown by the evidence, should be taken into consideration for purpose of determining their credibility.

11. Criminal Law ⇐323

Witness is presumed to speak the truth, but such presumption may be repelled by manner in which he testifies or by evidence affecting his character for truth, honesty, or integrity.

12. Witnesses ⇐345(1), 383

Witness may be impeached by evidence that, at other times, he has made statements inconsistent with his present testimony as to any matter material to the cause on trial and by proof that he has been convicted of a felony.

13. Criminal Law ⇐553

Witness, who is wilfully false in one material part of his testimony, is to be distrusted in others, and jury may reject whole of testimony of such witness.

14. Criminal Law ⇐553

If jury is convinced that witness, willfully and with design to deceive, has stated what was untrue as to a material point, jury may treat all his testimony with distrust and suspicion and reject all unless it shall be convinced that he has, in other particulars, sworn to the truth. West's Ann.Code Civ.Proc. § 2061, subd. 3.

15. Criminal Law ⇐800(5)

Ordinary words, such as "impeach" when used in instructions do not require defining but are presumed to be understood by the jurors.

16. Criminal Law ⇐561(1)

Doctrine of reasonable doubt applies only to question of defendant's guilt, not to appraisal of witness' testimony.

17. Criminal Law ⇐857(1)

Jury is not to involve question of guilt with a consideration of the penalty.

18. Criminal Law ⇐761(13)

Instruction that, in arriving at verdict, jury was not to discuss or consider subject of penalty or punishment, as that was a matter which would lie with the court or other governmental agencies, and was not in any way to affect jury's decision as to defendant's innocence or guilt did not suggest defendant's guilt.

19. Burglary ⇐42(1)

Possession of stolen property was a circumstance to be considered in connection with other evidence in determining defendant's innocence or guilt of charge of burglary.

20. Burglary ⇐42(3)

In addition to proof of possession of stolen property, there had to be proof of corroborating circumstances, to sustain charges of burglary such as the acts, conduct, and falsehood of defendant.

21. Criminal Law ⇐778(5)

In burglary prosecution, court, by giving instruction that possession of stolen property was circumstance to be considered in connection with other evidence in determining defendant's guilt or innocence and that, in addition to proof of possession of such property, there had to be proof of corroborating circumstances, such as de-

fendant's acts, conduct, and falsehood, did not impose upon defendant burden of convincing the jury beyond a reasonable doubt of his theory and explanation of possession of the stolen property.

22. Criminal Law ⇐781(6)

In burglary prosecution, given instruction that, if jury should find that a confession was false in material particular, it remained, nevertheless, evidence for jury's consideration in connection with all other evidence in the case and was to be given such significance and weight as jury's judgment might determine was not error, since it merely advised jury that, even though some portion of accused's confession might be false, balance was not necessarily rendered unworthy of consideration.

23. Criminal Law ⇐1186(4)

Where, in burglary prosecution, evidence of defendant's guilt was, on a review of the whole case, overwhelming, the judgment of conviction could not be reversed. West's Ann.Const. art. 6, § 4½.

Cary G. Branch, Los Angeles, for appellant.

Edmund G. Brown, Atty. Gen., Raymond M. Momboisse, Deputy Atty. Gen., for respondent.

MOORE, Presiding Justice.

Julius Shannon, Jr. appeals a judgment convicting him of burglary. He demands a reversal on the grounds that (1) the evidence against him was illegally obtained, (2) he was improperly cross examined, (3) erroneous instructions were given and proper instructions were refused.

After midnight in late February 1956, appellant and his codefendant Williams took a drive in appellant's automobile along the streets of Los Angeles. Williams suggested the idea of obtaining cigarettes from some store. On Main Street they found the weapon for their purpose, a piece of cement brick. While driving on West Pico Boulevard, they stopped at a store with a glass front window through which Williams hurled the concrete. Through the space created by his vicious missile, Williams entered and duly returned with "a few cartons" of cigarettes. These he passed on to appellant who placed them in the rear of his car. Williams returned into the store for more of the same. Observant of his associate, Williams saw appellant driving away followed by a police car. Appellant was promptly apprehended and just as he was being returned to the store, the officers detained Williams as he emerged through the paneless door.

Appellant admitted to the officers the facts in the foregoing recital and added that he had approved of the proposed method of acquiring cigarettes; that he had placed the cartons in his automobile; that when he noticed the police car make a U-turn to approach him, he became frightened and fled. At the trial he testified that he was asleep during the burglary. Not only was he contradicted by the events that occurred at the scene but he was impeached by proof of two prior felony convictions.

[1] There was no illegal arrest. Appellant was found sitting in his car about 4 o'clock in the morning in front of a store, his motor running. He attempted flight as the police approached him. Because of the suspicious circumstances, they searched his conveyance and found the cartons. But regardless of the facts, no objection was made at the trial to the evidence thereof. Hence, he cannot on appeal for the first time urge the doctrine of illegal search and seizure where his trial occurred following the decision in People v. Cahan, 44 Cal.2d 434, 282 P.2d 905. He is deemed to have waived all possible objections by his silence at the trial. People v. Maddox, 46 Cal.2d 301, 304, 294 P.2d 6; People v. Farrara, 46 Cal.2d 265, 268, 294 P.2d 21; People v. Kitchens, 46 Cal.2d 260, 262, 294 P.2d 17.

Appellant complains that the District Attorney "spent considerable time in cross examining appellant by going into the facts of appellant's prior convictions." He advances the thesis that details of a prior felony conviction "not appearing in the

judgment record of conviction should not be gone into by either side." The record does not bear out such contention. He answered that he had been twice convicted of a felony; once for possession of marijuana, once for *automobile* burglary. The prosecutor followed such answer by having appellant admit that he had pled guilty to having burglarized an *office building* and that while on probation he wrote to his probation officer that he was present during the burglary and was awake. The foregoing admissions were elicited from appellant to counteract his intimations that he was in fact innocent of the prior charge.

[2, 3] Not only is it proper to impeach a witness by proof of his conviction of a felony, but errors or falsehoods in his explanations may be exposed by contradictory proof. The district attorney is allowed to show that, under such circumstances, the defendant has attempted to deceive the court and is therefore untrustworthy. The prosecutor is not foreclosed of further inquiry by having asked the accused whether he had been convicted of a felony; he may proceed to inquire into the nature of the crime. People v. Williams, 27 Cal.2d 220, 228, 163 P.2d 692.

[4] Moreover, while under cross examination with respect to his felonies, appellant made no objection to any of the questions which he now contends were prejudicial. He thereby waived all right to complain thereof on appeal. People v. Coontz, 119 Cal.App.2d 276, 280, 259 P.2d 694; People v. Agajanian, 97 Cal.App.2d 399, 405, 218 P.2d 114.

[5, 6] Appellant contends that the evidence was entirely circumstantial and that he was prejudiced by the court's failure to instruct on the duty of the jury when the evidence is "susceptible of two reasonable theories" as embodied in Caljic Instruction 26,[1] in addition to Caljic 24 and 27 which were given. He asserts that inasmuch as he was asleep when Williams burglarized the store, the jury should have been instructed as to their duty in the event they should find such explanation equally reasonable with the theory that he was a conscious participant in the crime. But the evidence was not wholly circumstantial. It was in the main direct. The store had been broken and burglarized; two half cases of cigarettes had been removed. Appellant was found sitting behind the wheel, parked in front of the store, motor running; carrying away the stolen merchandise, he attempted to flee from the officers. His companion was arrested in the act of bringing additional loot from the store and defendant immediately confessed his guilty participation. Nothing more was required to prove that he was aiding his confederate in the commission of the crime. See People v. Martin, 128 Cal.App.2d 361, 364, 275 P.2d 635. When any circumstantial evidence is merely incidental and corroborative of direct evidence, an instruction on circumstantial evidence is not necessary. People v. Jerman, 29 Cal.2d 189, 197, 173 P.2d 805. In the instant case, direct evidence established the presence and participation of appellant at the scene of the robbery. Not only was he caught in the very act but subsequently he fabricated a falsehood to ex-

1. *California Jury Instructions Criminal*, No. 26.

If the evidence in this case [as to any particular count] is susceptible of two constructions or interpretations, each of which appears to you to be reasonable, and one of which points to the guilt of the defendant, and the other to his innocence, it is your duty, under the law, to adopt that interpretation which will admit of the defendant's innocence, and reject that which points to his guilt.

You will notice that this rule applies only when both of the two possible opposing conclusions appear to you to be reasonable. If, on the other hand, one of the possible conclusions should appear to you to be reasonable and the other to be unreasonable, it would be your duty to adhere to the reasonable deduction and to reject the unreasonable, bearing in mind, however, that even if the reasonable deduction points to defendant's guilt, the entire proof must carry the convincing force required by law to support a verdict of guilt.

plain how he had gained possession of the cigarettes and then confessed. In view of the overwhelming proof of his guilt, the propriety and correctness of the instructions becomes a matter of no importance.

[7] Appellant vainly complains that he was prejudiced by the court's failure to instruct on appellant's "theory of the case"; that is to say that appellant had been asleep. No such instruction was offered. The court had advised the jury that in order to convict appellant, it was essential that he intended, at the time of the entry into the store, to steal the property of another. (Caljic 201.) Also, the jury were directed that if appellant did not participate in the burglary or have knowledge thereof, he could not be convicted of the offense. Having covered general, applicable principles in the charge, the court was not obliged to give *sua sponte* more specific instructions as to defendant's theory of the case. People v. Warren, 16 Cal.2d 103, 116, 104 P.2d 1024.

[8–15] Appellant contends that Caljic Instruction 52 (alternate) printed on the margin [2] was not sufficient; that it should have defined "impeach" and have explained how the jury should consider proof of a prior felony conviction. The instruction given is correct, accurate and comprehensive. Nothing should have been added. The word "impeach" is in common usage—meaning to discredit. Such ordinary words do not require defining. They are presumed to be understood by the jurors. People v. Chavez, 37 Cal.2d 656, 668, 234 P.2d 632. The instruction does not suggest that a prior conviction of a felony on the part of the witness must necessarily discredit his entire testimony. The jury were fully informed that they are the sole and exclusive judges of the credibility of witnesses and that the instructions given to them on that subject are only guides for their assistance. Appellant urges that the admonition contained in the instruction that a witness' testimony may be impeached by "evidence affecting his character for truth, honesty, and integrity" is in error because no such evidence was presented. However, such an instruction has been held perfectly proper for the consideration of the jury since the witness' character and demeanor while on the stand are to be taken into account by the jurors. People v. Monteverde, 111 Cal.App.2d 156, 171, 244 P.2d 447.

[16] The last paragraph of Caljic 52 (alternate) relative to distrust to be given at least partially false testimony is not erroneous. It is authorized by Code of Civil Procedure, section 2061. See People v. Smith, 132 Cal.App.2d 805, 808, 283 P.2d 39; Code Civ.Proc., § 2061(3). Appellant insists that the word "convince" in the last paragraph should have been followed by the phrase "beyond a reasonable doubt." Such modification would have been error. The doctrine of reasonable doubt applies

2. Credibility of Witnesses

"The jury are the sole and exclusive judges of the effect and value of evidence addressed to them and of the credibility of the witnesses who have testified in the case * * *

"The character of the witnesses, as shown by the evidence, should be taken into consideration for the purpose of determining their credibility * * * A witness is presumed to speak the truth. This presumption, however, may be repelled by the manner in which he testifies * * * or by evidence affecting his character for truth, honesty or integrity * * * A witness may be impeached also by evidence that at other times he has made statements inconsistent with his present testimony as to any matter material to the cause on trial [; and a witness may be impeached also by proof that he has been convicted of a felony or felonies].

"A witness wilfully false in one material part of his or her testimony is to be distrusted in others. The jury may reject the whole of the testimony of a witness who has wilfully sworn falsely as to a material point. [If you are convinced that a witness has stated what was untrue as to a material point, not as a result of mistake or inadvertence, but wilfully and with the design to deceive, then you may treat all of his or her testimony with distrust and suspicion, and reject all unless you shall be convinced that he or she has in other particulars sworn to the truth]."

only to the question of defendant's guilt. It is not pertinent to the appraisal of the testimony of a witness.

[17, 18] The giving of Caljic Instruction 9[3] is assigned as error in that it suggests the guilt of appellant. On the contrary, it directs the jury not to involve the question of guilt with a consideration of the penalty. That is the law. Without that advice a jury may permit their consideration of guilt to be deflected by a dread of seeing the accused suffer the statutory punishment.

[19–21] Appellant complains that Caljic Instruction 203 was prejudicial in that it imposes upon the accused the "burden of convincing the jury beyond a reasonable doubt of his theory and explanation of possession" of the stolen property. Such contention is not justified. The instruction states merely that possession is "a circumstance to be considered in connection with other evidence in determining the question of innocence or guilt." It stated, also, that "in addition to proof of possession of such property there must be proof of corroborating circumstances" such as "the acts, conduct, falsehood * * * of the defendant." The instruction is a correct statement of the law. People v. Howell, 126 Cal.App.2d 780, 783, 273 P.2d 79; People v. Corral, 60 Cal.App.2d 66, 72, 140 P.2d 172; People v. Taylor, 4 Cal.App.2d 214, 217, 40 P.2d 870.

[22] Assignment is made of that portion of Caljic 29 as follows: "* * * if you should find that a confession was false *in any material particular,* it remains, nevertheless evidence for your consideration in connection with all other evidence in the case, to be given such significance and weight as your judgment may determine." (Emphasis added.) The derivation of this particular wording is of interest. The instruction as originally drawn read that if the jury "should find that a confession was false, *either entirely or in part,* it remains nevertheless evidence for your consideration." (Emphasis added.) People v. Ford, 89 Cal.App.2d 467, 472–473, 200 P.2d 867, reversed a conviction based upon such an instruction on the reasoning that if the confession was *entirely* false, then the defendant must be innocent of the crime. People v. Shaw, 115 Cal.App.2d 597, 604, 252 P.2d 670, held similarly but refused to reverse because of a failure to find prejudice to the rights of the defendant. The current wording of the instruction, as here given, has been expressly approved in People v. Ybarra, 127 Cal.App.2d 74, 78, 273 P.2d 284 (hearing denied). The court there pointed out that the new wording merely advised the jury that even though some portion of the confession of an accused may be false, the balance is not necessarily rendered unworthy of consideration.

[23] In any event, the evidence of appellant's guilt on a review of the whole case is overwhelming. Therefore, the judgment cannot be reversed. Const. art. VI, § 4½.

Affirmed.

FOX and ASHBURN, JJ., concur.

3. **Jury May Not Consider Penalty**
In arriving at a verdict in this case, you shall not discuss or consider the subject of penalty or punishment, as that is a matter which lies with the court and other governmental agencies, and must not in any way affect your decision as to the innocence or guilt of the defendant.

147 Cal.App.2d 94

Anna L. PALMER, Plaintiff and Appellant,

v.

Jack N. HOLCOMB et al., Defendants and Respondents.

Civ. 5272.

District Court of Appeal, Fourth District, California.

Dec. 19, 1956.

Action by wife, who had employed private detective to investigate activities of husband during pendency of divorce action, for cancellation of notes given to the detective for services rendered, assignment of interest in property, and trust deed securing notes and to quiet title. The detective filed cross-complaint to foreclose the trust deed. The Superior Court of San Bernardino County, R. Bruce Findlay, J., rendered judgment for defendant and plaintiff appealed. The District Court of Appeal, Coughlin, J. pro tem., held that the evidence sustained finding that notes and trust deed were executed voluntarily with full knowledge of all facts, uninfluenced by relationship between parties and that the instruments were supported by sufficient consideration.

Judgment affirmed.

1. Mortgages ⇐25(6), 86(3)

In action by wife, who had employed a detective to investigate husband's activities during pendency of her divorce, for cancellation of notes and trust deed given to detective for services rendered, evidence sustained findings that notes and trust deed were executed voluntarily with full knowledge of all facts, uninfluenced by relationship between parties and that the instruments were supported by sufficient consideration.

2. Appeal and Error ⇐931(1)

In examining the sufficiency of the evidence to support a questioned finding, an appellate court must accept as true all evidence tending to establish the correctness of the findings as made, taking into account, as well, all inferences which might reasonably have been thought by the trial court to lead to the same conclusion, and every substantial conflict in the testimony is to be resolved in favor of the finding.

3. Appeal and Error ⇐773(2), 792

Where appellant failed to serve opening and closing brief on one of several named respondents, and where omitted respondent made no appearance on his behalf, the court was justified in finding that appellant has abandoned appeal as to the omitted respondent and in dismissing appeal as to that respondent on its own motion.

Randolph J. Soker, Los Angeles, for appellant.

Arthur J. Crowley, Hollywood, for respondent Jack N. Holcomb.

COUGHLIN, Justice pro tem.

In December, 1952, the plaintiff, who then was a party to a divorce action, employed the defendant Holcomb, a private detective, to investigate the activities and financial affairs of her husband. Holcomb had been suggested by Millard M. Mier, her attorney in the divorce action.

During the ensuing 13 months, Holcomb, in the course of his employment, made two trips to San Diego, one to Crestline, and one to Yosemite Valley, following plaintiff's husband, ran down and checked out numerous rumors and false clues submitted by Mrs. Palmer; obtained recordings of her husband's conversation in their home; employed six operators, who, with himself, spent 2,782 hours in the course of this investigation; expended $6,876.97; and, from time to time, and sometimes daily, reported orally to the plaintiff the results of his efforts.

In June, 1953, the plaintiff paid Holcomb $690 on account. Thereafter, on different dates, she signed three documents purporting to be affidavits and promissory notes, which contained an itemization, month by month, of the charges for services rendered, automobile use, and miscellaneous ex-

penses, an acknowledgment of their correctness, and a promise to pay the amount then due. It appears from these documents that on August 1, 1953, there were charges of $4,587.75, $1,026 and $995.85, respectively, for services, automobile use and miscellaneous expenses covering the period from January to July, inclusive, upon which $690.00 had been paid, leaving a balance of $5,919.60; that on October 10, 1953, there were charges of $996.50, $418.32, and $311.90, respectively, for similar items covering the period from August to October, inclusive, none of which had been paid; and that on January 19, 1954, there were further charges of $3,206.50, $328.60 and $316.67, respectively, for the same purposes covering the period of October to January, inclusive, all of which were unpaid.

During the course of Holcomb's employment, Mier became concerned about the cost of the investigation which the plaintiff had ordered and he counseled with her about this, but she insisted that the investigation continue and, on several occasions, said that she would spend every dime she had to get something on her husband. At one time the plaintiff stated that if Holcomb quit she would get someone else to take over.

On January 20, 1954, the plaintiff executed a hybrid type of instrument, purporting to be an assignment to Holcomb of all her interest in any property which she might receive on a division with her husband, for the purpose of securing payment of the promissory notes in question.

Thereafter, Holcomb expressed concern to the plaintiff about the status of his account, saying that he felt he was not adequately protected and suggested to her, and she agreed, that the three notes be combined in one and be secured by a deed of trust on a house and lot which she expected to receive under a pending property settlement agreement with her husband. Thereupon, Holcomb telephoned Mier; advised him of this understanding; gave him the amount of the three prior notes; and asked him to prepare a note and deed of trust accordingly. Mier suggested that he be named trustee in order to protect his client from a foreclosure without notice. Following this telephone conversation, a note and deed of trust were prepared and submitted to the plaintiff by her attorney, but, because she did not want her sister, who was present, to know about the matter, they were not executed at that time. Later, Mier gave the papers to Holcomb, who arranged a meeting with the plaintiff, at which there was a discussion about the amount of the fee charged; some additional work she wanted done; the effect of this transaction on the prior notes, which were to be canceled; the amount of interest due on the notes, which was included in the principal of the new note; and the title to the property described in the deed of trust. Thereupon, the documents were executed by plaintiff and acknowledged before the defendant Scott, a notary public, who also was present.

A few days later Mrs. Palmer went to a bank in Apple Valley and made an application for a loan on the property in question, hoping to pay off Holcomb and refinance her property with a longer term note.

"It is, of course, to be understood that in stating the evidence we are bound to consider that the trial court resolved all substantial conflicts and drew all reasonable inferences in favor of the defendants." Thomas v. Hunt Mfg. Corp., 42 Cal.2d 734, 736, 269 P.2d 12, 14. This observation is particularly pertinent because the facts heretofore outlined are in substantial conflict with the plaintiff's concept of the evidence under consideration.

On March 19, 1954, Mrs. Palmer filed a complaint to cancel all of the promissory notes, the assignment and the deed of trust, and to quiet her title to the real property described therein, alleging that she "reposed trust and confidence" in the defendant Holcomb, and also in her attorney, Mier, who had recommended his employment, which was effected under an agreement that the services rendered would be paid by her husband as a part of the costs in the divorce proceeding; that Holcomb and Mier requested her to sign certain documents in

blank, falsely representing that her signature was necessary, either to enable Holcomb to obtain payment for his services from her husband, to assure her attorney that Holcomb was performing the investigation services requested, or to effect a release from tax obligations incurred by her husband; that she relied on these representations and signed the documents, which were acknowledged before the defendant Scott, a notary public, who was acting in collusion with Holcomb; that these documents purport to be the promissory notes, assignment and deed of trust in question, and are wholly without consideration.

Holcomb, Mier and Scott were named defendants in this complaint. Each filed an answer. In addition, Holcomb and Scott filed cross-complaints. Holcomb sought a court foreclosure of the deed of trust. Scott, who had been substituted for Mier as trustee, under the deed of trust, asked for attorney's fees which he claimed were payable under the terms of the trust agreement.

During the trial, the plaintiff asked for and obtained permission to file an amendment to her answer to Holcomb's cross-complaint, alleging inadequacy of consideration.

Upon conclusion of the plaintiff's case, she dismissed the action as against the defendant Mier.

The trial court rendered judgment in favor of the remaining defendants, on the complaint; directed foreclosure of the deed of trust; and awarded Scott $500 attorney's fees.

The plaintiff asks this court to reverse the judgment upon the ground that, in obtaining the documents in question Holcomb gained an inequitable advantage over her, resulting from the confidential relation existing between them, as evidenced by the inadequacy of the consideration involved and the other circumstances attendant upon the execution of those documents. Reliance is placed upon the rule that such transactions are presumed to be without sufficient consideration, obtained by undue influence and constructively fraudulent, casting upon the party who has gained the advantage the burden of showing fairness and good faith in all respects. Johnson v. Clark, 7 Cal.2d 529, 61 P.2d 767; Scovill v. Guy, 205 Cal. 386, 270 P. 934; Soberanes v. Soberanes, 97 Cal. 140, 31 P. 910.

[1] The rules of law applicable to the facts which plaintiff contends are established by the "uncontroverted evidence" in this case are clear. However, plaintiff's contention ignores the findings of the trial court that the allegations upon which she relies are untrue. These findings were based upon substantial evidence from which the court was entitled to conclude that the defendant Holcomb, in the course of his employment by the plaintiff, had rendered services and incurred expenses of the total reasonable value of $13,118.15, for which he had received $690 in cash and a promissory note in the sum of $12,604, which included interest, secured by a deed of trust; that the note and deed of trust were executed by the plaintiff voluntarily, with full knowledge of all the facts involved, understanding the effect of the transaction, and uninfluenced by the relationship existing between herself and the defendant.

There was an abundance of evidence which established that the documents which the plaintiff signed were not "in blank" at the time of their execution, as she alleged. No mention is made of this contention upon her appeal, and it must be assumed she now realizes that her story was incredible.

[2] At this time the plaintiff's complaint centers primarily around the insufficiency of the evidence to sustain the court's finding with respect to the adequacy of the consideration for the note and deed of trust in question. "* * * [i]n examining the sufficiency of the evidence to support a questioned finding, an appellate court must accept as true all evidence tending to establish the correctness of the finding as made, taking into account, as well, all inferences which might reasonably have been thought by the trial court to lead to the same conclusion. Every substantial conflict in the testimony is, under the rule

which has always prevailed * * * to be resolved in favor of the finding." Bancroft-Whitney Co. v. McHugh, 166 Cal. 140, 142, 134 P. 1157, 1158.

The extent and value of the defendant Holcomb's services were matters upon which a great deal of evidence was submitted to the trial court and its conclusion with respect thereto finds substantial support in the record.

Under the findings in this case the rule of law upon which plaintiff relies, regarding a presumption of insufficient consideration, fraud and undue influence, does not apply and, even if applicable, the proof necessary to overcome the presumption has been supplied.

The judgment as to the defendant Holcomb should be affirmed.

In her opening brief, appellant devotes part of a page contending that the court erred in awarding Scott $500 as attorney's fees, for the defense of the action seeking cancellation of the trust deed under which he acted as trustor. However, this brief never was served on Scott or his attorney, and this fact was pointed out in the reply brief filed by Holcomb, who intimates that the award of attorney's fees to the trustee was made under the provisions of the deed of trust, and charges that appellant's contention "in this regard is as frivolous as her argument is against Holcomb." No reply was made to this charge.

[3] The record on appeal, giving the name and address of each attorney representing each defendant, was filed in this court on November 23, 1955. Thereafter, appellant obtained two stipulations from respondent for extensions of time within which to file an opening brief; no stipulation was obtained from the respondent Scott. As stated, appellant's opening brief was served only on Holcomb, by serving his attorney. The same situation prevailed with respect to appellant's closing brief. Service of the former was made on January 16, 1956, and of the latter on May 11, 1956. The first brief was filed on January 17, 1956; the last on May 17, 1956. Oral arguments were set for November 13, 1956, at which appellant and respondent Holcomb were represented. No appearance was made for Scott and no brief was filed on his behalf. The foregoing facts justify a finding that appellant has abandoned her appeal as to the respondent Scott and, relying upon its inherent power, this court is justified in dismissing that appeal on its own motion. In re Estate of Wunderle, 30 Cal.2d 274, 279, 181 P.2d 874; Graham v. Los Angeles First N. T. & S. Bk., 3 Cal.2d 37, 41, 43 P.2d 543.

The appeal from the judgment in favor of defendant Scott is dismissed. The judgment in favor of the defendant Holcomb is affirmed.

BARNARD, P. J., and MUSSELL, J., concur.



147 Cal.App.2d 330

WHITTIER ELEMENTARY SCHOOL DISTRICT OF LOS ANGELES COUNTY, Plaintiff and Respondent,

v.

Robert C. KIRKWOOD, as Controller of the State of California, Defendant and Appellant.

Civ. 21915.

District Court of Appeal, Second District, Division 1, California.

Dec. 31, 1956.

Declaratory judgment action by school district against State Controller to determine authority of State Allocation Board to amend order apportioning funds from Public School Building Loan Fund so as to permit district to retain proceeds from sale of replaced school site instead of applying such proceeds toward repayment of the state allocation as required by the resolution which initially approved the allocation. The Superior Court, Los Angeles County,

Philip H. Richards, J., entered judgment adverse to Controller and Controller appealed. The District Court of Appeal, Fourt, J., held that Board was authorized to amend the original order so that school district would be entitled to retain the proceeds from sale of the replaced school site.

Judgment affirmed.

1. Schools and School Districts ⇐74

State Allocation Board has discretion to determine whether proceeds from subsequent sale of replaced school facilities shall be applied toward cost of school construction project financed by funds obtained from the board. West's Ann.Education Code, §§ 5041 et seq., 5044.5, 5045, 5048, 5050, 5053–5063, 5058, 5059, 5071–5073.

2. Schools and School Districts ⇐74

Where State Allocation Board had, in original order apportioning funds from Public School Building Loan Fund for construction of school, required that proceeds from sale of replaced school site be applied toward the repayment of the state allocation, board was thereafter authorized to amend the original order so that school district would be entitled to retain the proceeds from sale of the replaced school site. West's Ann.Education Code, §§ 5041 et seq., 5044.5, 5045, 5048, 5050, 5053–5063, 5058, 5059, 5071–5073.

Edmund G. Brown, Atty. Gen., Richard L. Mayers, Deputy Atty. Gen., for appellant.

Harold W. Kennedy, County Counsel, Wm. E. Lamoreaux, Asst. County Counsel, Los Angeles, for respondent.

FOURT, Justice.

This is an appeal by the defendant from a judgment in an action in declaratory relief brought to determine the authority of the State Allocation Board to amend an order apportioning funds from the Public School Building Loan Fund so as to permit the respondent School District to retain the proceeds from the sale of a replaced school site, instead of applying such proceeds toward the repayment of the state allocation, as set forth in the resolution initially approving such allocation.

On about June 5, 1950, respondent, pursuant to the provisions of chapter 1.6 of Division 3 of the Education Code, filed a written application with the State Allocation Board for an allocation of $2,689,632.-70, for the acquisition and construction of certain school facilities set forth therein. The electors of the respondent District, at an election, had authorized the Board of Trustees of the District to accept and expend an apportionment from the State in an amount not to exceed $3,250,000, pursuant to the law.

On or about January 9, 1951, the State Allocation Board, by Resolution numbered 1389–106, approved an allocation of $2,452,-472, for the purposes set forth in the application. By this Resolution the respondent District was required to contribute to the costs of the contemplated school project "the net proceeds or credits allowed from the disposition of any sites, improvements, or facilities sold, transferred, or exchanged as a result of the acquisition or construction of any sites, improvements, or facilities pursuant to Chapter 1.6. * *" The Resolution further provided: "That the District shall proceed to dispose of any school building area in excess of the maximum prescribed by Paragraph 2 of this resolution, and any site or sites scheduled to be abandoned as a result of the acquisition or construction of any sites, improvements or facilities pursuant to Chapter 1.6 above, not later than the date the new construction authorized by this resolution is available for occupancy, provided that the terms, conditions and manner of disposition thereof shall be subject to the approval of the Director of Finance, and provided further that if such excess area or sites have not been disposed of by said date, the District shall dispose of the same in accordance with the instructions of the Director of Finance."

On or about January 20, 1953, the respondent District requested permission to sell the real property owned by the District, known as the Jonathan Bailey School and site, and to retain the proceeds therefrom "to be used for the construction of additional classroom facilities in accordance with the needs of the District."

On or about December 16, 1953, the State Allocation Board adopted Resolution No. 1389–106V, which amended Resolution No. 1389–106, in that it deleted from the original Resolution the requirement that the respondent School District contribute to the cost of the specific project as approved the net proceeds obtained from the disposition by the District of any sites, improvements, or facilities sold, transferred, or exchanged. Said Resolution further purported to authorize respondent District to sell the Jonathan Bailey School and site for not less than $253,600, and to apply the net proceeds obtained from said sale toward providing or constructing additional but unspecified school facilities.

On or about April 26, 1954, the Attorney General advised the appellant that the State Allocation Board had no authority to amend the original Resolution and that such purported amendment was invalid. About September 8, 1954, the respondent District entered into an agreement with the city of Whittier for the sale of the school site for the sum of $253,600.

The Attorney General, in his brief, sets forth that on October 27, 1954, the State Allocation Board adopted Resolution numbered 1389–106X, which said Resolution apparently took notice of the fact that the Attorney General had been requested by the Chief of the Local Allocation Division to reconsider his opinion of April 26, 1954. Further, it is said that by this Resolution the approval of the State Allocation Board, in allowing the respondent District to retain the proceeds from the sale of the Jonathan Bailey School and site was specifically made subject to the approval of the Attorney General. The respondent District points out that this particular Resolution (1389–106X) was never received in evidence.

On or about November 12, 1954, the Attorney General reaffirmed his previous opinion. On January 12, 1955, by Resolution numbered 1389–106Y, the State Allocation Board, after taking notice of the opinions of the Attorney General, reaffirmed its previous position. In this latter Resolution there is contained the following:

"2. That Paragraph 2 to-wit: 'That the approval of the Board, allowing the District to retain the proceeds from the disposition of the Jonathan Bailey School and site, is subject to approval of the Attorney General of the State of California', of Resolution No. 1389/106X, adopted October 27, 1954, is hereby rescinded."

Thereafter, the appellant demanded that the entire sum received, or to be received, by the respondent District from the sale of the Jonathan Bailey School and site be paid to the State of California, and in his demand stated that if said sums were not paid, that the State Controller would deduct the same from the yearly allotments of state funds to the respondent School District.

Some of the pertinent, relevant provisions of the law involved are as follows: Section 5048 of the Education Code as it read in 1950, and as it now reads, authorizes school districts to file applications for state apportionments with the State Allocation Board, and requires that Board to approve or reject the application.

Section 5050 of the Education Code requires that before an allocation becomes final 95% of the bonded capacity of a school district be outstanding, or if not, that the outstanding bonds be within $25,000 of the total bond limit. The section then provides as follows:

"At the time the board makes a conditional apportionment pursuant to Section 5048, it shall determine what portion of the total amount of bonds which a district is permitted to issue and sell by law shall be issued and sold by such district, the

proceeds of which shall be applied toward the cost of the project for which the apportionment is sought. The portion so determined by the board shall be not less than the minimum amount required for such apportionment to become final under this section."

The section also requires the electors of the school district, by a two-thirds vote, to authorize the governing board of the district "to accept, expend, and repay, as provided in this chapter, an apportionment under the provisions of this chapter." As heretofore indicated, such an election was held in the respondent District and authorized the governing board to accept, expend and repay an amount not to exceed $3,250,000.

A complete scheme of repayment to the State of apportionments made, with interest, over a period of years is provided by sections 5053 to 5063 of the Education Code, section 5059 providing that interest shall cease after twenty-five years and at the end of thirty years any unpaid balance of an apportionment shall be cancelled. Section 5058 provides for the disposition of the repayments as follows:

"5058. The State Controller shall, during the next fiscal year following that in which he determines the annual repayment as herein provided, deduct the total amount of the annual repayment of each district in equal amounts from each installment of the apportionments made to such district from the State School Fund under Chapter 15 of this division; and, on order of the State Controller, the amount so deducted shall be transferred to the Public School Building Loan Fund. All money transferred to the Public School Building Loan Fund under the provisions of this section shall be available only for transfer to the General Fund under the provisions of Section 5103."

Other than as provided in the above referred to sections, there is no provision, so far as we are able to locate, requiring school districts to apply any other funds, either available at the time of the application or to become available from the sale of assets, towards the construction project or as a reduction or repayment of the apportionment, nor is there any provision in any of the sections requiring the State Allocation Board to include such provisions in the granting of the apportionment, this matter resting wholly within its discretion.

Pursuant to its rule-making power, the State Allocation Board adopted, among others, two rules as follows: Rule 1778 provides that at the time of making an apportionment the State Allocation Board shall prescribe the amount of funds to be contributed by the district toward the construction project, and in determining the amount of available funds may specify that proceeds from the sale of any facilities to be replaced through an apportionment shall be applied toward the cost of the construction project as such proceeds become available. Thus, by its own rule, the Board has discretion to require the proceeds from the sale of facilities to be used toward the project.

Rule 1781 provides, so far as material, as follows: "Notwithstanding anything to the contrary in these rules and regulations, the Board shall have power:

* * * * * *

"(c) To modify any apportionment or resolution of apportionment, either conditional or final, where the Board determines that good cause exists therefor.

"This section shall apply to any apportionment or resolution of apportionment heretofore or hereafter made or adopted by the Board."

The respondent has pointed out that under section 5058 of the Education Code it is required that the State Controller deduct the amount of annual repayments of each district from the apportionments made to such district from the State School Fund and to transfer the amount so deducted to the Public School Building Loan Fund and from there to the General Fund under the provisions of section 5103. The latter section provides for the accumulation of money to retire the State school bonds. Thus,

should the appellant deduct the amount here involved from the regular yearly State apportionment to respondent District, it would eventually come to rest in the General Fund and would not be available for an allotment to any other school district.

The only provisions we have been able to locate providing for reimbursing the Public School Building Loan Fund after an allocation has been made to a school district are when the money allocated has been expended for unauthorized purposes, or is in excess of the final cost of the project, under section 5071 of the Education Code; when any unexpended portion of an allocation remains after three years has expired, section 5072 of the Education Code; and when a school site acquired with money allocated is sold within three years, section 5073 of the Education Code. The money in question in the instant case does not fall within any of the categories named.

The respondent also points out that the legislature, in the 1955 session amended section 5048 by adding thereto, among other things, the following:

"The board may for such good cause as it shall determine, reduce the amount of, or modify any provisions relating to, any contribution required of a school district under the terms of an apportionment, other than any contribution required of such district under Section 5050 from the sale of bonds; provided, that the board may not, without the consent of the district, increase the amount of any district contribution under the terms of an apportionment, in the absence of mistake arising from any source, or misrepresentation, concealment, or omission, on the part of the district, intentional or otherwise. *The provisions of this paragraph shall be applicable to apportionments heretofore or hereafter made.*" (Emphasis added.) (Stats.1955, ch. 1734, § 3.)

It would appear therefore, that the legislature validated the actions of the State Allocation Board.

The trial judge in this matter prepared an opinion in writing wherein he set forth his reasoning and the law of the case. We believe the cause was correctly and properly disposed of in the trial court and we adopt as part of this opinion the memorandum opinion of the trial court which is as follows:

"The sole question for determination in this case is the authority of the State Allocation Board to amend an order apportioning funds from the Public School Building Loan Fund, so as to permit the plaintiff School District to use the proceeds from the sale of a replaced school site for the construction of additional school buildings, instead of applying such proceeds toward the repayment of the allocation as originally provided in the resolution approving such allocation.

"It is clear that the school building aid program embraced in Article 1, Chapter 1.6, Division 3 of the Education Code is to provide necessary and adequate school sites and buildings for financially distressed school districts.

"While the Act (Section 5048) requires the Director of Finances to determine the district's financial ability to meet all or a portion of the cost out of available funds, there is no provision in the Act which requires the Board to compel the district to contribute any of its available funds or funds which thereafter become available, except in the case of a sale within three years of a site or improvements purchased or improved in whole or in part from an apportionment (Section 5073).

"Rule 1778 adopted by the Board, pursuant to authority of Section 5045, provides that the Board *shall* prescribe the amount of funds to be contributed by the District and *may* specify that the proceeds from the sale of any facilities to be replaced through an apportionment shall be applied toward the cost of the approved project.

[1] "In the first instance then, it is within the Board's discretion to determine

if proceeds from the subsequent sale of replaced facilities shall be applied toward the cost of the project.

"Rule 1781 provides that the Board may modify any apportionment, conditional or final, where the Board determines that good cause exists therefor. With no statutory provision relating to the use of funds subsequently becoming available from the sale of replaced facilities, and with authority to modify an apportionment for good cause, it would appear that the Board has authority to modify the provision of an apportionment requiring the District to contribute the net proceeds from the disposition of any replaced facilities by excepting therefrom the net proceeds acquired by the District from the sale of a particular school and site.

"The Attorney General contends that both the statute and the Board rules require the District to make use of all its available funds before obtaining State aid. This contention is not supported by any provision of the statute or by the Board rules.

"The Attorney General further contends that by modifying the apportionment provision relating to the contribution of proceeds from the sale or replaced facilities, by exempting the proceeds from the sale of one site and improvements, the Board has in effect approved the use of such proceeds for a project without first requiring the District to apply for an apportionment of such sum in the manner prescribed by law. The fallacy of this contention is that the Board is not required by law, nor by its own rules to require such contribution in originally approved apportionment. An expenditure of the District's funds subsequently becoming available is not an allocation from the Public School Building Loan Fund.

"It is a further contention of the Attorney General that to permit the plaintiff to retain and use the proceeds received from the sale of replaced facilities subverts the entire statutory scheme envisaged in the State Building Aid program in that it would render completely ineffectual the priority system contained in the Act. Sec. 5044.5 provides that the Board shall by rule give priority in allocating funds to districts where the children will benefit most from additional facilities. After setting forth the several bases for priority, the section provides that the Board may make exceptions when it determines that it will be for the benefit of the children affected. Thus it appears that even a waiver of priority is within the discretion of the Board and not in conflict with the enabling statute.

[2] "We conclude that the Board was authorized to amend the original resolution by the adoption of the resolution of December 16, 1953, authorizing the District to sell the Jonathan Bailey School and site and to apply the proceeds to the construction of the facilities specified in the amendatory resolution."

Judgment affirmed.

WHITE, P. J., and DORAN, J., concur.



147 Cal.App.2d 219

Donna Jean COURTELL, a Minor, by Ruth E. Billings, her Guardian ad litem, Respondent,

v.

B. H. McEACHEN, Hazel M. McEachen, Harry Plummer, Robert A. Kegel, as Administrator of the Estate of B. H. McEachen, Deceased, et al., Appellants.

Civ. 22167.

District Court of Appeal, Second District, Division 1, California.

Dec. 27, 1956.

Application by appellants for order augmenting record on appeal. The District Court of Appeal, held that where respond-

ent's motion for correction of reporter's and clerk's transcripts was duly filed and heard, and appellants' attorney was present at hearing and did not call court's attention to matter appellants now wish included in record, application insofar as it asked for inclusion in record of all instructions requested by parties but refused by court, was denied.

Application denied in part.

1. Appeal and Error ⇐643(4)

Litigants must take notice of contents of a record that comes to appellate court.

2. Appeal and Error ⇐643(4)

Where respondent's motion for correction of transcript on appeal had been duly filed and heard, and where appellant's attorney was present at hearing, and attorney did not draw court's attention to matter appellant subsequently sought to have included in record, application in so far as it asked for inclusion in the record of all instructions requested by parties and refused by court was denied because of unexcused delay and manifest injustice to respondent, who needed operation to correct condition caused by accident. West's Ann.Rules on Appeal, rule 8(a).

Murchison & Cumming, Los Angeles, for appellants.

Frank W. Swann, Jr., Beverly Hills, for respondent.

PER CURIAM.

Appellants have filed an application for an order of this Court augmenting the record on appeal by adding to the clerk's transcript on appeal a supplement showing separately each instruction given to the jury, by whom each such instruction was requested, and whether the same was given as requested or whether the same was modified by the Court; and also adding all instructions requested by the parties but refused by the Court, showing in each instance the party by whom such instruction was requested.

It appears that the reporter's transcript on appeal contains each instruction which was given to the jury, but does not indicate in connection with each instruction at whose request the same was given, or whether the same was given on the Court's own motion, or given as modified, and that said transcript does not contain the instructions offered by the parties and refused by the Court.

By affidavit of their counsel appellants aver, "That a proper and adequate presentation of the questions to be raised on appeal, namely, the propriety of giving certain instructions, cannot be correctly and adequately presented unless the record herein is augmented" as requested.

Respondent makes no objection to an order being made directing the filing of a supplement to the clerk's transcript showing, "* * * at whose request such instruction was given or whether the same was given on the Court's own motion and further whether any such given instruction was modified and if so the wording of such modification."

Respondent however, opposes including in the requested supplement, "* * * all instructions requested by the parties but refused by the Court", on the ground that "Appellants are barred from such augmentation by laches and inexcusable delay".

The record reveals that on May 10, 1956, appellants filed their "Notice to Prepare Transcript and Designation of Items to be Included".

On September 11, 1956, counsel for appellants and respondents were advised by the usual printed form Notice of Completion of Clerk's and Reporter's Transcripts on Appeal, pursuant to Rule 8(a) that each party had 10 days after the mailing of such notice on said date to file a request for correction of such transcripts. No request was then made to include additional matters.

On September 21, 1956, respondent filed in the Superior Court a motion for correction of the Reporter's and Clerk's Transcripts on appeal in this action which

motion was heard in Department 11 on October 5, 1956. Bruce Murchison, attorney for appellants, was present at the argument of such motion, and as pointed out by respondent, the appellants "at that time could have called to the Court's attention the matter which he now wishes included in the record but he failed so to do".

As to the prejudice that will ensue to respondent should the motion herein be granted in its entirety, it is urged that "the accident to respondent occurred on February 11, 1953, and the trial of the within action ended on March 5, 1956. It has taken from that date until the present time to get the record filed in this court. Respondent is a little girl now nine years of age whose parents have no funds, and who urgently needs two additional operations to correct conditions caused by the accident."

[1,2] As stated in In re Estate of Easton, 136 Cal.App. 213, 216, 28 P.2d 376, 377, "* * * parties to an action must take notice of the contents of a record that comes to appellate courts". In the instant case it is plain that appellants were not taken by surprise nor have they shown any excusable neglect or other good cause to secure the relief prayed for. We are satisfied that the application should be denied insofar as it asks for inclusion in the record of all instructions requested by the parties and refused by the Court. This because of the unexcused delay of appellants in seeking their relief, and further because of the manifest injustice that would occur to respondent.

It is therefore ordered that the record on appeal be augmented by adding to the clerk's transcript on appeal herein a supplement showing separately each instruction given to the jury, by whom each such instruction was requested, and whether the same was given as requested or was given as modified by the Court.

And it is further ordered that the Clerk of the Superior Court of the County of Los Angeles be, and he is hereby directed to prepare said supplemental transcript in accordance with this order.

It is further ordered that the time for appellants to file their opening brief herein be and it is hereby extended until 30 days after said supplemental transcript herein ordered has been filed in this Court.

In all other respects the application is denied.



147 Cal.App.2d 213

Harry S. GORDON and David J. Williams, co-partners, doing business under the fictitious firm name and style of Independent Home Supply Co., Plaintiff and Respondents,

v.

Allen SCHWARTZ, Defendant and Appellant.

Civ. 21684.

District Court of Appeal, Second District, Division 1, California.

Dec. 27, 1956.

Rehearing Denied Jan. 21, 1957.

Hearing Denied Feb. 19, 1957.

Action brought by plaintiffs, who were engaged in the house-to-house installment sales business, against one of their former collector-salesmen, who had allegedly gone into same business for himself and solicited business from customers he had formerly served for plaintiffs. The Superior Court of Los Angeles County, Thurmond Clarke, J., granted injunctive and other relief, and defendant appealed. The District Court of Appeal, Fourt, J., held that evidence sustained decree.

Affirmed.

1. Master and Servant ⇐66

In action brought by plaintiffs, who were engaged in the house-to-house installment sales business, against one of their former collector-salesmen, who had

allegedly gone into same business for himself and solicited business from customers he had formerly served for plaintiffs, plaintiffs were entitled to recover for all damage proximately caused by defendant's wrong; and, on record presented, judgment for $500 was not excessive. West's Ann. Civ.Code, § 3333.

2. Injunction ⇐128
Master and Servant ⇐66

In action brought by plaintiffs, who were engaged in the house-to-house installment sales business, against one of their former collector-salesmen, who had allegedly gone into same business for himself and solicited business from customers he had formerly served for plaintiffs, evidence sustained decree granting injunctive relief and damages.

Harry A. Franklin, Los Angeles, for appellant.

Joseph Stell, Los Angeles, for respondents.

FOURT, Justice.

This is an appeal by the defendant from a decree enjoining defendant from, among other things, soliciting or accepting certain business of persons who were customers of the plaintiffs during the period of the employment of defendant by plaintiffs, and awarding plaintiffs $500 damages.

A résumé of the facts established, and some of the reasonable inferences to be drawn therefrom, is as follows: The plaintiffs are, and for about eight and one-half years had been, engaged in the house-to-house installment sales business. Their business is carried on by selling merchandise, generally to a housewife in the low income bracket, at her house, with either a down payment of a dollar or two, or with no down payment. Weekly installments of one or two dollars each are thereafter collected by the plaintiffs through their collector-salesman. The collector-salesman has a dual task: he calls at the house of the customer each week on a scheduled day and collects the small installment payment; at the same time he makes what in the trade are called "add-on sales," which are sales of additional merchandise the cost of which is added to the customer's account. The customer comes to rely on the plaintiffs, through the media of their collector-salesmen, as her supplier of the type of goods which plaintiffs handle.

Plaintiffs carry a line of general merchandise, clothing, household goods and appliances. Their customers are unique in that they are, very largely, persons in the low income brackets and many of them cannot afford to patronize more than one house-to-house credit-installment supplier. To such persons, the plaintiffs' services and credit policy are of special appeal.

Plaintiffs have about 9,000 accounts in Los Angeles county. Their customers were obtained, ordinarily, by (1) references from old customers; (2) employees of plaintiffs canvassing the various homes for the sole purpose of attempting to make an initial sale and (3) plaintiffs purchasing accounts from companies whose business it was to canvass and make the opening sale on an installment basis. Many of the persons who opened such accounts would make a single purchase and thereafter pay off the account, but some would continue to buy and these formed the hard core of regular, steady customers who bought merchandise from the plaintiffs for many years. There was considerable turnover in the new accounts but plaintiffs' regular customers could be counted on to buy month after month and year after year.

The plaintiffs' cost of merchandise plus costs of sales and collections was about 70% of the gross sales price. After computing overhead, plaintiffs made a net profit of approximately 10%. These percentages continued fairly constant and a few hundred customers one way or the other did not raise or lower the overhead materially.

Defendant was employed by the plaintiffs as a collector-salesman in March, 1954, and shortly thereafter he was assigned to a route. For each day of the week he was

given a set of about 100 cards and on each card was the name of a customer of plaintiffs on the particular route, her address, a list of the merchandise previously bought by her from the plaintiffs, and the dates and amounts of payments for the period during which she had been a customer of the plaintiffs; also, the money balance due on the account and the name of the person who referred or obtained the customer in the first instance. The weekly route of about 500 customers assigned to the defendant was located in the district known as East Los Angeles. The defendant serviced this regular route of plaintiffs' customers for six months, seeing each customer on the same day of each week during that time. When the card indicated that the balance of the account and the credit rating of the customer warranted it, the defendant would attempt to sell additional merchandise to the customer. The customers were induced to and did rely upon defendant being at their house one week from the day of his last call.

About September 4, 1954, defendant left plaintiffs' employ. He immediately started operating the same type of business for himself, selling the same kind of merchandise. He went back along his old route and methodically visited the customers of plaintiffs whose names, identities and location he had learned, and whose personal acquaintance he had made, during and by reason of his former employment with the plaintiffs. He visited these customers without any prior invitation or request on their part to do so, with the exception of a very few instances, and he solicited business from them and advised them that he was now engaged in the same business for himself. With the knowledge which he had acquired from the plaintiffs' customer cards he asked, suggested and urged the customer to buy merchandise from him upon the same installment basis. If he did not succeed in selling the customer the first time, he would call back regularly. After he made a sale he would call on the customer regularly each week, collecting the weekly installment and making substantial add-on sales, which were greatly facilitated by his having sold them merchandise during his employment with the plaintiffs.

Defendant solicited business from most of the customers on whom he called while in the plaintiffs' employ and he succeeded in diverting to himself in many cases all, and in some cases a portion, of the business of about 100 customers. He admitted selling a total of $2,676.45 in merchandise to 54 of plaintiffs' customers.

The plaintiffs, upon learning of defendant's activities, instituted this action and on December 2, 1954, a preliminary injunction was issued. Thereafter, defendant continued to make sales in spite of the injunction. After a full and complete hearing was had, the trial court granted a permanent injunction and awarded the plaintiffs $500 damages, from which judgment the defendant prosecutes this appeal upon a settled statement.

[1] The defendant contends that the evidence is insufficient to sustain the judgment for $500 damages. The defendant admitted to sales of merchandise in a total sum of $2,676.45 to but fifty-four of the plaintiffs' customers. There would be nothing unreasonable under the facts of this case to conclude that the sales to the fifty-four customers were representative of the sales made by the defendant to all of the approximately one hundred customers of the plaintiffs. The trial court could well have concluded from the evidence that the defendant sold $5,000 worth of merchandise of a kind usually sold by the plaintiffs to those of plaintiffs' customers whom defendant learned of by reason of his employment by the plaintiffs. There was testimony that the net profit is always about 10% of the gross sales. Furthermore, the plaintiffs would not necessarily be limited to such an amount as damages. They were entitled to recover for all damages proximately caused by the defendant's wrong. Civ.Code, § 3333.

Defendant asserts that there was no confidential information not readily accessible to his competitors and further

contends that he did not injure the plaintiffs. A reading of the facts of this case completely answers any such contention.

In the case of George v. Burdusis, 1942, 21 Cal.2d 153, at pages 159–161, 130 P.2d 399, at page 402, the court stated: "It is well settled in California that after an employee who worked on a retail delivery route has left the service of his employer, his use of the customer list to solicit business for another person is an unwarranted disclosure of trade secrets. Under such circumstances, a court of equity will enjoin not only the solicitation of the customers of the first employer but also the acceptance of any orders from them. [Citing cases.] However, where the customers are wholesale buyers whose names appear in directories, and they are so few in number that anyone might readily discover them, it has been held that the employer's list is not secret and confidential information. Avocado Sales Co. v. Wyse, 122 Cal.App. 627, 10 P.2d 485 * * *.

"The rule of Avocado Sales Co. v. Wyse, supra, has, however, been expressly limited by subsequent decisions of this court. It 'is not merely the knowledge of the identity of the customers, *but the friendly contact with them, which is important to the solicitors* * * *.' *Their personal acquaintance with customers and knowledge of 'their respective places of residence, their peculiar likes and fancies and other characteristics, a knowledge of which would greatly aid them in securing and retaining the business of said former customers,' is sufficient to invoke equitable protection against the subsequent use by a former employee of such information.* Dairy Dale Co. v. Azevedo, 211 Cal. 344, 295 P. 10.

"And the list of customers, not ordinarily entitled to judicial protection, may become a trade secret, if there is confidential information concerning the value of these customers. * * *

"As a customer list within the rules expressed may exist in the memory of the employee as well as in writing (Avocado Sales Co. v. Wyse, supra), the finding that no route book ever existed for the customers of the appellants served by Tom Burdusis is not determinative of the appellants' rights. Tom Burdusis testified that he carried in his mind his list of customers, and they are as easily identified as those in the cases of Avocado Sales Co. v. Wyse, supra, and Gloria Ice Cream & M. Co. v. Cowan, supra [2 Cal.2d 460, 41 P.2d 340]." (Emphasis added.)

Aetna Building Maintenance Co. v. West, 39 Cal.2d 198, 246 P.2d 11, decided in July, 1952, was a case wherein a former employee with an intimate knowledge of his former employer's customers, business operations and trade secrets, went out to compete with his former employer. The court said, 39 Cal.2d at pages 203–205, 246 P.2d at page 14: "* * * The question, therefore, is whether West was guilty of unfair competition in soliciting Aetna's customers.

* * * * * *

"'Solicit' is defined as: 'To ask for with earnestness, to make petition to, to endeavor to obtain, to awake or excite to action, to appeal to, or to invite.' Black's Law Dictionary, 3d ed., p. 1639. 'It implies *personal* petition and importunity addressed to a particular individual to do some particular thing, * * *.' Golden & Co. v. Justice's Court, 23 Cal.App. 778, 798, 140 P. 49, 58. It means: '"To appeal to (for something); to apply to for obtaining something; to ask earnestly; to ask for the purpose of receiving; to endeavor to obtain by asking or pleading; to entreat, implore, or importune; to make petition to; to plead for; to try to obtain."' People v. Phillips, 70 Cal.App.2d 449, 453, 160 P.2d 872, 874.

* * * * * *

"However, even in the absence of solicitation, Aetna is entitled to protection against West's use or disclosure in competition with it, of trade secrets given to him only for the purpose of carrying on his employer's business. (Riess v. Sanford, 47 Cal.App.2d 244, 246–247, 117 P.2d 694; Germo Mfg. Co. [of Missouri] v. McClellan, 107 Cal.App. 532, 541, 290 P. 534; §

2860 Labor Code; Rest., Agency, § 396(b); see cases collected in Junker v. Plummer, 320 Mass. 76, 67 N.E.2d 667, 165 A.L.R. 1453. * * *

"* * * Under such circumstances, as stated in George v. Burdusis, 21 Cal.2d 153, 159, 130 P.2d 399, and other decisions, to obtain relief against a former employee it must be shown: (1) The information was confidential and not readily accessible to competitors; (2) The former employee solicited the customers of his former employer with intent to injure him; (3) The former employee sought out certain preferred customers whose trade is particularly profitable and whose identities are not generally known to the trade; (4) The business is such that a customer will ordinarily patronize only one concern; (5) The established business relationship between the customer and the former employer would normally continue unless interfered with. California Intelligence Bureau v. Cunningham, 83 Cal.App.2d 197, 202, 188 P.2d 303, and cases there cited.

* * * * * *

"Equitable protection may be invoked against the subsequent use by a former employee of knowledge of the '"peculiar likes and fancies and other characteristics"' of the former employer's customers where such knowledge will aid him in securing and retaining their business. [Citing cases.] This rule applies where friendly contact with customers is important to solicitors, a circumstance typical of the so-called 'trade route' cases. It has also been applied to situations involving a knowledge of the customer's desire for specialized information, his preference for certain products, and his buying habits. California Intelligence Bureau v. Cunningham, supra, 83 Cal.App.2d at page 204, 188 P.2d 303; Wallich v. Koren, 80 Cal.App.2d 223, 227, 181 P.2d 682."

[2] Whether the Aetna case sets down the rule that it is necessary to show all of the five items recited above (paragraph [8] of the Aetna decision, 246 P.2d 15) before relief against a former employee may be had, or whether it was intended otherwise, as is suggested in a law review article in 41 Cal.L.Rev. 38 (1953), does not concern us for the reason that we are of the opinion that in the instant case all of the factors, in any event, were present.

The remaining contentions of the defendant are, in our opinion, without merit.

Judgment affirmed.

WHITE, P. J., and DORAN, J., concur.



147 Cal.App.2d 385

Florence CROSAT, Plaintiff and Respondent,

v.

Arthur L. PAIGE, Defendant and Appellant.

Civ. 17025.

District Court of Appeal, First District, Division 1, California.

Jan. 2, 1957.

Action by unmarried woman to have unmarried man declared to be father of woman's child and to obtain order for support of the child. The Superior Court, County of San Mateo, A. R. Cotton, J., after trial before a jury, granted woman's motion for directed verdict and entered judgment on order for directed verdict and order for support, costs, and attorney's fees, and man appealed. The District Court of Appeal, Peters, P. J., held that evidence upon issue of paternity was sufficient to preclude direction of verdict for woman.

Judgment and order reversed.

1. Bastards ⇐70

In action by unmarried woman to have unmarried man declared father of her child and to obtain an order for support of child, evidence upon issue of paternity

was sufficient to preclude direction of verdict for woman.

2. Trial ⇐170

Motion for directed verdict may be granted upon plaintiff's motion where, upon the whole evidence, the cause of action alleged in the complaint is supported, and no substantial support is given to the defense alleged by the defendant.

3. Trial ⇐178

Upon motion for directed verdict, the trial court has no power to weigh the evidence or pass upon conflicts in the evidence or upon credibility of witnesses.

4. Trial ⇐143

If there is a material conflict in the evidence, motion for directed verdict must be denied.

5. Bastards ⇐70

Fact that defendant denied, in his deposition, that he had ever had sexual intercourse with plaintiff, but at trial of paternity proceeding testified that he had had sexual intercourse prior to certain date, was matter which should have been submitted to jury, not decided by trial court on plaintiff's motion for a directed verdict.

6. Bastards ⇐59

In paternity proceeding, refusal to permit plaintiff to be asked, when testifying as an adverse witness under the Code of Civil Procedure, whether she had had sexual relationships with other men during period in which she conceived, was error. West's Ann.Code Civ.Proc., § 2055.

7. Bastards ⇐59

Evidence of plaintiff's sexual relations if any, with other men at or about time of her conception is admissible in paternity proceeding.

8. Trial ⇐45(1)

No offer of proof is necessary where the examination is of an adverse witness. West's Ann.Code Civ.Proc., § 2055.

Robert P. McNamee, San Jose, for appellant.

Leonoudakis & Kleines, San Francisco, for respondent.

PETERS, Presiding Justice.

This action was brought by the plaintiff, an unmarried woman, to have defendant, also unmarried, declared to be the father of plaintiff's child, and for an order for the support of the child. After a trial before a jury, the trial judge granted the plaintiff's motion for a directed verdict. From a judgment based on the order for a directed verdict and from an order for support, costs and attorney's fees defendant appeals.

[1–4] The case is a simple one. The child was admittedly conceived in June of 1952. Plaintiff testified that on the night of June 14th and early morning of June 15th of that year defendant had intercourse with her. Defendant, while admitting being in the company of plaintiff on the night in question, denied having intercourse with plaintiff on that night or any other time after April, 1952. In the face of this conflict in the evidence the trial court granted a directed verdict for the plaintiff. This was error. "A motion for a directed verdict may be granted upon the motion of the plaintiff, where, upon the whole evidence, the cause of action alleged in the complaint is supported, and no substantial support is given to the defense alleged by the defendant." Walters v. Bank of America National Trust & Savings Ass'n, 9 Cal.2d 46, 49, 69 P.2d 839, 840, 110 A.L.R. 1259. The trial court, on such a motion, has no power to weigh the evidence, or to pass upon conflicts in the evidence or upon the credibility of the witnesses. If there is a material conflict in the evidence the motion must be denied. In re Estate of Flood, 217 Cal. 763, 21 P.2d 579; In re Estate of Lances, 216 Cal. 397, 14 P.2d 768.

Tested by these standards it is obvious that the trial court was in error in granting the motion for the directed verdict.

Both principals admit first meeting in 1948 while they were both employed in San Francisco by the same company. They

began dating early in 1951. Thereafter, defendant's job required him to do considerable traveling away from San Francisco, but they corresponded. Plaintiff testified that late in January or early in February, 1952, she visited defendant in Los Angeles and they had intercourse; that she again went to Los Angeles and saw defendant in April of 1952, and again they had intercourse. Plaintiff also testified that on June 14, 1952, she and defendant had dinner with friends in San Francisco, and then, in defendant's automobile, went to their favorite "necking" spot at Bernal Heights, where, between 1:00 a. m. to 6:30 a. m. of June 15th they engaged in the acts of intercourse.

Defendant admitted having intercourse with plaintiff in Los Angeles in April of 1952, but unequivocally and positively denied having intercourse with her at any time thereafter. These denials appear in at least 15 different places in the reporter's transcript.

Plaintiff admits that she had her regular menstrual period early in June, 1952, and that she first passed her period in July of 1952. The child was born March 18, 1953. The plaintiff designated defendant as the father of the child on the birth certificate.

Defendant admits that he took plaintiff to a dinner party on the night of June 14, 1952, and that thereafter he took plaintiff to Bernal Heights, and sat with her in the car until the morning of June 15th. His version of what there occurred is that plaintiff delivered an ultimatum, that is, that they get married or quit seeing each other. He testified that plaintiff told him that she had been seeing another man who had proposed marriage and that she wanted to know where she stood with defendant. Defendant told her that, because of his financial responsibilities, because of his mother's health, and because his job required him to travel so much, he could not and would not marry her. Defendant repeatedly denied having intercourse with plaintiff on this occasion.

Blood tests of all those involved demonstrated that defendant could have been the father of the child.

The mother of plaintiff testified that defendant called at her home about nine months after the baby was born and referred to the baby as "my son" and offered to give him a good education. Defendant admitted this visit but denied the admission. Defendant testified that some time after the child was born he began paying plaintiff $50 a month. He stated that he did this as a matter of "expediency" to try and prevent a scandal on plaintiff's promise not to press the paternity action.

Plaintiff contends that in spite of defendant's positive denials of intercourse after April of 1952, defendant in fact admitted paternity in four letters written by him to her. The first of these letters is dated August 11, 1952, and the last March 29, 1954. We have read these letters carefully. We find in them no unambiguous and unequivocal admission of paternity, although, when read in connection with plaintiff's testimony, they would support a jury finding of paternity. It is unnecessary to quote all four letters. Typical is the letter of August 11, 1952, written shortly after plaintiff had informed defendant by letter that she had passed her July menstrual period. In this letter defendant stated: "I certainly hope your fears will not be realized, as we would *both* severely jeapordize [sic] our futures financially, and what is more important, socially if any scandal should arise. Naturally I'm just as worried as you, and for for [sic] the first time in many years, will say my prayers in hopes everything will work out for the best." Immediately preceding this passage is the following: "I hope by the time this reaches you everything will be back on schedule,—it seems highly unlikely that anything drastic will occur, at least on *my* account if you will recall careful [sic] the details and circumstances of our last meeting. Perhaps if you will read up on some scientific explanation of the 'facts of life' you will understand what I mean. At any rate, there are *several* causes for

the cessation which you mentioned, age, emotional disturbance, diet, etc. I certainly hope your fears will not be realized * * *."

These passages are representative of the so-called admissions alleged to have been made in the letters. It is obvious that they do not constitute an unequivocal admission of paternity. They are subject to interpretation and explanation. Moreover, even if so interpreted they would conflict with the positive denials of defendant at the time of trial. Clearly, these were matters that should have been submitted to and determined by the jury.

[5] Plaintiff makes much of the fact that defendant lied in his deposition in which he stated that he had never had intercourse with plaintiff, and then at the trial testified as to the April, 1952, episode. The effect of this lying, was, of course, a matter that should have been submitted to the jury and not decided by the trial court on a motion for a directed verdict.

[6–8] Another error committed by the trial court should be mentioned. Plaintiff was asked, when testifying as an adverse witness under section 2055 of the Code of Civil Procedure, whether she had had sexual relationships with other men during June and July of 1952. Plaintiff objected on the grounds that the question was "purely irrelevant, immaterial." The objection was sustained. On appeal plaintiff seeks to sustain the ruling on the grounds that defendant made no offer of proof. The ruling was clearly erroneous. Evidence of plaintiff's sexual relations with other men at or about the time of conception is admissible. In re Estate of Gird, 157 Cal. 534, 108 P. 499; Berry v. Chaplin, 74 Cal.App.2d 652, 169 P.2d 442. It is equally clear that no offer of proof is necessary where the examination is of an adverse witness. Tossman v. Newman, 37 Cal.2d 522, 233 P.2d 1; Lawless v. Calaway, 24 Cal.2d 81, 147 P.2d 604.

The order of support appealed from falls with the judgment.

The judgment and order appealed from are reversed.

BRAY and FRED B. WOOD, JJ., concur.



147 Cal.App.2d 415

Jared R. HAINES and Mary K. Haines, his wife, Plaintiffs and Appellants,

v.

Jerry FISHER, Elsie Fisher, Betty Cook, Julia M. Chandler, Title Insurance and Trust Company, and Southern California Building and Loan Association, Defendants,

Jerry Fisher and Elsie Fisher, Respondents.

Civ. 22086.

District Court of Appeal, Second District, Division 1, California.

Jan. 2, 1957.

Rehearing Denied Jan. 28, 1957.
Hearing Denied Feb. 27, 1957.

Purchasers brought action against vendors for rescission of purchase of realty or for damages if rescission should be denied. The Superior Court of Los Angeles County, Eugene P. Fay, J., entered judgment for purchasers in an allegedly inadequate amount and provided that amount for which vendors were liable should be applied against purchase money note, which was not due and payable, and the purchasers appealed. The District Court of Appeal, Doran, J., held that where vendors caused and procured a false report to be made by termite inspector that property was free of termites, and purchasers purchased the realty for $11,950 in reliance on such report, and property was in fact badly infested with termites and, because of termite infestation, was worth only $8,500 at time of sale, purchasers were entitled to damages in amount of $3,450, and not merely in amount of $1,600 as found by Superior Court, and

that vendors were not entitled to have amount of damages set off against purchase money note.

Judgment modified and, as modified, affirmed.

1. Fraud ⇐62

Where vendors caused and procured a false report to be made by termite inspector that property was free of termites, and purchasers purchased the realty for $11,950 in reliance on such report, and property was in fact badly infested with termites and, because of termite infestation, was worth only $8,500 at time of sale, purchasers were entitled to damages in amount of $3,450, and not merely in amount of $1,600 as found by Superior Court.

2. Set-Off and Counterclaim ⇐36

Vendors, who were liable to purchasers for damages for causing and procuring a false report to be made by termite inspector that property was free of termites, were not entitled to set off damages against purchase money note, which was not yet due and payable .

William H. Haupt, Inglewood, for appellants.

Emmett A. Tompkins, Alhambra, for respondents.

DORAN, Justice.

This is an action for damages.

The facts, as recited in appellants' brief and supported by the record, are as follows:

"In this action for rescission of a purchase of real property, or for damages if rescission be denied, the plaintiffs had judgment against the fraudulent sellers for damages. In the complaint it is alleged that the purchase price was $11,950, and in the findings this was found to be true. This property was represented by defendant sellers, as being in good condition and free of all termite or dry-rot infestation; these representations were made with intent that the plaintiffs should rely thereon, the said defendants knowing that the plaintiffs were wholly ignorant of any facts which would have revealed to them the presence of termites or dry-rot. Plaintiffs believed these representations, and in reliance thereon purchased this property. The representations were in fact false and were known by these defendants to be false, and in fact they knowingly supressed the true facts as to the condition of this property. The property was badly infested with and damaged by termites and dry-rot.

"The Court found that the reasonable market value of the property purchased, at the time of this sale, was $8,500 due to this termite and dry-rot condition, but concluded that plaintiffs were entitled to judgment for only the sum of $1,600 as against the fraudulent vendors. The Court further concluded that this sum should be applied against a note held by the fraudulent vendors, taken as a part of the sale price, which was payable at $44.50 per month, and not due and payable for a long time thereafter. On May 29, 1956, judgment in keeping with these conclusions was entered."

It is contended on appeal that the trial court should be directed to modify the judgment in keeping with the facts as found so as to allow the sum of $3,450 damages and to eliminate the provisions for setoff and as so modified the judgment should be affirmed.

In connection with the sale and purchase of the property a termite inspector checked the condition of the property and reported the property to be free of termites. The court found that defendants had "caused and procured" a false report to be made by the termite inspector. The court also found that the inspector was not the employee or agent of plaintiff.

Respondent contends that, "the only person liable is C. Harold MacInnes, the termite contractor issuing the certificate on whom everyone relied".

[1, 2] Appellants' contentions are supported by the record and the law. It is

ordered that the judgment be modified so as to allow the sum of $3,450 damages and that provision for setoff be eliminated. As so modified the judgment is affirmed. Appellants to recover costs on appeal.

WHITE, P. J., and FOURT, J., concur.



147 Cal.App.2d 352

The PEOPLE of the State of California, Respondent,

v.

Inez BROWN, Appellant.

Cr. 5686.

District Court of Appeal, Second District, Division 1, California.

Dec. 31, 1956.

Rehearing Denied Jan. 10, 1957.

Hearing Denied Jan. 30, 1957.

Prosecution for unlawful possession of heroin together with a charge of a prior misdemeanor conviction for narcotics addiction. The Superior Court of Los Angeles County, Thomas L. Ambrose, J., entered judgment of conviction and defendant appealed therefrom and from order denying her motion for new trial. The District Court of Appeal, White, P. J., held that evidence sustained finding that arresting police officer had such knowledge as would lead a man of ordinary care and prudence to believe that defendant was guilty, so as to authorize arrest without a warrant and subsequent search of defendant whom he had observed transferring some object to another woman in a back alley at night.

Judgment affirmed; attempted appeal from order dismissed.

1. Arrest ⇐63(4)

If the facts of which the officer has knowledge are such as would lead a man of ordinary care and prudence to believe, or to entertain an honest and strong suspicion, that the person is guilty, the police officer has such "reasonable cause" as would justify an arrest without a warrant. West's Ann.Pen.Code, § 836, subds. 3, 5.

2. Arrest ⇐63(4), 71

In prosecution for unlawful possession of narcotics, evidence was sufficient to sustain finding that officer had such reasonable cause to believe that defendant had committed a felony as would authorize subsequent arrest and search of defendant whom officer had observed transferring material to another woman in a back alley late at night. West's Ann.Health & Safety Code, §§ 11500, 11721; West's Ann.Pen. Code, § 836, subds. 2, 3, 5.

3. Arrest ⇐63(4)

Reasonable and probable cause for belief that a person has committed a felony so as to justify his arrest without a warrant, must be measured by the facts presented to the officer at the time he is required to act. West's Ann.Pen.Code, § 836, subds. 3, 5.

Minsky & Garber, Albert C. Garber, Los Angeles, for appellant.

Edmund G. Brown, Atty. Gen., Bonnie Lee Hansen, Deputy Atty. Gen., for respondent.

WHITE, Presiding Justice.

In an information filed by the District Attorney of Los Angeles County, defendant was charged with a violation of Section 11500 of the Health and Safety Code, a felony, in that she unlawfully had in her possession heroin, and was also charged with a prior misdemeanor conviction for narcotics addiction in violation of Section 11721 of the aforesaid code, which prior conviction was subsequently admitted. To the offense charged in the information defendant pleaded not guilty. Trial by jury was duly waived and by stipulation the People's case in chief was presented on the transcript of testimony adduced at the preliminary examination. Both parties reserved the right to introduce additional tes-

timony. At the trial, when the judge announced he had read and considered the testimony contained in the transcript of the preliminary examination, and following argument by counsel, both parties rested after defendant's objection to all evidence presented by the prosecution was overruled. Defendant was adjudged guilty and sentenced to the California Institution for Women for the term prescribed by law.

This appeal is from the judgment of conviction and from "the order * * * denying defendant's motion for a new trial". Since the record reveals that no motion for a new trial was made, the attempted appeal therefrom must be dismissed.

The following will serve as a fair epitome of the factual background surrounding this prosecution. On January 15, 1956, at about 1:35 a. m., Officer Salagi was in an alley in the rear of the Chatterbox Hotel at 441 Stanford Street in the City of Los Angeles. He testified that, "I know that narcotics are sold in that area—quite a bit of narcotics sold in that area"; that he and his partner were in that area investigating vice conditions. That defendant and another woman walked into the alley and appeared to be conversing. The officer was about fifty or sixty feet from the two women and the alley was very well lighted at this point. The defendant was observed placing something in the other woman's hand, when the officer heard what sounded like a coin hit the pavement. The defendant bent over, picked up the object, and placed it in the lady's hand. The other lady was observed removing something from her purse and placing it in the defendant's hand. The latter then placed her hand in the area of her breast. For the purpose of establishing probable cause for making the arrest, the officer was permitted to testify that this incident "indicated to me that there was a transfer of narcotics taking place." The other woman left the area first and then defendant followed her out of the alley. Officer Salagi then left the area and found the defendant at the corner of 5th and Stanford about four minutes later. The defendant was there placed under arrest.

The officer removed a bindle from the left side of a jumper bag where the defendant was observed to have placed an object after the transaction referred to above. The powder contained in the bindle was identified as heroin. The defendant stated to the arresting officer that she had bought the heroin from one Fay Harris and paid $4 for it. The officer further testified that he was approximately 50 or 60 feet away from the two women at the time he observed them in conversation. He could not hear what they were saying. With regard to anything being transferred by one of the women to the other the officer testified:

"Q. With reference to this alleyway here, you actually didn't see anything transferred from one person to the other, did you?

"A. No, sir, just the way their hands were coming together and the coin dropping to the pavement and the defendant picking the coin up."

Appellant's sole ground for reversal of the judgment is that the trial court committed prejudicial and reversible error in overruling her objection to the introduction into evidence of the bindle of heroin and in refusing to suppress such evidence on the ground that the same was obtained as the result of an illegal arrest and consequent unlawful search and seizure. Appellant earnestly insists that the facts hereinbefore narrated did not furnish reasonable or probable cause for her arrest and that therefore, the aforesaid narcotic was erroneously received in evidence because it was the product of the claimed unlawful trespass upon appellant's constitutional rights.

In United States v. Snyder, D.C., 278 F. 650, 658, reasonable or probable cause is defined as "a reasonable ground of suspicion, supported by circumstances sufficiently strong in themselves to warrant a cautious man in his belief that the person accused is guilty of the offense with which he is

charged." See also Hernandez v. United States, 9 Cir., 17 F.2d 373; People v. Kilvington, 104 Cal. 86, 91, 37 P. 799; Cook v. Singer Sewing Machine Co., 138 Cal. App. 418, 422, 32 P.2d 430; People v. Moore, 141 Cal.App.2d 87, 89, 299 P.2d 691.

Penal Code, Section 836(2) authorizes an officer to make an arrest without a warrant, "When a person arrested has committed a felony * * *", or under subdivision (3) "When a felony has in fact been committed, and he has reasonable cause for believing the person arrested to have committed it", or under subdivision (5) "At night, when there is reasonable cause to believe that [the person arrested] has committed a felony."

[1] Therefore, the primary question presented to us is whether the facts of which the officer herein had knowledge were such " 'as would lead a man of ordinary care and prudence to believe, or entertain an honest and strong suspicion, that the person [appellant] is guilty' ". People v. Kilvington, supra, 104 Cal. at page 92, 37 P. at page 801.

[2] Applying this rule to the facts of the case now engaging our attention, we are satisfied that it must be held that the officer had reasonable cause to believe that appellant may have committed a felony. Officer Salagi and his partner were patrolling a district where, as testified by Officer Salagi, "I know that narcotics are sold in that area—quite a bit of narcotics sold in that area". The officers were investigating vice conditions in the vicinity. It was 1:35 o'clock in the morning. The scene was a back alley. The officer observed appellant and another woman walk about 15 feet into the alley. They appeared to be conversing with each other, "I observed the defendant here take her hand and the other lady had her hand in this manner (indicating) down, with her palm up, and she was placing something into the other lady's hand—that is, the defendant was placing something into this lady's hand.

"I heard what sounded like a coin hitting the pavement and this defendant then bent over and picked up this object, so that sounded like the ring of a coin and she picked it up and placed it into the hand of this other lady, and then this other lady was observed to go through her purse, take something out and place it in this defendant's hand.

"Then I observed this defendant as she placed her hand up in this area here (indicating) of her breast, and the other lady left the alley first and this defendant followed her, and I left the area where I was and found the defendant at the southwest corner of 5th and Stanford, where I placed her under arrest."

[3] Reasonable and probable cause for belief that a person has committed a felony must be measured by the facts presented to the officer at the time he is required to act. People v. Kilvington, supra, 104 Cal. at page 93, 37 P. 799; People v. Hupp, 61 Cal.App.2d 447, 449, 143 P.2d 84. The time of the night; the location of appellant's activities together with her unusual conduct as observed by the officer, we are satisfied present such a state of facts " 'as would lead a man of ordinary care and prudence to believe, or entertain *an honest and strong suspicion*, that the person is guilty' ". People v. Kilvington, supra, 104 Cal. at page 92, 37 P. at page 801. (Emphasis added.) See also People v. Rodriguez, 140 Cal.App.2d 865, 869, 296 P.2d 38; People v. Blodgett, 46 Cal.2d 114, 117, 293 P.2d 57; People v. Martin, 46 Cal.2d 106, 107, 108, 293 P.2d 52; People v. Jiminez, 143 Cal.App.2d 671, 300 P.2d 68.

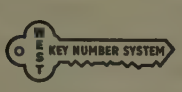
We have examined the cases of People v. Cahan, 44 Cal.2d 434, 282 P.2d 905; People v. Brown, 45 Cal.2d 640, 290 P.2d 528; People v. Simon, 45 Cal.2d 645, 290 P.2d 531, and other cases relied upon by appellant but find them factually distinguishable from the case at bar and we do not find therein anything which militates against the conclusion at which we have arrived herein, under the existing facts presented by the record now before us.

While it may not be entirely clear whether the actual arrest occurred before or

after the search and seizure, it has been held that if an arrest is lawful, the search incident thereto would not be unlawful merely because it preceded the arrest. People v. Boyles, 45 Cal.2d 652, 655, 290 P.2d 535; People v. Martin, 45 Cal.2d 755, 761, 762, 290 P.2d 855.

The attempted appeal from the order denying a motion for a new trial is dismissed. The judgment is affirmed.

DORAN and FOURT, JJ., concur.



147 Cal.App.2d 197

Julia JONES and John Jones, Husband and Wife, Plaintiffs and Appellants,

v.

S. W. HOTCHKISS and Mrs. S. W. Hotchkiss, Defendants and Respondents.

Civ. 21776.

District Court of Appeal, Second District, Division 3, California.

Dec. 26, 1956.

Action for personal injuries sustained by a house worker when she slipped and fell on the floor of a service porch in defendants' residence. The Superior Court, Los Angeles County, Wallace L. Ware, J., entered judgment of nonsuit, and house worker appealed. The District Court of Appeal, Vallée, J., held that evidence presented questions for the jury as to whether the floor of service porch in question was sufficiently hard and smooth to be unsafe due to wax or sawdust upon it, and as to whether defendants exercised ordinary care with respect to the condition of such floor.

Reversed.

1. Trial ⇐142

If inferences can reasonably and fairly be deduced from the evidence which sustain the allegations of a complaint, it is error to grant a motion for a judgment of nonsuit.

2. Negligence ⇐134(2)

Negligence may be established by "circumstantial evidence", which is nothing more than one or more inferences which may be said to arise reasonably from a series of proven facts.

See publication Words and Phrases, for other judicial constructions and definitions of "Circumstantial Evidence".

3. Negligence ⇐121(2)

No inference of negligence arises from mere fact of a fall or from mere fact that a floor was slippery, in the absence of proof of some foreign substance on the floor or proof of a dangerous condition created by or known to defendant.

4. Negligence ⇐48, 121(1)

To impose liability on the owner of a building for injuries sustained by an invitee, it must be shown that a dangerous condition existed, that the owner knew or should have known of it, and, while under some circumstances, negligence may be inferred from the existence of a dangerous condition, the burden rests on invitee to show the existence of a dangerous condition and that the owner knew or should have known of it.

5. Master and Servant ⇐286(16)

In action for personal injuries sustained by a house worker when she slipped and fell on the floor of a service porch in defendants' residence, evidence presented questions for the jury as to whether the floor of service porch in question was sufficiently hard and smooth to be unsafe due to wax or sawdust upon it, and as to whether defendants exercised ordinary care with respect to the condition of such floor.

S. M. Dana, Beverly Hills, for appellants.

Crider, Tilson & Ruppé and Jerome M. Budinger, Los Angeles, for respondents.

VALLÉE, Justice.

Appeal by plaintiffs from a judgment of nonsuit in an action for damages for personal injuries sustained by plaintiff Julia Jones when she slipped and fell on the floor of the service porch in defendants' residence.

The complaint alleged that plaintiff Julia Jones was employed by defendants as a day houseworker on their premises; defendants "placed and permitted to remain thereupon sawdust and/or other foreign substances which maintained a dangerous condition" on the premises; as a proximate result plaintiff slipped and fell while in the performance of her duties.

It appears to be conceded that Julia Jones was an invitee of defendants and that they were under a duty to exercise ordinary care to maintain the floor of the service porch in a reasonably safe condition.

Plaintiff Julia Jones was employed intermittently by defendants from 1949 to September 21, 1953. On direct, she testified: She worked four days a week for defendants. On September 21, 1953 she was doing cleaning and laundry work.

"Q. Before the accident occurred on the service porch, did you have any other occasion to go to the service porch? A. No, sir, no, sir. * * *

"Q. Will you tell us, please, how you got onto the service porch that day? A. Well, after I finished all in the house, I came on out, on through the kitchen, out on the service porch, picked up the trash cans to take them on out to the incinerator. * * *

"Q. Did you have anything in your hands? A. Not when I went on out, no, sir.

"Q. When did you take the cans in your hands? A. After I got out on the service porch I picked up the trash cans.

"Q. You picked up the trash cans and you went out to the back? A. Yes, sir. * * *

"Q. Did you take the trash to the back? A. Yes, sir.

"Q. In going to the back, were you on any particular pavement or concrete or stones or were you on grass or what were you actually walking on to go from the service porch to the incinerator? A. When you come off the service porch it is concrete. They have little concrete steps to go down, then you are on gravel to the incinerator.

"Q. Did you empty the wastebaskets in the incinerator? A. Yes, sir.

"Q. Did you return to the service porch? A. Yes, sir. * * *

"Q. As you were walking into the service porch, did something happen? A. Yes, sir.

"Q. Tell me there what happened. A. Well, my left feet [sic] slipped out from under me.

"Q. Go ahead. A. And I fell. My left feet [sic] skid out from under me and I fell, fell back.

"Q. When you fell, did you fall onto the ground? A. Yes, onto the floor. * * *

"Q. * * * Now, after you fell did you notice the ground—the floor on which you fell? A. No, sir, I didn't pay any attention, much attention to the floor.

"Q. You didn't pay any attention to the floor itself? A. No, sir.

"Q. Did you notice anything on your clothes that apparently came from the floor? A. Yes, sir, after I had gotten up and gotten—they taken me, I notice that little fine stuff was on my uniform.

"Q. What do you mean? A. Little fine sawdust that come from the machine of Mr. Hotchkiss', little fine stuff.

"Q. You say that was on your uniform? A. Yes, sir.

"Q. What portions of your uniform did you notice this on? A. This little part here, this big part is where I noticed it (indicating).

"Q. Did you notice anything at all on the floor, such as mud, sticks, stones, anything like that? A. No, sir. * * *

"Q. Incidentally, after the accident happened, Mr. Hotchkiss and Mrs. Hotchkiss were both in the house? A. Yes, sir.

"Q. Was there anything said about the accident or the service porch or the sawdust after the accident happened? A. Well, Mrs. Hotchkiss mentioned once that—said that she was going to have Mr. Hotchkiss move his machine in the garage because that sawdust kept the floor slippery and somebody was going to get hurt."

On cross, plaintiff Julia Jones testified that in going through the service porch on her way to the incinerator she did not look at or pay any attention to the floor.

"Q. How about coming back in before you had your fall, let's take it just as you are about to step into the door, go back onto the service porch, did you look to see if there was anything on the floor in front of you? A. No, sir, I didn't even look there, I didn't even pay any attention to the floor, I had the pail in my hand.

"Q. How many steps would you say you took from the time you entered the door until you had your fall? A. I would say I took about three—about three steps, I would say.

"Q. And were you going back the same way that you had come out? A. Yes, sir.

"Q. You were going back over the same path that you used before? A. Yes, sir, I was going back toward the kitchen.

"Q. On the time that you were walking out with the baskets had you slipped? A. Did I slip?

"Q. When you were walking out with the baskets did you slip? A. No, sir. * * *

"Q. Did you notice anything unusual at all about the floor as you walked out with the baskets? A. No, sir.

"Q. It didn't feel slippery, did it? A. I wasn't paying any attention, I didn't pay any attention, I just wasn't paying any attention to the floor.

"Q. Then as you took those first three steps before you had your fall, you didn't notice anything unusual about the floor, during those three steps, did you? A. No, sir.

"Q. And you never did either before or after the accident see anything on the floor itself, did you? A. Well, no, sir, I didn't, no, sir. In fact, I didn't look and after I had the accident I was hurting so I didn't pay any attention to the floor."

Defendant Margareta W. Hotchkiss, called by plaintiffs, testified Julia was employed as a cleaning maid; there was a "Delta" power tool on the service porch; her husband used it primarily on holidays and nights after work;

"Q. Did this Delta power tool give off any debris, sawdust, shavings or the like? A. When in use, yes, sir.

"Q. Did it give off sawdust? A. Depending on the type of work being done, yes, sir.

"Q. If he were sawing wood, would it give off sawdust? A. I believe so.

"Q. Had you observed sawdust on the floor of the service porch when he was working? A. Yes, sir. * * *

"Q. Now, there were occasions before September 21, '53, when this Delta tool was used, were there not? A. Yes."

Defendant W. S. Hotchkiss, called by plaintiffs, testified he was at home at the time of the accident;

"Q. Did you help Mrs. Jones to her feet? A. Yes.

"Q. After you helped her to her feet, did you notice any mud or debris or pebbles or anything of that sort on the floor? A. No.

"Q. As you walked out the service porch to the incinerator is there a pathway of some sort to walk on? A. No, there is no path; there is concrete slab which abuts on the outside of the door.

"Q. Would you be walking on any mud or grass or oil as you went out to the incinerator and returned? A. No.

"Q. On the service porch there was a mechanical—that's a bad word—there is a kind of a work bench? A. Yes.

"Q. Besides that work bench you had some other tools there? A. Yes.

"Q. And you had a so-called Delta tool? A. Yes.

"Q. And this Delta tool, among other things, I gather it shaves and cuts wood? A. Yes.

"Q. Before September 21, '53, you had occasion to use the tool? A. Yes.

"Q. Did anyone besides yourself use it? A. No. * * *

"Q. * * * How did the tool get onto the service porch? A. I put it on the service porch.

"Q. Did you place it yourself or did you have someone else do it for you? A. It was movable and I moved it.

"Q. You moved it and placed it there? A. Yes.

"Q. Now, when this tool is being used for certain types of work will it create sawdust? A. Yes.

"Q. Have you observed this sawdust on the floor of the service porch? A. Yes.

"Q. I am talking about before September 21st about the operation of the tool and the sawdust on the floor. I am going to ask you something subsequently but right now I am addressing myself to the period subsequent to September of 1953. This is an asphalt tile floor, is it not? A. That's what I understand. * * *

"Q. Had this service porch been waxed before the time of the accident? A. I never saw it waxed.

"Q. Well, to your knowledge had you observed if it had been waxed or was in a waxed condition? A. I am not sure that I could tell that. I don't believe I could determine without close and careful examination whether or not it had been waxed. * * *

"Q. I would like to refer you to Page 14 [of deposition], commencing at Line 13 to Line 17—I beg your pardon—starting at Line 10, where the question is, to Line 17. There was a question asked of you at this time, November 9, '55, when your deposition was taken: 'Question: Did you ordinarily mop the floor or did you use something else, in the main, did you wax it or anything like that? Answer: Yes, it is waxed. You have to preserve the surface and you also mop it and clean it. Question: Before September 21, 1953, do you know when it was last waxed? Answer: No, I don't know.' Does this refresh your memory as far as the fact that it had been waxed before September of 1953? A. I believe I answered that I had never seen it waxed but I think it had been waxed at some time prior to that.

"Q. Now, you customarily used this tool in the evening after you came home from work? And I don't mean every evening but if you would use it, it would be after working hours? A. Nonworking hours.

"Q. Ordinarily what time do you get home? A. 6:00, 6:30.

"Q. And do you use the tool on holidays when you are not working? A. On occasion.

"Q. After you use the tool you always, when you finish, clean up, do you not? A. Yes.

"Q. And usually you would clean up the same evening you used the tool? * * *

"Q. Gather up any shavings? * * * A. Yes."

[1, 2] The foregoing evidence constituted plaintiffs' case. It is hardly necessary to say that if inferences can reasonably and fairly be deduced from the evidence which sustain the allegations of the complaint, it is error to grant a motion for a judgment of nonsuit. Negligence may be established by circumstantial evidence, which is nothing more than one or more inferences which may be said to arise reasonably from a series of proven facts. A plaintiff relying on circumstantial evidence does not have to exclude the possibility of every other reasonable inference possibly deriving from the evidence. Sanders v. MacFarlane's Candies, 119 Cal.App.2d 497, 500, 259 P.2d 1010. It is reasonable to infer that the asphalt tile floor was slippery—Julia's foot skidded out from under her and she "fell back"; that the floor had been waxed;

that there was "fine sawdust" on the floor which came from the power tool; that defendants knew or should have known of the condition—Mrs. Hotchkiss said she was going to have the machine moved "because that sawdust kept the floor slippery and somebody was going to get hurt." Hatfield v. Levy Brothers, 18 Cal.2d 798, 805, 117 P.2d 841.

[3, 4] No inference of negligence arises from the mere fact of the fall or from the mere fact the floor was slippery in the absence of proof of some foreign substance on the floor or proof of a dangerous condition created by or known to the defendant. Harpke v. Lankershim Estates, 103 Cal.App.2d 143, 145–146, 229 P.2d 103. To impose liability on the owner it must be shown that a dangerous condition existed, and that the defendant knew or should have known of it. While under some circumstances negligence may be inferred from the existence of a dangerous condition, the burden rests on the plaintiff to show the existence of a dangerous condition and that the defendant knew or should have known of it. Vaughn v. Montgomery Ward & Co., 95 Cal.App.2d 553, 556, 213 P.2d 417, and cases there cited.

It is not negligence per se to have a waxed floor in a home, but a floor may be so waxed as to make it slippery and dangerous, particularly with sawdust upon it. Henderson v. Progressive Optical System, 57 Cal.App.2d 180, 185, 134 P.2d 807. Tuttle v. Crawford, 8 Cal.2d 126, 63 P.2d 1128, was a case where a woman stepped on a wet space of cement floor in a store, slipped and fell, and was injured. The wet spot was caused by the act of the employees of the store in freshening heads of lettuce by immersing them in water. The court held that whether the floor of the store was so negligently maintained as to render the person responsible for its condition liable in damages, was a question of fact to be decided by the jury. Many cases are there cited dealing with injuries resulting from falls caused by feet slipping on account of oil or grease or other substances which sometimes become deposited on floor spaces, or injuries inflicted because of improper floor conditions; and in each case they are held to be properly referable to juries for decision.

In Sharpless v. Pantages, 178 Cal. 122, 172 P. 384, 385, the plaintiff fell in the defendant's theatre due to the laying of a carpet in a loose condition. It was there held that since it was the defendant's act that was complained of as creating a dangerous floor condition, notice was not involved, and it was only necessary for plaintiff to show that the defendant's act had created a dangerous floor condition causing the plaintiff's injury. The plaintiff proved that her foot slipped as she stepped upon the carpet. The defendant moved for a nonsuit. The motion was denied by the trial court. Affirming, the Supreme Court said: "the fact that the plaintiff's foot slipped as she stepped upon the carpet is some evidence tending to show that defendant had failed" to use ordinary care to maintain the carpet upon the steps in such condition that it would be safe for persons to pass thereon in an ordinary manner, "and it is sufficient to sustain the decision upon the motion for a nonsuit."

In Nicola v. Pacific Gas & Electric Co., 50 Cal.App.2d 612, at page 615, 123 P.2d 529, at page 530, this court observed:

> "Appellants' argument goes further to assail the finding that the floor was maintained by defendants in a negligent manner, and they rely upon a rule, which has been followed by some courts in other jurisdictions, that the duty of an owner to exercise ordinary care is not violated by merely oiling or waxing and polishing a floor in the usual way although the floor is rendered slippery thereby. [Citations.] This is contrary to the settled law as announced by our own courts.
>
> "In Rothschild v. Fourth & Market St[reet]. R[ealty]. Co., 1934, 139 Cal. App. 625, 628, 34 P.2d 734, it was held that evidence that a floor of a hallway maintained by the owner of a building

for use by invitees of tenants of the building had been rendered slippery by the application of wax was sufficient to support a finding of negligence. This decision was in accord with those in [citations]. The right of a proprietor of a place of business to wax a floor which the customers are expected to use is not one which upon any reasonable theory can be held to be superior to his duty to use ordinary prudence and caution to avoid injury to those who come to his premises by invitation. If wax or, as in the present case, both wax and soft soap, are applied to the floor, it must be in such manner as to afford reasonably safe conditions for the proprietor's invitees, and if such compounds cannot be used on a particular type of floor material without violation of the duty to exercise ordinary care for the safety of invitees, by reason of the dangerous conditions they create, they should not be used at all. Of course slipperiness is an elastic term. From the fact that a floor is slippery it does not necessarily result that it is dangerous to walk upon. It is the degree of slipperiness that determines whether the condition is reasonably safe. This is a question of fact." [1]

[5] The jury could have reasonably inferred from the evidence that the surface of the floor of the service porch was sufficiently hard and smooth to become unsafe with the application of wax, or from the application of wax with sawdust upon it. It was for the jury to determine whether the condition was one of reasonable safety or, in other words, whether defendants had exercised ordinary care with respect to the condition of the floor.

In the light in which the evidence must be viewed on a motion for a judgment of nonsuit, the motion was improperly granted.

Reversed.

PARKER WOOD, J., concurs.

SHINN, Presiding Justice.

I concur; but feel impelled to add a thought which comes to mind more often than it is expressed. I put it in the form of questions. Why do defense lawyers press for nonsuits when practically all the material facts are in evidence, instead of submitting the case on the merits, and why do trial judges grant nonsuits in doubtful cases when they are convinced that a verdict in favor of the plaintiff would be against the weight of the evidence and that it would be their duty to grant a new trial? It should be clear from a study of the reported cases that the rule applicable to nonsuits operates strongly in favor of plaintiffs and that it precludes reviewing courts from sustaining judgments of nonsuit if the evidence would be legally sufficient to support a verdict or judgment for the plaintiff. However dubious a plaintiff's case may appear to a reviewing court the functions of the jury must be respected and there can be no weighing of the facts beyond the inquiry whether the case of the plaintiff is entirely devoid of substantial support in the evidence. The frequency with which judgments of nonsuit are reversed should stand as a warning that too many of them are granted.

1. Also see Williamson v. Hardy, 47 Cal. App. 377, 190 P. 646; Brinkworth v. Sam Seelig Co., 51 Cal.App. 668, 197 P. 427; Brown v. Holzwasser, Inc., 108 Cal.App. 483, 291 P. 661; Lamb v. Purity Stores, Inc., 119 Cal.App. 690, 7 P.2d 197; Tuttle v. Crawford, 8 Cal.2d 126, 63 P.2d 1128; Winsby v. Kertell, 10 Cal.App.2d 61, 50 P.2d 1075; De Verdi v. Weiss, 16 Cal.App.2d 439, 60 P.2d 879; Stoddard v. Roberts Public Markets, Inc., 27 Cal.App.2d 166, 80 P.2d 519.

PEOPLE of the State of California, Plaintiff and Respondent,

v.

PARAMOUNT CITRUS ASSOCIATION, Inc., a corporation, Defendant and Appellant.

Civ. 21587.

District Court of Appeal, Second District, Division 1, California.

Jan. 2, 1957.

Rehearing Denied Jan. 28, 1957.

Hearing Denied Feb. 27, 1957.

Suit for penalties and injunction against violation of marketing order requiring processors of lemon products to place certain per cent of all lemons received for processing during marketing season in Stabilization Pool, subject to control of Director of Agriculture. The Superior Court of Los Angeles County, Joseph W. Vickers, J., granted the relief sought, and defendant appealed. The District Court of Appeal, Per Curiam, held that even if otherwise authorized, mandatory injunction was improper in absence of evidence which would justify finding that deposit of defendant's delinquent tonnage in Stabilization Pool would have any effect to stabilize market price of lemons or lemon products for marketing year or that it would rectify any detriment caused by defendant's wrongdoing, or have any other effect than to further penalize defendant for his violation of the Act.

Reversed in part and in part modified and affirmed.

1. Appeal and Error ⇐756

It is duty of counsel to search records and authorities to establish error.

2. Appeal and Error ⇐756, 761

Trial court, in suit for penalties and injunction against violations of marketing order, would not be put in error for refusing to allow defendant to file proposed amendment to its answer, where defendant failed to sustain by argument or authority its claim that circumstances alleged in proposed amendment, if established, would have constituted a defense to action, or that they would, if proved, have established an invasion of its constitutional rights.

3. Appeal and Error ⇐717

Opinion of trial judge may be examined by reviewing court as an aid in interpreting findings of fact and conclusions of law, but an opinion rendered by trial court cannot be used as a substitute for findings of fact and conclusions of law or to modify or defeat them.

4. Agriculture ⇐2
Injunction ⇐128

In suit for penalties and injunction against violation of marketing order requiring processors of lemon products to place certain per cent of all lemons received for processing during marketing season in Stabilization Pool subject to control of Director of Agriculture, evidence sustained finding that defendant had willfully and deliberately violated marketing order.

5. Administrative Law and Procedure ⇐749
Agriculture ⇐2

Where marketing order, requiring processors of lemon products to place certain per cent of all lemons received for processing during the marketing season in Stabilization Pool, did not make it obligatory upon Advisory Board to make sale from Stabilization Pool, question as to whether Board properly exercised its discretion was one of fact; and where evidence offered in administrative proceedings had for review of action of Advisory Board in refusing request to purchase lemons from Pool was not before court, it would be presumed that Director's decision upholding Board was supported by substantial evidence. West's Ann.Agric.Code, §§ 1300.10 et seq., 1300.19.

6. Agriculture ⇐2

In suit for penalties and injunction against violation of marketing order requiring processors of lemon products to place certain per cent of all lemons received for processing during marketing season in Stabilization Pool subject to control of Director of Agriculture, plaintiff was obligated to support its claim for penalties by proof as to number of weeks

in which defendant had been delinquent in fulfilling its obligation to Stabilization Pool.

7. Agriculture ⇐2

In suit for penalties and injunction against violation of marketing order requiring processors of lemon products to place certain per cent of all lemons received for processing during marketing season in Stabilization Pool, trial court could not properly ignore, in assessing penalties, lemon concentrate which Board had accepted as delivered in partial fulfillment of defendant's obligation, even though defendant had not furnished a laboratory analysis showing citric acid content of the concentrate. West's Ann.Agric.Code, § 1300.19(b).

8. Injunction ⇐89

Agriculture Code subsection, making penalties and remedies prescribed cumulative with any and all other civil remedies provided or allowed by law with respect to violation, expressly conferred upon court power to enjoin further violations of act, but did not empower court to affirmatively enforce compliance with act. West's Ann. Agric.Code, § 1300.19(h, m).

9. Injunction ⇐4, 5

Propriety of affording equitable relief by injunction, either prohibitory or mandatory, rests in sound discretion of trial court, but such discretion is not arbitrary and must be exercised in accordance with fixed principles and precedents of equity jurisprudence.

10. Injunction ⇐1, 14

Power to issue injunction is extraordinary one to be exercised always with great caution and only in those cases where it appears that plaintiff will suffer irreparable injury if it is not issued.

11. Injunction ⇐4, 22

Office of writ of injunction is a preventive one, and it is to be used to restrain a wrongdoer rather than to punish him after the wrong has been done or to compel him to undo it.

12. Injunction ⇐22

An injunction lies only to prevent injury and has no application to wrongs which have been completed.

13. Injunction ⇐5

A court of equity has power to issue a mandatory injunction where wrong is continuing in character and can only be remedied by requiring affirmative action on part of wrongdoer.

14. Injunction ⇐128

In suit for penalties and injunction against violation of marketing order requiring processors of lemon products to place certain per cent of all lemons received for processing during marketing season in Stabilization Pool, mandatory injunction, even if otherwise authorized, was improper in absence of evidence which would justify finding that deposit of defendant's delinquent tonnage into Stabilization Pool would have any effect to stabilize market price of lemons or lemon products for marketing year or that it would rectify any detriment caused by defendant's wrongdoing, or have any effect other than to further penalize defendant for his violation of the act. West's Ann.Code Civ.Proc., § 1300.19 (b, h, m).

G. V. Weikert, Los Angeles, for appellant.

Edmund G. Brown, Atty. Gen., Walter S. Rountree, Asst. Atty. Gen., Alberta Gattone, John E. Fourt, Deputy Attys. Gen., for respondent.

PER CURIAM.

This action is one prosecuted by the Attorney General under the provisions of division 6, chapter 10, of the Agricultural Code, and particularly section 1300.19 thereof, and upon the complaint of the Director of Agriculture.

Pursuant to the relevant provisions of the Agricultural Code, the Director of Agriculture issued a marketing order effective October 1, 1954, requring processors of lemon products to place 75 per cent of all their lemons received for processing during

the 1954–55 marketing season in the "Stabilization Pool" and to be there subject to the control of the Director of Agriculture, acting through and upon the advice of the Lemon Products Advisory Board, which was appointed by the Director pursuant to the authority granted him by section 1300.15 of the Agricultural Code.

From time to time during the marketing year 1954–55 the percentage of lemons which any processor was required to place in the Stabilization Pool was reduced, until in June of 1955 the percentage was reduced to 58 per cent. The appellant, Paramount Citrus Association, Inc., is a processor of lemons.

Under the provisions of the marketing orders and the rules and regulations for the administration thereof issued by the Director, each processor was obligated each week to report to the Advisory Board the amount of lemons received by it for processing during the preceding week, and the Stabilization Pool obligation incurred thereon. The processor might meet its obligations to the Stabilization Pool by storing the lemons and delivering warehouse receipts therefor issued in the name of the Board, or by delivering to the Board in lieu of lemons concentrated lemon juice or single-strength juice or warehouse receipts therefor, or by delivering to a processor for conversion into citric acid lemons of a tonnage equal to the unfulfilled obligation of the processor or their equivalent in concentrated or in single-strength juice, or by entering into an agreement with the Director for postponed compliance, and posting a bond in a penal sum in an amount equal to one hundred per cent of the processor's Stabilization Pool obligation computed at the rate of $60 per ton, or an equal amount in cash, as security for compliance at the deferred date which could not be later than August 31 of the marketing year (in this case August 31 of 1955). The rules and regulations provided that all products delivered to the Board in fulfillment of a processor's obligations to the Stabilization Pool should be certified by the United States Department of Agriculture as having been processed in California, and that all bulk containers should be sealed by that department.

The marketing order also provided that in each marketing season between the 1st day of October and a date to be fixed by the Board, which should not be earlier than March 1 nor later than May 30, lemons for use as free tonnage lemons (those not subject to Pool obligations) "may be sold from the Stabilization Pool" and that they might be sold after May 30 upon the affirmative vote of six members of the Board, and a finding by the Board that such action would not endanger the price stability of lemons or lemon products.

The appellant, in accordance with the terms of the marketing order and regulations, reported to the Board all lemons acquired by it for processing, but as to 34 separate weeks did not deposit any of said lemons with or hold them for the Stabilization Pool, nor did it execute any agreement for postponed compliance or post any bond or cash with the Board. It did, early in the marketing year, deliver to the Board 16 barrels of concentrate, equivalent to 64 fruit tons, for conversion into citric acid, and these were accepted by the Board but only 69 hundredths tons were credited to appellant's current Stabilization Pool obligation, the balance of the 64 tons being credited against appellant's obligation for the preceding season.

Shortly thereafter appellant delivered to the processing plant for conversion into citric acid for credit against its Pool obligation 16 additional barrels of concentrate, which was the equivalent of 65.4 tons of lemons, but this concentrate was rejected by the Board as not having been certified or sealed by the United States Department of Agriculture. At this time the appellant orally notified the representative of the Board that it had approximately 103 additional barrels for delivery. Of this 103 barrels appellant on June 27, 1955, delivered 81 barrels of lemon concentrate, which were certified and sealed by the United States Department of Agriculture and which were accepted by the Board, but were

not credited against appellant's delinquency. The Board's manager testified that the 81 barrels of concentrate were the approximate equivalent of 250 tons of fruit, but neither plaintiff nor defendant offered any other evidence as to the citric acid content of this concentrate.[1]

The original complaint filed herein was in 15 counts. In the first count facts relevant to the promulgation of the marketing order and the rules and regulations, the failure of the appellant to comply with those rules and regulations, and the processing and sale by the appellant of the lemons which under the marketing order it was obligated to hold for the account of the Pool, were alleged, as well as other facts relevant to plaintiff's prayer for an injunction against further violations of the marketing order by appellant.

Each of the remaining 14 counts charged appellant with a violation of the marketing order in that it had, during a calendar week designated in that count, incurred an obligation to the Stabilization Pool of a certain number of tons, or citric acid pounds, of lemons, and in violation of the marketing order had failed to deliver any portion thereof to the Pool; and as to each violation sought a penalty of $500 or such lesser sum as the court should assess pursuant to section 1300.19(b) of the Agricultural Code.

By its supplemental complaint filed during the progress of the trial, the People alleged in separate counts 21 further violations of the same character covering 21 weeks during the period between January 1, 1955, and the week ending June 25, 1955. By its answer[2] appellant set forth two affirmative defenses, the first of which alleged in substance that 96 per cent of all the lemons produced in the United States are produced in California; that 99 per cent of all the lemons processed in the United States are processed in this state; that Sunkist Growers, Inc., and Exchange Lemon Products Co., which is alleged to be a subsidiary of Sunkist, control and handle 86 per cent of all lemons produced and processed in this state and have a virtual monopoly of the handling and marketing of lemon products in this state; that said Sunkist Growers, Inc., has since 1942 been subject to the terms of a decree of a United States court enjoining it from committing acts in violation of the federal antitrust laws including obstructing, restricting, or interfering with purchase by others of fruits; that under the provisions of the California Marketing Act of 1937 any marketing order must be assented to by processors who handle or process not less than 65 per cent of the volume of the agricultural commodity regulated thereby, and that by reason of the fact that Sunkist dominates and controls 86 per cent of the lemons the purposes of the act are defeated and nullified and the will of Sunkist imposed upon others engaged in the lemon industry in this state; that in order to operate its processing plant efficiently appellant must process at least ten thousand tons of lemons during each season; that it can acquire that quantity of lemons and has established an outlet for that quantity; that compliance with the decree of the Advisory Board that 75 per cent of all lemons acquired for processing during the present season be set aside and turned over to the Stabilization Pool would leave appellant able to meet less than 25 per cent of the requirements of its customers; that Sunkist has a surplus of lemons for processing but other processors in the state have more demand for their lemon products than they can supply, and that Sunkist refuses to sell

1. The Board apparently had no difficulty in ascertaining the fruit content of the 16 barrels which it refused, as it is shown on Exhibit 7 as being the equivalent of 64.71 fruit tons.

2. We do not here refer to the denials contained in the answer, inasmuch as many of them are on information and belief as to matters which were of public record and therefore not subject to such denials, and as all other material allegations of the complaint which were denied were admitted at the trial, with the exceptions which we will hereafter note.

any of said lemons to appellant but has turned its surplus into the Stabilization Pool for conversion into citric acid; that appellant attempted to buy ten thousand tons of lemons from the Stabilization Pool at the price fixed by the Advisory Board, but the Board refused to sell said lemons upon the ground that the sale thereof might unstabilize the market; and that the appellant had petitioned the Director of Agriculture to review the decision of the Advisory Board refusing to sell lemons to appellant from the Stabilization Pool.[3]

By its second affirmative defense appellant pleaded that the marketing order and the administrative rules and regulations issued thereunder "as the same have been and are now being interpreted and administered" are contrary to and in violation of the provisions of the Marketing Act and sections 11 and 13 of article I of the Constitution of the state and section 1 of the 14th Amendment to the Constitution of the United States.

During the trial of the action appellant tendered, but the court refused to receive, an amendment to its answer by which it pleaded the same matters set forth in its second separate defense (denominated by the answer as Third Answer to the First Amended Complaint) and alleged as the facts which it contended constituted the alleged acts of the Advisory Board in interpreting and administering the marketing order, the following: (a) that the Board had interpreted the marketing order as controlling the handling and processing of lemons produced outside the state of California, and that by reason thereof appellant had been prevented from procuring lemons outside the state and processing them within the state and thus supplying the demands of its customers and enabling it to meet its Stabilization Pool obligations; (b) that the Lemon Products Advisory Board was illegally constituted in that the marketing order did not provide for a method of nominating and appointing members and alternate members of the Board representing any processors other than Exchange Lemon Products, but that the Director had nevertheless appointed persons purporting to represent other cooperative marketing organizations and processors which are not cooperative marketing organizations; (c) that by its interpretation and administration of the marketing order the Advisory Board has discriminated against the growers of inland California lemons and the processors thereof, including appellant, and in favor of the growers of coastal California lemons and the processors thereof.

The trial court held that none of the affirmative defenses either pleaded or tendered by appellant constituted defenses to the action, and although it received some evidence as to facts pleaded in these affirmative defenses refused to receive other evidence offered by the appellant in support of them, but required appellant's counsel to make offers of proof, to which offers the court sustained plaintiff's objections or its own objections.

By its findings of fact the court found that the appellant had willfully failed to comply with the marketing order and the rules and regulations promulgated by the Director thereunder in that it had willfully failed to hold for the benefit of the Stabilization Pool or to deliver to that Pool the percentages of lemons acquired by it for processing which were from time to time required by the marketing order and rules and regulations. It found that the total amount of lemons which appellant was required to deliver to the Stabilization Pool during the period from October 1, 1954, to June 15, 1955, amounted to 1,701.14 standard tons of lemons; that appellant had delivered and there had been accepted by the Board for compliance with appellant's Stabilization Pool obligation 81 barrels of lemon concentrate, but that the appellant had not furnished to the Advisory Board a labora-

3. It was stipulated at the trial that a hearing was had upon this petition and the action of the Advisory Board affirmed by the Director of Agriculture.

tory analysis of the citric acid content thereof; and that the appellant was entitled to credit against its obligation of 1,701.14 tons of lemons, whenever it should furnish a laboratory analysis of the citric acid content of said 81 barrels of concentrate.

The court further found that the appellant would, unless enjoined, continue to violate the marketing order and the rules and regulations thereunder by processing all lemons acquired by it for that purpose and without withholding or delivering to the Stabilization Pool the percentage of said lemons required by the act. The court further found that the allegations of each of the counts of the amended complaint and the supplemental complaint which alleged weekly violations of the marketing order and sought penalties of $500 for each of such violations were true; and by its conclusions of law the court concluded that the plaintiff was entitled to recover the maximum penalty of $500 for each of the weekly violations alleged in the amended and supplemental complaints, or a total of $17,000; that the matters pleaded in the second affirmative defense set forth in appellant's answer were insufficient to constitute a defense to the action; and that the third affirmative defense set forth did not plead any facts but conclusions of law and constituted no defense to the action.

By its judgment the court gave judgment in favor of the plaintiff and against the defendant in the sum of $17,000 as civil penalties for appellant's failure on 34 separate weeks to deliver or hold its quota of lemons for the Stabilization Pool pursuant to the marketing order and the rules and regulations. It further ordered appellant to forthwith deliver to the Lemon Products Advisory Board for the Stabilization Pool 1,707.14 standard tons of lemons "or such lesser sum as shall be due after credit for 81 barrels of lemon concentrate" and such additional quantities of lemons or approved products as shall become due on each succeeding week under "the Marketing Order for Lemon Products, as Amended, effective November 3, 1954, or any validly adopted amendment, continuation, re-adoption or reissuance of said Order; Or: That defendants execute an agreement in writing for postponed compliance in accordance with Article III, Section E, subsection 7 of the Marketing Order for Lemon Products, as Amended, effective November 3, 1954, and deposit security therefor as provided in said Marketing Order and the Administrative Rules and Regulations issued thereunder." It further enjoined appellant from processing lemons unless it should have delivered to the Stabilization Pool lemons or approved lemon products equal to appellant's Stabilization Pool obligation "presently due" and which might thereafter become due under any marketing order.

Appellant by its opening brief makes three general assignments of error. In its presentation of these points, however, it has in most instances wholly failed to support the claims of error by citation of authority or by argument showing that the alleged errors of the trial court resulted in prejudice to appellant, and has left it to the court to search the record and the law in order to uphold its claims of error.

[1] Appellant's first point is "Appellant did not have a fair trial." It then asks us to read the entire record of oral proceedings (502 pages, which we have read with care) and charges the trial court with becoming an advocate for the plaintiff and with compelling appellant to present its defenses by offers of proof rather than through the examination of witnesses. A reading of the transcript of the oral proceedings does indicate that the trial court injected itself into the conduct of the trial to an extent much beyond that necessary to the proper conduct of the trial, and to an extent which certainly must have embarrassed and hindered counsel for the appellant in the presentation of its case. However, the court did permit offers of proof of the matters as to which it prevented appellant's counsel from examining its witnesses, and appellant has by its briefs utterly failed to show either by argument or authority that any of the matters which it offered to prove were relevant to any material issue presented by the pleadings, and we do not feel

called upon to search the records and the authorities to establish error. That is the duty of counsel. See 3 Witkin, California Procedure (1954) sec. 150, pp. 2332–34, and cases there cited.

[2] The second point argued by appellant in its brief is done so under the heading "In regard to the pleadings." Under this heading appellant calls our attention to the matters alleged in the second and third affirmative defenses and to the fact that the court ruled that these did not allege facts sufficient to constitute a defense to the action, but again it utterly fails to furnish us with argument or authority to establish that the trial court erred in so ruling. Appellant also, under this heading, asserts that the court abused its discretion in refusing to allow it to file its proposed amendment to its answer, to which we have heretofore alluded, and in excluding all evidence in support thereof. Here again appellant fails to, by argument, point out wherein the facts alleged therein would constitute a defense to the action; and the only authority cited by it in support of its contention, State Board of Dry Cleaners v. Thrift-D-Lux Cleaners, 40 Cal.2d 436, 254 P.2d 29, in no wise supports its contention, as the Supreme Court in that case was dealing with the constitutionality of the Dry Cleaners Act of 1945, while in the case at bar appellant admits not only the constitutionality of the statutes here involved but that of the marketing order issued thereunder, and complains only of the manner in which the act is administered by the Board. Appellant fails to sustain by argument or authority its claim that any of the circumstances alleged in its proposed amendment, if established, would have in any wise constituted a defense to this action, or that they would have, if proved, established an invasion of its constitutional rights.

The third point argued in the briefs is argued under the heading "In regard to the opinion from the bench." Under this point counsel criticizes the court's oral announcement of its decision at the close of the case, seemingly contending that thereby the court demonstrated that it did not understand the facts or the law involved, and that therefore the court's findings of fact and conclusions of law cannot be sustained.

[3] While the opinion of the trial judge may be examined by an Appellate Court as an aid in interpreting the findings of fact and conclusions of law, an opinion rendered by the trial court cannot be used as a substitute for the findings of fact and conclusions of law made by the court, nor used to modify or defeat them. Strudthoff v. Yates, 28 Cal.2d 602, 170 P.2d 873. Furthermore, a reading of the remarks of the trial court which are adverted to by appellant as the opinion from the bench indicates that the learned trial judge had a very full and fine grasp of both the issues of fact and of law that had been presented to him, and we find nothing in the court's oral statement that is in material conflict with its findings of fact and conclusions of law.

[4] Appellant's next contention is that there is no evidence to support the finding of the trial court that appellant willfully and deliberately violated the marketing order. In support of this contention it contends that the evidence showed without conflict that it had attempted to buy from the Stabilization Pool ten thousand tons of lemons in order to meet the demands of its customers and to fulfill its obligations to the Pool, and that this demonstrated that it was not acting willfully or in bad faith in failing to comply with its obligations to the Pool.

The provisions of the marketing order did not make it obligatory upon the Advisory Board to sell lemons from the Pool to appellant or to any other processor; but, assuming that appellant in good faith construed the marketing order as making a sale obligatory, it was initially within the province of the Advisory Board, and finally within that of the Director, to construe it, and when appellant's request had been denied by both the Board and the Director it made no other effort to make up its delinquencies, although the evidence shows, and the court found, that it then had the ability so to do. The trial court was there-

fore fully justified in finding that appellant's violations of the marketing order were willful and deliberate.

[5] Appellant would have us review the order of the Director sustaining the Advisory Board's refusal to sell appellant lemons from the Pool. This we cannot do. The marketing order does not, as we have stated, make it obligatory upon the Board to make a sale from the Stabilization Pool, but permitted it so to do. The question as to whether the Board and the Director properly exercised their discretion is therefore one of fact and not of law. The evidence offered before the Director in the proceedings had to review the action of the Advisory Board refusing appellant's request to purchase lemons from the Pool is not before us, and we must presume that the Director's decision was supported by substantial evidence and was not arbitrary.

It is suggested by the Attorney General that the Director's decision cannot be collaterally attacked here, but can only be attacked by proceedings had pursuant to section 1094.5 of the Code of Civil Procedure; but inasmuch as no showing was made by the appellant which would have justified the trial court in holding that the decision of the Director was not supported by any substantial evidence and constituted an abuse of his discretion, we are not called upon to decide whether or not the Director's decision is subject to collateral attack.

[6, 7] A careful study of the record convinces us that the findings of the trial court as to the violations of the marketing order, and the judgment assessing penalties in the amount of $17,000, cannot be sustained. The evidence shows without conflict that on June 27, 1955, appellant delivered, and the Board accepted for compliance with appellant's Stabilization Pool obligation, 81 barrels of lemon concentrate; yet the Board, while accepting this 81 barrels as delivered in partial fulfillment of appellant's obligation, gave appellant no credit therefor and the trial court, in assessing penalties, allowed no credit therefor. This was done seemingly upon the basis that appellant had not furnished a laboratory analysis showing the citric acid content of the concentrate in the barrels.[4] In our opinion, however, the plaintiff was obligated, as a part of its case and in support of its claim for penalties, to prove the weeks as to which appellant was delinquent in fulfilling its obligation to the Pool. The evidence having shown without conflict that appellant had delivered and the Board had accepted 81 barrels of concentrate, it was incumbent upon the plaintiff to prove to what extent if any appellant remained in default under its obligations to the Pool. The record is not devoid of evidence from which this fact could be ascertained, for the manager of the Advisory Board testified that the concentrate delivered would be the equivalent of approximately 250 tons of fruit. This concentrate having been accepted as partial compliance by appellant with its obligation, it follows that if it satisfied appellant's obligation for one or more full weeks, no penalty could be exacted for those weeks. An examination of Plaintiff's Exhibit 7 demonstrates that if this 250 tons of fruit had been applied to appellant's obligations during the first part of the marketing season, it would have satisfied its obligation for at least the first four weeks; or if credited upon appellant's obligation at the latter part of the period for which penalties were sought, it would have satisfied at least the last six weeks on account of which appellant has been assessed penalties.

It was the duty of the trial court to make some proper allocation of the 81 barrels of concentrate which admittedly were accepted by the Board in fulfillment of appellant's obligation, and it could not assess penalties for weeks as to which appellant's default

4. Our attention has not been called to any regulation requiring appellant to furnish a laboratory analysis, but if one does exist the failure to supply such analysis would only constitute grounds for refusing to accept the concentrate and would not justify accepting it but refusing to give credit for it.

in its obligations was rectified by the concentrate delivered.

[8–14] The final question presented by appellant concerns the mandatory injunction granted by the court. As we have heretofore pointed out the court not only enjoined appellant from further violations of the marketing order in question but ordered appellant to forthwith deliver the total amount of the delinquencies on account of which it had assessed penalties of $17,000 for the benefit of the Stabilization Pool, and enjoined appellant from engaging in business as a processor until it had complied with this mandatory order.

We are convinced that the mandatory provisions of the decree granted by the judgment cannot be sustained. The injunction speaks from the time of the entry of the judgment. Judgment was entered on August 11, 1955. At that time the marketing year was drawing to a close and there is no evidence whatsoever which would justify a finding or conclusion that the deposit of appellant's delinquent tonnage into the Stabilization Pool would have any effect to stabilize the market price of lemons or lemon products for that marketing year, or to rectify any detriment caused by appellant's wrongdoing, or have any other effect than to further penalize appellant for its violations of the act.

The act itself does not grant to the court, in an action such as this, any express power to compel compliance with the act, but does permit the court to, in addition to assessing penalities of not *over* $500 for each violation, enjoin *further violations thereof.* Agr.Code, sec. 1300.19(h). The Attorney General, however, asserts that under subdivision (m) of that section the court had the power to issue a mandatory injunction compelling appellant to fulfill the obligation to the Pool as to which it had defaulted.

So far as pertinent here, this section provides: "The penalities and remedies prescribed in this section with respect to any violation mentioned in this section * * * shall be cumulative with any and all other civil, criminal or administrative rights, remedies, forfeitures or penalties *provided or allowed by law with respect to any such violation.*" [Emphasis added.] It is the Attorney General's contention that under this section the court could exercise its general equitable powers and grant injunctive relief beyond that specified in subdivision (h) of the section which limits relief of that kind to enjoining the defendant from further violations.

We do not so interpret subdivision (m), but believe that it was the intent of the Legislature by that subdivision to make it clear that those charged with the enforcement of the act were free to pursue any or all of the remedies provided by law for violation of the act, and it was not the intent to empower a court to affirmatively enforce compliance with the act by requiring the delivery of lemons or of lemon products into the Stabilization Pool. We think it is clear that when the Legislature by subdivision (h) of the section expressly conferred the power to enjoin against further violations of the act, it intended that that should be the limit of the court's power to issue an injunction. If it had been the legislative intent to empower a court to make an order which in effect compels specific performance of the obligations imposed by a marketing order, the Legislature would have, by apt language, expressly conferred that power. It may be futher said that the power of a court of equity to grant a mandatory injunction is not a remedy provided or allowed by law "with respect to * * *" the violations covered by section 1300.19.

Assuming, however, that subdivision (m) of the section does give the court the right, in actions of this kind, to exercise its general equitable power and to grant injunctive relief beyond that which it is expressly authorized to grant under subdivision (h) of the section, it is still apparent that the court improperly exercised this power.

While the propriety of affording equitable relief by an injunction either prohibitory or mandatory rests in the sound discretion of the trial court, this discretion is not arbitrary but must be exercised in

accordance with the fixed principles and precedents of equity jurisprudence. Diederichsen v. Sutch, 47 Cal.App.2d 646, 118 P.2d 863. The power to issue an injunction is an extraordinary one to be exercised always with great caution and only in those cases where it appears that the plaintiff will suffer irreparable injury if it is not issued. The office of the writ is a preventive one and it is to be used to restrain a wrongdoer, "not to punish him after the wrong has been done or to compel him to undo it." An injunction lies only to prevent injury and has no application to wrongs which have been completed. Stewart v. Superior Court, 100 Cal. 543, 546–547, 35 P. 156, 563; Blake v. City of Eureka, 201 Cal. 643, 661, 258 P. 945; City and County of San Francisco v. Market St. Ry. Co., 95 Cal.App.2d 648, 656, 213 P.2d 780; Blumenthal v. Di Giorgio Fruit Corp., 30 Cal.App.2d 11, 18, 85 P.2d 580.

In the present case the evidence shows without substantial conflict that appellant had processed and marketed that portion of the lemons acquired by it which under the marketing order it was obligated to withhold from the market or deliver to the Board, and that any effect that its violations of the act might have upon the market price of lemons or upon the marketing by other processors of their lemon products had occurred prior to the issuance of the mandatory injunction with which we are concerned. It is thus apparent that the prohibitory injunction granted by the court, which enjoined appellant from further engaging in business as a processor without complying with the marketing order, fully served the preventive purposes for which an injunction is granted, and that the mandatory injunction served only to penalize the appellant for the wrong which it had committed, and to force it to undo those wrongs. Its further effect was to grant the plaintiff damages payable in kind without any proof as to the amount of damage actually sustained.

Undoubtedly a court of equity has power to issue a mandatory injunction where the wrong is continuing in character and can only be remedied by requiring affirmative action on the part of the wrongdoer—for example, nuisances, continuing trespasses, and encroachment upon easements. But here the wrongs which the court by its mandatory injunction sought to right were not continuing ones but completed ones; and the prohibitory provisions of the injunction granted, as we have heretofore said, adequately prohibited appellant from a repetition of those wrongs.

Paragraph II of the judgment made and entered by the trial court by which plaintiff is awarded judgment against appellant in the sum of $17,000 as civil penalties is reversed, with directions to the trial court to receive such further competent evidence as the parties may offer relative to the citric acid content of the 81 barrels of concentrate delivered to and accepted by the Lemon Products Advisory Board on June 27, 1955, and to make such allocation thereof to the delinquencies for which penalties are sought as the court shall find proper, and thereafter to enter judgment awarding plaintiff penalties, in such sum as the court may find just, against the appellant as to the delinquency for each week which is not fully satisfied by such allocation, not to exceed $500 for each violation.

Paragraph III of the judgment which reads as follows, is reversed:

"That the defendant, Paramount Citrus Association, Inc., a corporation, is hereby ordered and directed to forthwith deliver to the Lemon Products Advisory Board for the Stabilization Pool 1707.14 standard tons of lemons (36.5 citric acid pounds per ton) or such lesser sum as shall be due after credit for 81 barrels of lemon concentrate delivered on June 27, 1955 or the equivalent of said quantity of lemons in processed lemon products of a character and quality approved by the Lemon Products Advisory Board for Stabilization Pool compliance for the 1954–55 marketing season, and such additional quantities of lemons or approved products as shall be or become due on each succeeding week thereafter for so long as there shall remain any

Stabilization Pool obligation of said defendant accruing under the Marketing Order for Lemon Products, as Amended, effective November 3, 1954, or any validly adopted amendment, continuation, re-adoption or reissuance of said Order;

"Or:

"That defendants execute an agreement in writing for postponed compliance in accordance with Article III, Section E, subsection 7 of the Marketing Order for Lemon Products, as Amended, effective November 3, 1954, and deposit security therefor as provided in said Marketing Order and the Administrative Rules and Regulations issued thereunder."

Paragraph IV of the judgment is modified to read as follows, and as so modified is affirmed:

"It is further ordered adjudged, and decreed that:

"The defendant, Paramount Citrus Association, Inc., a corporation, its officers, agents, employees, attorneys, representatives, and assigns are hereby permanently enjoined and restrained from processing, sorting, shipping, grading, extracting, grinding, crushing, or otherwise processing lemons for the purpose of preparing them for market in processed form and from marketing, contracting for the sale of, shipping, selling, transferring or transporting, or otherwise entering into the channels of trade any lemons for processing use or processed lemon products until and unless said defendants shall have delivered to the Stabilization Pool of the Lemon Products Advisory Board lemons or approved lemon products equal to their total Stabilization Pool obligation when and as such obligation shall become due under any Marketing Order presently in effect or any administrative orders, rules or regulations issued pursuant thereto, or, until and unless the defendants shall have executed an agreement in writing for postponed compliance in accordance with Article III, Section E, subsection 7 of the Marketing Order for Lemon Products as Amended, effective November 3, 1954, or any validly adopted amendment, continuation, readoption or reissuance thereof and shall have deposited security therefor as provided in said Marketing Order and the Administrative Rules and Regulations issued pursuant thereto."

Hearing denied; GIBSON, C. J., and CARTER and TRAYNOR, JJ., dissenting.



147 Cal.App.2d 248

The PEOPLE of the State of California, Plaintiff and Appellant,

v.

Charles Phillipe ORTIZ, Defendant and Respondent.

Cr. 5779.

District Court of Appeal, Second District, Division 2, California.

Dec. 27, 1956.

Prosecution for possession of marijuana. The Superior Court, Los Angeles County, Herbert V. Walker, J., granted defendant's motion to set aside the information and the State appealed. The District Court of Appeal, Fox, J., held that where marijuana in question was found during the course of making an inventory of the contents of an automobile in which defendant was found asleep, after defendant had been arrested for drunken driving, it was not discovered as a result of an unreasonable search, and therefore was not inadmissible in evidence even though officer did not have a search warrant.

Order setting aside information reversed.

1. Arrest ⇐71

Criminal Law ⇐395

In prosecution for possession of marijuana, where the marijuana in question was found during the course of making an inventory of the contents of an automobile in which defendant was found asleep, after

defendant had been arrested for drunken driving, it was not discovered as a result of an unreasonable search, and therefore was not inadmissible in evidence even though officer did not have a search warrant. West's Ann.Health & Safety Code, § 11500; West's Ann.Vehicle Code, §§ 585 (b) (5), 585.2; West's Ann.Pen.Code, § 849.

2. Arrest ⇐71

Where, in prosecution for possession of marijuana, defendant's automobile was legally in arresting officer's possession as an incident of its impounding after defendant's arrest for drunken driving, its contents were legally in the officer's possession and marijuana found in such automobile was legally obtained by the officer even though officer did not have a search warrant. West's Ann.Health & Safety Code, § 11500.

3. Arrest ⇐71

Criminal Law ⇐395

Where an officer's search without a warrant, of automobile in which defendant was found prior to his arrest for drunken driving, was reasonable, arresting officer was not required to ignore contraband he discovered in the automobile simply because it was disconnected with the initial purpose of the search, to inventory the contents of the automobile prior to its impounding, and the contraband thus discovered was not thereby rendered inadmissible in evidence. West's Ann.Health & Safety Code, § 11500; West's Ann.Vehicle Code, §§ 585(b) (5), 585.2; West's Ann.Pen.Code, § 849.

Edmund G. Brown, Atty. Gen., William E. James, Deputy Atty. Gen., S. Ernest Roll, Dist. Atty., Jere J. Sullivan and Lewis Watnick, Deputy Dist. Attys., Los Angeles, for appellant.

Cadoo & Tretheway, Los Angeles, for respondent.

FOX, Justice.

Defendant was charged with possession of marijuana. Health & Safety Code, sec. 11500. His motion to set aside the information, Pen.Code, sec. 995, was granted. The People appeal.

Defendant was arrested at approximately 5:00 o'clock in the morning on July 10, 1956, in the 900 block on Pier Avenue, Hermosa Beach. Just prior to the arrest Police Officer Hopkins observed a car parked some eight feet from the curb. Upon investigation, the officer discovered defendant lying on the front seat asleep with his head at the passenger side; his belt was loose, and "his trousers were down near his hips." The officer reached in the window, shook the defendant, and "finally got him awake." His breath was alcoholic and he "staggered badly, as he walked to the rear of his car." He told the officer he had had a quart of beer and a pint of whiskey the previous evening. The officer concluded he was intoxicated and arrested him for "drunk auto." City Ordinance No. 508. Officer Hopkins turned defendant over to the watch sergeant for incarceration.

Hopkins immediately began making an inventory of the items of personal property in the car preliminary to impounding it. In the course of his search, Hopkins found a small, brown paper bag containing marijuana in the glove compartment. The sergeant having departed with defendant for the jail, Officer Hopkins called them back. Upon being asked where the bag came from, defendant stated he did not know anything about it and refused to answer any more questions. Defendant does not appear to have made any statement then nor previously that the car was not his.

The officer also found in the glove compartment "two wallets containing numerous check stubs with defendant's name." The registration certificate for the car was in the glove compartment too.

It was the officer's custom always to make inventory of the contents of a car that he

impounded. Such practice was deemed necessary to defeat dishonest claims by the owner of theft of the car's contents and to protect the temporary storage bailee against false charges.

At about noon on the day of defendant's arrest he was transported from the Hermosa Beach jail to the sheriff's station at Lenox by Deputy Sheriff Hatfield. In the course of that trip the deputy asked defendant how long he had been "fooling round with the weed," to which he replied "about three months." The deputy also asked the defendant "where he had obtained the marijuana that was found in his car." Defendant stated that "he had bought the marijuana on Main Street from an unknown, male Negro approximately a week prior to his arrest." He further stated "he had paid $5.00 for a half can" and that "the contents of the brown paper bag found in the glove compartment was the remainder of that half a can. * * *"

Defendant did not take the witness stand.

Defendant does not question the validity of his arrest. His thesis is that the search was unreasonable and therefore illegal. Hence the contraband that was found was inadmissible in evidence.

From defendant's position in the car, his physical condition, the manner in which the car was parked, and the earliness of the morning hour, the officer could reasonably conclude that defendant was "in control of" the vehicle,[1] and not just a passenger, at the time of the arrest. Hence the officer was entitled to impound the car, Veh.Code, secs. 585(b) (5) and 585.2; Pen.Code, sec. 849, and thus take possession of it.

[1] In the circumstances of this case it was not unreasonable for the police officer to make an inventory of the contents of the automobile prior to impounding it. Such inventory was a protection to the owner of the vehicle, the garage owner, and the officer. Since the marijuana was found during the course of making the inventory, it was not discovered as a result of an unreasonable search and therefore it was not inadmissible in evidence.

[2] This result may be reached by another approach. Defendant's car was legally in Officer Hopkins' possession as an incident of its impounding. Its contents also were legally in his possession. Therefore possession of the marijuana was legally obtained by the officer. Where an automobile is lawfully in the custody of a peace officer, such contraband articles as are contained in it are legally in the possession of such officer, People v. Baker, 135 Cal. App.2d 1, 5, 286 P.2d 510 and People v. Cahan, 44 Cal.2d 434, 282 P.2d 905, has no application.

[3] Defendant also argues that the marijuana was illegally seized and therefore inadmissible in evidence because it "was not related to the crime for which the defendant had been placed in custody. * * *" An effective answer to this contention is found in Harris v. United States, 331 U.S. 145, 67 S.Ct. 1098, 91 L.Ed. 1399. In that case federal officers, armed with an arrest warrant, arrested the defendant for one crime and while searching his apartment

1. Defendant's statement to Deputy Sheriff Hatfield that he had purchased the contraband a week prior to his arrest and that the contents of the brown paper bag in the glove compartment were the remainder of that purchase justifies an inference that the car belonged to him, or, at least, that he was "in control of" it. This, plus Officer Hopkins' testimony, effectively disposes of defendant's contention that "There is no testimony or any evidence before this court that the defendant was in *control of* or *driving* the motor vehicle in which he was reclining prior to his arrest." Incidentally, it does not appear that defendant made any suggestion to Officer Hatfield that the car was not his. Also, although this was a matter within his own knowledge and power to dispute, defendant failed to testify. For the significance of such failure, see People v. Steccone, 36 Cal.2d 234, 239, 223 P.2d 17. Actually, the case appears to have been tried on the assumption that the car belonged to the defendant.

found evidence which implicated him in a wholly different and distinct offense. Upon conviction of the second charge, defendant appealed on the ground, among others, that the evidence thus procured was improperly admitted as it was not within the purview of the charge for which he was arrested. In rejecting defendant's contention, the court stated, 331 U.S. at pages 154–155, 67 S.Ct. at page 1103: "Here during the course of a valid search the agents came upon property of the United States in the illegal custody of the petitioner. * * * A crime was thus being committed in the very presence of the agents conducting the search. Nothing in the decisions of this Court gives support to the suggestion that under such circumstances the law-enforcement officials must impotently stand aside and refrain from seizing such contraband material. If entry upon the premises be authorized and the search which follows be valid, there is nothing in the Fourth Amendment which inhibits the seizure by law-enforcement agents of government property the possession of which is a crime, even though the officers are not aware that such property is on the premises when the search is initiated."

Similar views were recently expressed by our Supreme Court in People v. Roberts, 47 Cal.2d 374, 303 P.2d 721. It is there pointed out that officers in the course of conducting a reasonable search do not have to blind themselves to what is in plain sight simply because it is disconnected with the purpose for which they entered. In support of this principle the court cited Love v. United States, 4 Cir., 170 F.2d 32, where officers entered defendant's home legally for the purpose of searching for another man but in the course of their search they discovered a still in operation, and Paper v. United States, 4 Cir., 53 F.2d 184, where officers entered lawfully for the purpose of finding and arresting defendant on one charge but in searching for defendant they found an illegal supply of liquor, constituting another offense in the basement. The court quoted with approval the following from the Paper decision, 53 F.2d at pages 184–185: "Where the entry and search are rightful and there is present no element of trespass or fraudulent invasion of the rights of the citizen, there is no reason for excluding evidence of crime discovered in the course of the search. If the officers * * * had discovered in the cellar a counterfeiting plant in operation, would it have been their duty to ignore it? If they had come upon the body of a murdered man, would their testimony as to finding the body be excluded?"

So, here, since the search was reasonable, officer Hopkins was not required to close his eyes to the contraband he discovered simply because it was disconnected with the initial purpose of the search, People v. Roberts, supra, and the contraband thus discovered was not thereby rendered inadmissible in evidence. Harris v. United States, supra.

The order setting aside the information is reversed.

MOORE, P. J., and ASHBURN, J., concur.

147 Cal.App.2d 390

S. Lee VAVURIS, Plaintiff and Appellant,

v.

Raymond A. PINELLI and Louis Sanchez, Defendants and Respondents.

Civ. 17038.

District Court of Appeal, First District, Division 1, California.

Jan. 2, 1957.

Landlord's action against tenants for breach of alleged oral agreement to execute a five-year written lease, or for breach of such lease. From a judgment for defendants rendered by the Superior Court, City and County of San Francisco, Milton D. Sapiro, J., the plaintiff appealed. The District Court of Appeal, Agee, J. pro tem., held that evidence supported trial court's finding that no such new lease was executed and that no terms of any such proposed lease were ever agreed upon by parties.

Judgment affirmed.

1. Landlord and Tenant ⇐25(5)

Delivery of signed lease to tenant was essential in order to make lease operative.

2. Landlord and Tenant ⇐22(4)

In landlord's action against tenants for breach of alleged oral agreement to execute a five-year written lease, or for breach of such lease, evidence supported trial court's finding that no such new lease was executed and that no terms of any such proposed lease were ever agreed upon by parties.

3. Landlord and Tenant ⇐115(3)

Where original lease provided that any holding over with consent of landlord would be construed as a tenancy from month to month, tenants could not be liable under alleged five year extension of such lease, which they did not sign, on any theory that it was merely an extension of original lease at an increased rental and not a renewal thereof. West's Ann.Civ.Code, § 1624, subd. 4; West's Ann.Code Civ.Proc., § 1973, subd. 4.

4. Landlord and Tenant ⇐116(5)

Tenants from month to month, in order to terminate their tenancy at end of a 30-day period, were only required to give the statutory notice of termination and not to have the consent of the landlords to surrender premises. West's Ann.Civ.Code, § 1946.

5. Election of Remedies ⇐14

Plaintiff may not change his election of remedies by means of a supplemental complaint.

James C. Purcell, San Francisco, for appellant.

Robert K. Barber, San Francisco, for respondents.

AGEE, Justice pro tem.

Plaintiff brought this action for damages for breach of an alleged oral agreement by defendants to execute a five-year written lease. The trial court found upon conflicting evidence that defendants did not make any such agreement. Plaintiff makes no contention that this finding is not supported by substantial evidence. Defendants also raise the Statute of Frauds. Civ.Code, § 1624, subd. 4; Code Civ.Proc., § 1973, subd. 4. The trial court held that this was likewise a good defense.

Judgment was rendered for plaintiff in the sum of $185, that being the amount of rent owing by defendants for the last month of their month-to-month tenancy of the premises in question. Plaintiff has appealed from this judgment.

Plaintiff and his brother held the master lease on premises located at 714 and 710 Folsom Street, in the City and County of San Francisco. This lease expired by its terms on January 14, 1952. On May 17, 1948, they executed, as sublessors, a written sublease of 714 Folsom Street. This sublease expired by its terms on December 31, 1951, and provided for a rental of $125 per month. The sublessees operated a tavern on the premises. In November, 1950, they sold out to defendants, Raymond A. Pinelli and Louis Sanchez, and as-

signed the sublease to them. Plaintiff is an attorney at law and he handled all of the details of the sale and acted as escrow holder. He retained the sublease in his files and defendants did not have a copy.

In October, 1951, plaintiff obtained a new master lease of 714 and 710 for the term commencing January 15, 1952, and ending January 14, 1957, at a rental of $95 per month. Prior to this, there had been a general discussion between plaintiff and defendants about a new sublease of 714 for the period commencing January 1, 1952. Plaintiff told them that as soon as he had contacted the owners about a new master lease he would talk to them further. He did tell them, however, that there would be a "slight increase" in their rent. In December, 1951, plaintiff told defendant Pinelli that the defendants could have a new lease and that the rent would be increased to $200 per month. Pinelli told plaintiff that they would not pay that much rent. Plaintiff called back later and told Pinelli that they could have the place for $185 per month. Pinelli agreed to this and asked plaintiff to prepare a new lease. Plaintiff suggested that the new lease contain all of the other terms of the existing lease. Pinelli told plaintiff that he had never read or seen that lease and would not agree to a new lease until he had seen its proposed terms. Pinelli asked plaintiff to draft a new lease and bring it to the tavern so that all of the parties could look it over at the same time. Plaintiff never presented a new lease to defendants. He testified that on January 2, 1952, he prepared and signed an "Extension of Lease" but he admitted that he did not at any time show this to defendants and they did not sign it. This extension instrument adopted the old lease by reference except as to the new period and the increased rental. Defendants paid the increased rental, commencing January 1, 1952. Defendant Sanchez called at plaintiff's office on several occasions and asked to see the proposed lease but he was always told that it had been misplaced. As late as April, 1953, defendant Sanchez called at plaintiff's office, paid the rent, and asked to see the proposed new lease and again plaintiff said he could not find it but that defendants were not to worry about it. About this time defendants became discouraged by their failure to obtain a new lease, the roof was leaking badly, and cars in the parking lot adjacent to the tavern were bumping into the side of the building and knocking liquor bottles off the shelves. In May, 1953, defendants gave plaintiff 30 days' written notice of termination of tenancy, sold their liquor license, and closed up.

Plaintiff then filed this action for damages in the sum of $7,955, that amount representing the total rent for the balance of the five-year period at $185 per month.

[1, 2] Plaintiff's first contention is that it was not necessary, in order to effectuate the new lease, that defendants, as lessees, sign the "Extension of Lease" which plaintiff prepared and which he testified was signed by him on January 2, 1952. In all of the cases [1] relied upon in support of this contention, there was an agreement reached by the lessor and the lessee as to the terms of the lease and the lessee entered into possession under the lease agreed upon. Here, the parties did not reach an agreement as to the proposed new lease and their entry into possession was under the old lease of May 17, 1948. In each of the cases referred to by plaintiff, there was a delivery to the lessee of the lease agreed upon, signed by the lessor. In the instant case there may have been a signing by the lessor but there was no delivery to the lessee. "To become operative, a lease must not only be signed but delivered." (15 Cal.Jur. p. 617, citing authorities.) Plaintiff kept the "Extension of Lease" in his file and defendants never

1. Allan v. Guaranty Oil Co., 176 Cal. 421, 168 P. 884; Chandler v. Hart, 161 Cal. 405, 119 P. 516; Dodd v. Pasch, 5 Cal. App. 686, 91 P. 166; Watkins v. McCartney, 57 Cal.App. 643, 207 P. 909; Munford v. Humphreys, 68 Cal.App. 530, 229 P. 860.

even saw it. The trial court found as follows: "Prior to the termination of said lease, plaintiff and the defendant Louis Sanchez engaged in certain oral negotiations relative to the execution of a new written lease of the premises from plaintiff to defendants but no such new lease was executed nor were the terms there-ever agreed upon by the parties." This finding is supported by substantial evidence.

[3] The second contention of plaintiff is that it was not necessary that defendants sign the instrument dated January 2, 1952, in order to make it effective, because such instrument was merely an extension of the term of the original lease at an increased rental and not a renewal thereof. The cases relied upon by plaintiff involve leases which contain an express provision for such an extension. See 172 A.L.R. 1219, et seq., for collection.

The plaintiff argues from these cases that a mere holding over by the lessee constitutes an election to take the additional or extended term and obviates the necessity of executing a new lease. The fallacy of this argument is that the original lease in the instant case contains no such provision for an extension. Instead, it provides as follows: "Twentieth: Any holding over after the expiration of said term, with the consent of the lessor, shall be construed to be a tenancy from month to month, at a rental of One Hundred and Twenty Five ($125.00) Dollars * * * and shall otherwise be on the terms and conditions herein specified, so far as applicable."

Plaintiff's third contention is that defendants are estopped to raise the Statute of Frauds as a defense. His argument is that he was under no obligation to obtain a new master lease and that he obtained the new master lease "solely in reliance upon the promise of the defendants to execute the instrument in question [the so-called extension of lease]." This argument fails for the obvious reason that the trial court found that the defendants had not made any such promise. The defendants so testified and plaintiff does not claim that this finding is not supported by substantial evidence.

[4] Plaintiff's fourth contention is that there has been no surrender of the premises. He states that a surrender of leased premises before the expiration of the term can be done only by expressed consent of the parties in writing or the operation of law when they do something that implies that both have consented. This argument is based upon the assumption that there was a valid lease for a specified term in existence after the expiration of the original term. Defendants correctly point out that, after December 31, 1951, their tenancy was from month to month and that all that was necessary, in order to terminate such tenancy, was to comply with section 1946 of the Civil Code. Here, the notice required by this section was admittedly given. This is all that defendants were required to do to terminate their tenancy at the end of the 30-day period. Dorn v. Oppenheim, 45 Cal.App. 312, 186 P. 462.

[5] Lastly, plaintiff complains of the denial of his motion to file a supplemental complaint. This proposed pleading requested a money judgment for rent at the rate of $185 per month from January 1, 1953, to the entry of judgment. It is based upon the theory that a new lease was in effect between the parties. This is a different theory than that alleged in the original complaint, which was for damages for breach of an oral agreement to execute a lease. Both theories, however, are dependent upon the existence of an agreement to execute a lease and, in view of the finding that there was no such agreement, any judgment rendered on the proposed supplemental complaint would of necessity have been the same as the judgment rendered on the original complaint. This being so, plaintiff could not have been prejudiced by the denial of his motion. It should also be noted that plaintiff was attempting to change his election of remedies by means of a "supplemental complaint,"

which he cannot do. Bradbury v. Higginson, 162 Cal. 602, 123 P. 797.

The judgment is affirmed.

BRAY, Acting P. J., and FRED B. WOOD, J., concur.



147 Cal.App.2d 338

Anne Vivian FOSTER, Plaintiff and Respondent,

v.

Glen Varick FOSTER, Defendant and Appellant.

Civ. 22018.

District Court of Appeal, Second District, Division 1, California.

Dec. 31, 1956.

Proceeding by wife against husband for order increasing allowance for separate support and maintenance, and new attorney's fees. The Superior Court, Los Angeles County, Walter H. Odermar, J., ordered husband to pay $475 a month alimony for 13 months, and additional attorney's fee of $1,000, and husband appealed. The District Court of Appeal, Fourt, J., held that where there was evidence that wife was being attended by psychiatrist and another doctor, but since prior order husband's obligations had decreased $250 per month by reason of termination of alimony to prior wife, the trial court did not abuse its discretion by modifying previous order for support and maintenance and attorney's fees.

Order affirmed.

1. Husband and Wife ⇐295, 299(3)

In proceeding by wife against husband for increase in separate support and maintenance allowance and new attorney's fees, where there was evidence that wife was being attended by a psychiatrist and another doctor, but since prior order husband's obligations had decreased $250 per month by reason of termination of alimony to previous wife, and that assets of husband were $400,000, it was within discretion of the trial court to raise allowance for support and maintenance from $400 to $475 per month and to increase attorney's fees.

2. Appeal and Error ⇐984(1)

Order granting increase in allowance for separate support and maintenance should not be disturbed on appeal, in absence of clear abuse of discretion.

3. Appeal and Error ⇐1047(5)

In proceeding by wife against husband for increase in separate support and maintenance allowance and for additional attorney's fees, where attorney testified that reasonable value of services rendered was $1,500, but did not have record with him, failure to order attorney to bring such books and records to court was not prejudicial error.

4. Attorney and Client ⇐62

There is no rule which expressly limits a wife, seeking a divorce, to representation by single attorney.

5. Husband and Wife ⇐299(3)

Stipulation at preliminary hearing to fix balance of attorney's fees at the time of trial did not preclude trial court from exercising its discretion and making modification order for attorney's fees, in proceeding by wife against husband for increase of separate support and maintenance allowance and for additional attorney's fees.

Price, Postel & Parma, Santa Barbara, Frederick W. Mahl, Jr., Los Angeles, for appellant.

Walter H. Young, Los Angeles, for respondent.

FOURT, Justice.

This is an appeal from an order wherein the court ordered the appellant to pay to the respondent's new counsel, on account of

attorney's fees, the sum of $1,000, and further, to pay to the respondent, in addition to the sum of $400 per month previously ordered, the sum of $75 per month.

The facts of the case, as disclosed by the files and records, are substantially as follows: The parties hereto were each previously married to and divorced from another spouse at least once. The respondent, hereinafter referred to as the wife, had, prior to her marriage to the appellant, hereinafter referred to as the husband, lived in California sometimes with and sometimes separated from her then husband. The husband herein was, at the time of his marriage to the wife herein, divorced from another wife and was paying her alimony in the sum of $250 per month plus $300 per month for the support and maintenance of two minor children of that marriage. The parties here were married in Las Vegas, Nevada, on or about June 20, 1953, and separated about April 8, 1955. Apparently the marriage took place on the day of the divorce of the wife herein from a previous husband.

The wife brought this action wherein she alleged extreme cruelty and seeks a judgment for separate support and maintenance. The husband's answer denies the existence of the marriage relationship and the alleged acts of extreme cruelty. He also filed a cross-complaint for annulment, and in the alternative, for a divorce.

An order to show cause with reference to alimony, attorney's fees and costs was secured by the wife and returned and heard before Judge Mosk in Department B, Santa Monica, on June 3, 1955. After a full and complete hearing on that date the judge ordered the husband to pay to the wife the sum of $400 a month for support and maintenance, plus the sum of $250 on account of costs and the sum of $1,500 on account of the wife's attorney's fees, and pursuant to stipulation between counsel for the parties, the balance of attorney's fees, if any, was to be set at the time of trial. The amounts so ordered were all paid by the husband.

Thereafter the wife secured an order to show cause with reference to a modification of the order of June 3, 1955, based upon her affidavit that she required over $800 per month for her support and maintenance, additional fees for her new attorney, and additional sums for costs. This order with reference to a modification of the original order was heard on April 13, 1956, in the superior court, Santa Monica, Department C, before Judge Odemar, and at the conclusion of the hearing the judge ordered that the husband pay additional attorney's fees, on account, in the sum of $1,000, and the sum of $475 for a thirteen month period for the wife's support and maintenance. This appeal is from the order of April 13, 1956.

The record seems to indicate that the complaint for separate support and maintenance was filed on the 25th day of May, 1955. The first order to show cause was heard and disposed of on June 3, 1955. Sixty-four days elapsed from the date of the filing of the original complaint to the date of the husband's first appearance by demurrer. The hearing on the demurrer was continued on the day it was set to be heard. A first amended complaint was filed by the wife on August 26, 1955. Sixty-eight days later an answer and cross-complaint was filed by the husband. At the date of the hearing of the petition to modify the previous order of June 3, 1955, no answer to the cross-complaint had been filed, although some 162 days had passed. An answer to the cross-complaint was ultimately filed on June 26, 1956. The case is now at issue and set for pre-trial hearing on April 18, 1957.

The husband contends that the wife failed to sustain the burden of showing a change of circumstances since the making of the original order. The evidence did show, however, that she was now apparently being attended by a psychiatrist and another doctor. She was apparently being attended by the psychiatrist for what she said was being "emotionally upset", and by the second doctor for what she stated the doctor said was a "near ulcer". She further

testified that she now drove her automobile 25,000 miles per year, or over 2,000 miles per month. Further, in an affidavit, she set forth that she once was employed by I. Magnin for two or three months in 1950 for $165 per month, that she hasn't worked since, and does not expect to work in the future. She also stated that she required $30 per month for beauty treatments and care.

At the original hearing the wife stated that she had lived in California up to a period of approximately six weeks before securing her divorce from her then husband. She was extremely vague and uncertain as to just how long she had been in Las Vegas, Nevada, immediately prior to her marriage on June 20, 1953, but that she was certain that she had been there at least six weeks. She did not recall whether she had closed her bank account in California when she left the state, or whether she had registered to vote in Nevada, and she believed, however she was not sure, that she took her clothing to Nevada. Furthermore, it was shown that since the prior order the husband's obligations were decreased $250 per month by reason of the termination of alimony to a previous wife in the sum of $350 per month, but increasing his child support charge by $100 per month. The assets of the husband were disclosed to be about $400,000, consisting of $180,000 in securities, and $220,000 in three trusts of which he is the beneficiary.

[1, 2] We are of the opinion that under the circumstances it was within the discretion of the trial court to raise the allowance for the support and maintenance of the wife from $400 to $475 per month. Under the facts and circumstances of this case, the court apparently found, among other things, that the wife was in need of some additional psychiatric or other treatment, and well he might have so found. It is true that any other judge might very well have rejected the petition of the wife for any increase on the evidence which was presented. There is, however, in our opinion, an insufficient showing to demonstrate a clear abuse of discretion, and unless there is such a clear abuse, the order should not be disturbed on appeal. Sweeley v. Sweeley, 28 Cal.2d 389, 170 P.2d 469. The court did not exceed the bounds of reason.

[3] Next considering the matter of the allowance for additional attorney's fees, Sidney Traxler, the first attorney for the wife, appeared as a witness in the hearing to modify the original order. He testified that the reasonable value of the services rendered to the wife by him was the sum of $1,500. He stated that he had expended seventy hours on the case and that his rate was $30 per hour. The witness said that he did not have the record of the seventy hours work with him. Counsel for the husband requested of the judge that he make an order that Traxler bring his office records concerning the services he rendered to the wife to the court, to the end that he could be cross-examined thereon. The judge apparently did not state that he would not make such an order as requested, but the fact remains that he did not so order Traxler to bring to the court his books and records concerning the time expended on the case. Appellant contends that it was prejudicial error not to grant his request. We are of the opinion that there is no merit to the contention. In the case of Rose v. Rose, 109 Cal. 544, at page 546, 42 P. 452, the court said, in reference to an order for additional attorney's fees: "As the value of the services and the pecuniary condition of the defendant are elements entering into the determination by the court of the amount which it will direct to be paid, the court would naturally require some evidence upon these points; and unless it is made to appear that the order was made without any evidence, or without any opportunity on the part of the husband to be heard, and that it is of such a character as on its face to be inordinate in amount, it must be assumed that the discretion of the court has been properly exercised. The mere absence from the record of the evidence upon which the order was based does not authorize its

reversal. The appellant must show that error has been committed. In taking the evidence for the purpose of fixing the amount of the allowance, the court is not trying an issue in the case, but is seeking for information as the basis of its order, and is not bound by the technical rules of evidence applicable to controversies between contesting litigants." And 109 Cal. at pages 545–546, 42 P. at page 452, the court said: "The court cannot know at the commencement of the action the amount of labor that will be required, or the value of the services to be performed, in the prosecution or defense of the action on behalf of the wife, and there is no rule of procedure which requires it to fix the entire amount of counsel fees at the beginning of the action, or to prevent it from making allowances from time to time as the exigencies of the case shall seem to demand."

[4] There is, of course, no rule which expressly limits a wife to representation by a single attorney, Armstrong v. Armstrong, 81 Cal.App.2d 322, 183 P.2d 905. Furthermore, if counsel had been so minded, he could during the recess, have subpoenaed whatever records he desired.

[5] We are further of the opinion that there is no merit to the contention of the husband to the effect that the stipulation at the hearing in 1955 to fix the balance of the attorney's fees at the time of trial precluded the court from making the modification order as was done here. There was a change of circumstances and the court excercised its discretion.

This case fairly well points up the difficulties which can, and do, arise when matters are unduly delayed. Perhaps there is something which is not apparent on the face of the record in this case, but it would seem that it is an ordinary separate support and maintenance, annulment or divorce case and probably could have been heard long ago if there had been just a little diligence exercised.

The order is affirmed.

WHITE, P. J., and DORAN, J., concur.

* Opinion vacated 309 P.2d 420.

Emily M. COLLINS, Plaintiff and Appellant,

v.

Robert F. COLLINS et al., Defendant and Respondent.*

Civ. 21779.

District Court of Appeal, Second District, Division 3, California.

Dec. 20, 1956.

Rehearing Denied Jan. 17, 1957.

Hearing Granted Feb. 13, 1957.

Divorced wife's action against divorced husband to set aside property settlement agreement on ground that it was allegedly procured by undue influence and breach of fiduciary duty to disclose nature and extent of community property. The Superior Court of Los Angeles County, Maurice C. Sparling, J., rendered judgment for defendant, and plaintiff appealed. The District Court of Appeal, Shinn, P. J., held that questions of whether divorced husband was guilty of breach of fiduciary duty and whether divorced wife entered into agreement voluntarily and solely in exercise of her own judgment could not be determined in entire disregard of question of fairness of agreement, and trial court's action in so doing was prejudicially erroneous.

Judgment reversed.

1. Trial ⇐388(1)

The purpose of findings is a determination of the material ultimate factual issues.

2. Appeal and Error ⇐1056(1)
Husband and Wife ⇐279(2)

In divorced wife's action against divorced husband for rescission of property settlement agreement on ground that her consent had been allegedly procured by undue influence and by breach of fiduciary duty to disclose amount and character of community property, questions of whether divorced husband was guilty of breach of fiduciary duty and whether divorced wife had entered into agreement voluntarily and solely in exercise of her own judgment could not be determined in entire disregard of question of fairness of agreement, and trial court's action in so doing, excluding

evidence proffered to show unfairness of agreement was prejudicially erroneous. West's Ann.Civ.Code, §§ 158, 2219, 2228, 2229, 2234, 2235.

3. Husband and Wife ⇐278(1)

Where husband had acted as fiduciary in dealings with community property, that wife could have determined character and amount of such property from inspection of public records did not negate husband's duty of disclosing such to her when they were negotiating property settlement prior to divorce.

4. Husband and Wife ⇐279(2)

In divorced wife's action against divorced husband for rescission of property settlement agreement on ground that her consent had been allegedly procured by undue influence and by breach of fiduciary duty to disclose amount and character of community property, trial court's finding that, in entering into property settlement agreement, divorced wife had relied upon advice of her counsel and not on advice of husband in respect to such agreement was contrary to evidence.

5. Husband and Wife ⇐279(2)

In divorced wife's action against divorced husband for rescission of property settlement agreement on ground that her consent was allegedly procured by exercise of undue influence and by breach of fiduciary duty to disclose nature and amount of community property, when divorced husband undertook to justify his actions as those of fiduciary, burden was on him to establish fairness of contract and that he did not in slightest degree abuse trust and confidence of wife or take advantage of her ignorance or inexperience. West's Ann. Civ.Code, §§ 158, 2219, 2228, 2229, 2234, 2235.

6. Husband and Wife ⇐265

Where wife had had nothing to do with husband's real estate operations except occasionally to sign escrow instructions and notes secured by trust deeds and she did not question husband about business ventures, husband occupied a fiduciary relationship to wife with respect to such community property and would be deemed to be her trustee. West's Ann.Civ.Code, §§ 158, 2219, 2228, 2229, 2234, 2235.

7. Husband and Wife ⇐279(2)

Where husband occupies fiduciary relationship as trustee for wife with respect to community property and, in negotiating property settlement, knowingly receives more value than wife receives, settlement is presumptively fraudulent, placing burden upon him, in action for rescission of agreement, to show that it was fair, just and fully understood by wife. West's Ann.Civ. Code, §§ 158, 2219, 2228, 2229, 2234, 2235.

8. Husband and Wife ⇐278(1)

Where husband has had complete control and management of community property and wife has had nothing to do with it other than to join with him in executing documents at his request, husband, in negotiating property settlement, has affirmative duty to see that wife is fairly and fully informed to extent and value of property and must inform her of all facts of which he has knowledge which would reasonably affect her judgment and which are not known to her. West's Ann.Civ.Code, §§ 158, 2219, 2228, 2229, 2234, 2235.

9. Husband and Wife ⇐278(1)

Fact that husband gave wife freedom does not bear on fairness of division of property.

Vaughan & Brandlin, Vincent E. Lumbleau, Robert P. Schifferman, Los Angeles, for appellant.

McLaughlin & Casey, Los Angeles, for respondent.

SHINN, Presiding Justice.

Plaintiff appeals from an adverse judgment in an action to set aside a property settlement agreement. The gravamen of the action is that plaintiff's consent to the agreement was procured by the exercise of undue influence by the defendant and breach of fiduciary duty to disclose to plaintiff the amount, character and value

of the community property. The grounds of the appeal are that the findings are not supported by the evidence, they do not support the conclusions of law and that the court failed to make findings upon material issues.

The complaint contains several causes of action for rescission, declaration of a constructive trust, declaratory relief and to quiet title. They are but variations of the claim of plaintiff that she was overreached in entering into the property settlement agreement and that defendant received in the settlement property of many times the value of what she received.

The parties, residents of California, intermarried March 23, 1940; they have three sons born, respectively, in 1941, 1945 and 1947 and a daughter born in 1944. At the time the agreement was entered into the parties were separated. Plaintiff had gone to Las Vegas for the purpose of obtaining a divorce. She employed the firm of Ralli, Rudiak and Horsey. Mr. D. Francis Horsey wrote defendant a letter date July 10, 1953, advising him that plaintiff intended to sue for divorce upon the ground of mental cruelty and that the evidence would not involve anything that was derogatory or detrimental to defendant. Mr. Horsey was under the impression that a property settlement agreement had been executed and requested a copy of it for presentation to the court at the time of trial. Also enclosed was a power of attorney which defendant executed and which authorized a Nevada attorney to appear in the action for him. Defendant mailed to plaintiff a draft of an agreement. It provided that the home of the parties in Sherman Oaks, Los Angeles County, would remain in the names of the parties as tenants in common until the youngest child became of age, when it would be conveyed to the children. All other property was to be owned by defendant as his separate property. Plaintiff would have the right to live in the home as long as she kept the children with her. She would have physical custody of the children during the school terms and defendant reasonable rights of visitation and also custody during holidays and vacation periods. Defendant was to pay plaintiff $3,000 for her support and $100 per month for the support of each child, and pay an indebtedness of some $13,000 on the home property, keep up fire and liability insurance and pay all taxes. Plaintiff waived the right to receive support from defendant in addition to the $3,000 and there were the usual releases of rights to after-acquired property, to administer upon the estate of the other and to inherit property. Plaintiff waived the right to have the property of the parties listed in the agreement or disclosed to her by defendant. Shortly after the agreement was mailed to plaintiff, Mr. Rudiak wrote to defendant stating that plaintiff had consulted his firm relative to the proposed agreement. He requested for Mrs. Collins title to the home, a written disclosure of the community property, an appraisal of the property and an equitable division of it and a statement of defendant's income. Other requests were made.[1] Defendant did not answer the

1. "3. Mrs. Collins feels furthermore that the dwelling house at 4006 Longridge Avenue, Sherman Oaks, California, should be deeded to her outright, and that an equitable division should be made as to her community interest in the other real estate which you own together. In this connection, an appraisal of the value of her interest in such realty could be made by three disinterested persons and you could either purchase her interest therein upon a monthly basis or agree to pay her the amount of her present interest at the time the property is sold. Either arrangement would be satisfactory. In fairness to Mrs. Collins, however, since she has very little knowledge of your business affairs, we believe that you should make a written disclosure to her of all of your mutual community property interests before a final agreement relative to the disposition of such interests is made.

"4. Mrs. Collins advises that your original agreement was to pay her the sum of $600.00 per month for the support and maintenance of the children. Support money in that amount would en-

letter. Mr. Rudiak also called defendant by telephone and was referred to defendant's attorney but did not contact the attorney. At defendant's telephone request plaintiff returned to California. Defendant had another agreement prepared which the parties executed August 13, 1953, and pursuant thereto plaintiff executed and acknowledged on that date conveyances to defendant of her interest in 20 parcels of real property, title to which had stood in joint tenancy. On September 4th she executed assignments of 3 trust deeds which stood in the name of defendant. The real property was in joint tenancy. The parties treated it as community property and the court so considered it. It is apparent that the vesting in joint tenancy was merely for the purpose of convenience. The agreement that was executed recited that the home stood in joint tenancy and would be transferred to plaintiff as her separate property. This was done. The provision that plaintiff would receive $3,000 in lieu of support, as stated in the first draft, was omitted from the second. Plaintiff waived the right to support. Otherwise, the two agreements were substantially the same.

Immediately after August 13th plaintiff returned to Nevada and exhibited the executed agreement to her attorneys. She filed an action for divorce and on August 27th obtained a decree of divorce which approved the property settlement. She promptly married Major Blankenship. Within a few days defendant was married to his secretary. In September 1954 plaintiff divorced Major Blankenship. She gave notice of rescission of the agreement and promptly instituted this action.

Plaintiff alleged that defendant refused to disclose, and that she did not know, the nature, extent or value of the property which she and defendant owned; she did not receive advice from her attorney respecting the settlement and did not read the property settlement agreement or the deeds or assignments which she signed. Her testimony was specific that she did not know what was in the agreement or the purport of the deeds and assignments which she executed and did not know what properties were owned or their value.

The primary factual questions were: 1, what community property was owned by the parties; 2, the value of the property; 3, did plaintiff know what property was owned, and 4, did she know its value. It was necessary that these questions be answered in order that the court would be prepared to try the further questions whether plaintiff entered into the settlement voluntarily, in the exercise of her own free judgment, or as a result of undue influence of the defendant.

able Mrs. Collins to assume payment of the encumbrance and maintenance costs upon the dwelling house at 4006 Longridge Avenue, which we suggest be deeded to her, thereby relieving you of that burden.

"5. By way of security, in the event of your demise, Mrs. Collins also feels that you should agree that you will immediately prepare and keep in force a valid Will whereby the children will be left at least two-thirds of your estate. In the same connection Mrs. Collins is willing to relinquish her community property rights in the policies of life insurance upon your life (provided you will agree to at all times keep said policies in force, unimpaired, and to irrevocably designate the children as the beneficiaries of such policies. Since the amount of your insurance coverage is also not known to Mrs. Collins, we believe a full disclosure should be made of the names of the companies, policy numbers, and principal sum indemnities of your several policies.

"6. Finally, Mrs. Collins would like to have you undertake to pay the children's tuition in private schools for so long as your income does not drop below a specified level to be agreed upon by the parties. Here, again, Mrs. Collins is at the disadvantage of having no knowledge as to the exact amount of your income or of what sum would be reasonable in this regard, and would therefore welcome your suggestions.

"We are sure you will agree, after considering these proposed changes, that they are not unreasonable. Mrs. Collins has every confidence that you will want to make fair and adequate provision for the children and that you are equally desirous that she obtain her just share of the community property."

[1] We turn to the court's findings and conclusions and we again meet a set of findings and conclusions which are eloquent of the author's unfamiliarity with the purpose served by findings, namely, the determination of the *material ultimate factual issues* in the case. Altogether the findings and conclusions consist of 10 closely typed pages, 7 under the head of findings and 3 under the head of conclusions. They consist of a conglomeration of evidentiary facts and conclusions. They add up to no more than a rambling and incomplete news story of plaintiff's confession of her love for Major Blankenship, the break-up of the marriage, the circumstances under which the property settlement agreement was entered into, including the subsequent marital venture of plaintiff, but omitting reference to that of the defendant.

The court made no finding as to what community property was owned by the parties, no finding as to the value of the property, no finding whether plaintiff knew what property was owned and no finding whether she knew its value. The court did find that plaintiff knew the purport of the property settlement agreement and that the parties owned the property that was described in the deeds, but in the light of the evidence and the findings as a whole, this finding means only that plaintiff knew from the fact that defendant requested her to execute the deeds that they conveyed property in which she had an interest. As we shall see, the property was not described in the agreement and the deeds were prepared and executed after the terms of the agreement had been substantially agreed upon.

The failure of the court to make a determination as to the extent and value of the property and with respect to plaintiff's knowledge of the same was due to the course of the trial as directed by the court. There was in evidence a chart prepared by defendant which listed the parcels of real property which were divided, with their cost, existing encumbrances and defendant's estimates of their values. With certain explanatory testimony the cost of the properties was shown on the chart to have been about $350,000. Defendant's estimates of the values at the time of the property settlement were substantially the same as the total cost. The balance unpaid on the trust deed notes which defendant held was something over $14,000. The chart lists the encumbrances on the real property at about $190,000. Plaintiff claimed the interest of the defendant in the home which she received was worth only $20,000. Defendant estimated it to be worth $32,500.

Counsel for plaintiff stated in the beginning of the trial that plaintiff proposed to prove that defendant received in the settlement property eight times the value of that received by plaintiff. At that time, and later in the trial, the court directed that there should first be tried the question of the validity of the agreement and later, if it should be necessary, the question of the value of what plaintiff received and what defendant received in the settlement. When plaintiff sought to prove by expert testimony that the property defendant retained was worth eight times as much as what plaintiff received, the court ruled in accordance with earlier rulings that it was trying only the issue of the validity of the agreement, and rejected the offered evidence.

[2] We do not see how it would have been possible for the court to arrive at a just decision without knowing whether the division of the property was just and equitable. Defendant was a fiduciary; plaintiff, as we shall see, was a credulous and complacent party to the property settlement. The questions whether defendant was guilty of breach of fiduciary duty and whether plaintiff entered into the agreement voluntarily and solely in the exercise of her own judgment could not be determined in entire disregard of the question of the fairness of the agreement.

We have concluded that evidence offered by plaintiff was erroneously denied admission and that there was a failure to deter-

mine issues indispensable to a decision of the cause on the merits, which necessitate a reversal of the judgment.

We do not find it necessary to go to any great length in reciting the evidence or to do more than give a general outline of the situation of the parties. When we refer to the testimony, as well as to the admitted facts, it is only for the purpose of showing the entire inadequacy of the findings on the material issues and the necessity for a new trial in which all material and relevant evidence will be received.

Defendant is a physician with a gross income in excess of $80,000 a year. For a number of years he had been speculating in unimproved real estate. He made many purchases and in one instance put on a residential subdivision which he sold out. He and the plaintiff gave many purchase money trust deeds. Plaintiff was a housewife with the care of four children. She occasionally signed escrow instructions and had signed numerous notes secured by trust deeds. Aside from this she had nothing to do with defendant's real estate operations or his business. So far as disclosed by the evidence she never questioned defendant about his business ventures.

In the latter part of 1952, the parties had discussed a divorce. Defendant testified that at that time he was opposed to it. However, when the matter was discussed again in about June 1953, defendant was agreeable to a divorce. He gave plaintiff $300 to pay for her divorce in Las Vegas. Plaintiff testified, and defendant did not deny, that he told her at that time to tell her attorneys that a property settlement had been made and that she wanted a simple divorce, as otherwise, if property was involved, the cost of a divorce would be greater. There had been discussions of a property settlement. Both parties testified to that fact and the further fact that plaintiff had asked for some of the properties and had suggested that defendant sell some of them. Plaintiff had asked for title to the home and $600 per month and this was agreed to by defendant. In plaintiff's telephone conversation with defendant and upon other occasions and at the time she signed the agreement, she asked for and was assured that she was getting the home. Instead of $600 per month, which had apparently been agreed upon, both agreements drafted by defendant provided for only $400 per month. Defendant's explanation at the trial of the terms of the first drafted agreement was that if the title to the home had been placed in the name of plaintiff he could not have received credit on his income tax liability for taxes paid. The first draft was more favorable to plaintiff than the second one, since it provided that plaintiff would receive $3,000 in lieu of support, which she was not to receive under the second agreement.

[3] Defendant testified that he never had any intention of giving plaintiff a statement of the property owned. At the same time he claimed that she knew what the properties were and it is contended now that she could have found out what they were by consulting the public records and then could have investigated their value. This, of course, would have been true if the parties had been dealing at arm's length, but it is not the rule in dealings between fiduciaries.

[4] The court found: "That at the time the said property settlement agreement was signed and prior thereto, plaintiff had legal counsel and was relying upon the advice and opinions of her said legal counsel and did not rely upon any advice, statements or opinions of the defendant with respect to any matter involved in such property settlement agreement. * * *" This finding is contrary to all the evidence on the subject. Plaintiff's attorneys objected to her entering into the agreement first drafted. The circumstances corroborate plaintiff's testimony, which was not contradicted by defendant, that defendant endeavored to avoid negotiation of a property settlement agreement through plaintiff's attorneys. Knowing the objections which the attorneys had to the proposed settlement, defendant had plaintiff

come to Los Angeles where she unhesitatingly signed the agreement, which she had no opportunity to submit to her attorneys. She had been requested not to consult them with respect to the settlement. She had obeyed the instructions until the attorneys called for a copy of the agreement which they understood had been signed. Defendant knew that the attorneys had rejected the first proposed agreement. He knew, so he testified, that plaintiff was in love with Major Blankenship and intended to marry him as soon as possible. She was in haste, and for obvious reasons. There was no evidence that plaintiff knew that defendant also had plans for his own remarriage.

[5] It will be the duty of the trial court to pass upon the fairness of defendant's conduct and the ability of plaintiff to cope with defendant in the matter of the settlement. We hold that when defendant undertook to justify his actions as those of a fiduciary the burden was upon him to establish the fairness of the contract and that he did not in the slightest degree abuse the trust and confidence of the plaintiff or take any advantage of her ignorance and inexperience.

The court was in error when it ruled that the value of what plaintiff received in the settlement and the value of what defendant received was immaterial. It was the most important factual issue in the case. There was no doubt of the existence of a fiduciary relationship which imposed upon defendant the duty to take no advantage of plaintiff in the division of property. But even upon the values as admitted by defendant there was ample reason for plaintiff's contention that defendant received in value far more than the amount plaintiff received.

Knowledge of the values could not have been imputed to plaintiff except upon the theory that she could have learned of the ownership of the real property and the three trust deeds by an examination of the public records, could have had the real properties appraised, and could have ascertained from the makers of the trust deed notes the amounts of the unpaid balances. Plaintiff testified that defendant had assured her many times that he would be eminently fair with her in the settlement of property rights and would also support the children. But even without such assurances plaintiff had no reason to suspect that defendant would deal unfairly with her. She was not required to examine the public records nor make inquiry of the trust deed debtors. She had a right to rely upon the honesty and fairness of the defendant and he could not sit tight and expect her to discover what he refused to disclose to her.

[6, 7] Although the court made no finding whether plaintiff reposed trust and confidence in defendant, the fact that a fiduciary relationship existed was not open to question. In view of the evidence defendant was to be deemed a trustee for plaintiff. Civ.Code §§ 158, 2219, 2228, 2229, 2234, 2235; Fields v. Michael, 91 Cal.App.2d 443, 205 P.2d 402. The court found that defendant knew he was receiving in the settlement more of value than his wife received. The settlement was presumptively fraudulent. Defendant had the burden of showing that the transaction was fair and just and fully understood by plaintiff. In re Estate of Cover, 188 Cal. 133, 204 P. 583; Norris v. Norris, 50 Cal.App.2d 726, 123 P.2d 847; Andrew v. Andrew, 51 Cal.App.2d 451, 125 P.2d 47.

[8] The principles which control the conduct of fiduciaries, as applicable to property settlements, impose upon a husband, situated as defendant was, certain definite duties. Where the husband has had complete control and management of the community property and the wife has had nothing to do with it other than to join with him in executing documents at his request (which is a common, if not the usual situation), the husband has an affirmative duty to see that the wife is fairly and fully informed as to the extent and value of the community property, in order that he may be in a position to negotiate a property settlement agreement with her which effects a division of it. He must inform the wife

of all facts of which he has knowledge which would reasonably affect her judgment and which are not also known to her. We do not say there may not be circumstances in which he would be excusable for not making a disclosure, nor do we say that a disclosure is in all cases a prerequisite to a just and fair division of property. But the present case is governed by the general rule we have stated.

Defendant contends that plaintiff and her attorneys undertook to make an investigation and that they, alone, are to blame if they did not finish it. There is no merit whatever in this contention. Defendant did all he could to separate plaintiff from the influence and advice of her attorneys in the matter of the settlement, and he succeeded. Plaintiff supinely did as requested by defendant, although it was contrary to the judgment of her attorneys.

A fact which is manifestly fatal to the judgment is that the court did not undertake to determine whether the settlement was fair, just and reasonable. No finding or conclusion was made that it was fair and just. No facts were found which would show it to be fair and just. The finding was that defendant knew he was receiving more in the settlement than plaintiff was receiving. Defendant contended, and here contends, that "Courts have no power to remake an agreement merely because it turns out to be more beneficial to one party than the other" and that "The law does not weigh the quantum of the consideration. (6 Cal.Jur. p. 169; Brawley v. Crosby Research Foundation, Inc., 73 Cal.App.2d 103, 166 P.2d 392.)" This argument prevailed in the trial court. In announcing its decision and the reasons for it, the court stated: "It further appears at that time for reasons possibly best known to her the plaintiff, particularly wanted a divorce. That appears to have been paramount in her mind. Possibly the agreement which she signed did not constitute an equal or possibly even on the face of things a fair division of the community property. Yet it was what the plaintiff wanted, bargained for and accepted, other factors then possibly being more important to her."

[9] Throughout the trial and on the appeal defendant has contended that the property settlement should be regarded as one between parties who were dealing at arms' length, and that if plaintiff did not receive a fair share of the property it is her own fault. All his arguments as to the benefits he conferred upon plaintiff do not conceal the skeleton upon which they are draped. It came to view in the testimony of defendant that he never had any intention of informing plaintiff or her attorneys what property was owned or its value. It is shown throughout the briefs of defendant. He says, in substance, that plaintiff was in love with Major Blankenship, she was in a hurry for a divorce so she could remarry, and was less interested in getting a fair share of the property than in acquiring a new husband. This does appear to have been her immediate motive. But defendant had no right to take advantage of the fact that her romantic illusions obscured whatever business judgment she possessed. She was all the more in need of protection against her own impulsive action. The fact that defendant gave plaintiff her freedom does not bear upon the fairness of the division of the property. In that connection he gave no more than he received. He, also, had plans, but was shrewd enough not to divulge them. To say that plaintiff received what she asked for is not an answer to the question whether she would have been given more upon a fair and equitable division.

It may well be that if the court had found how much more was allotted to defendant than to plaintiff, the disparity would have been so great as to render the settlement grossly inequitable. That is an indispensable issue which must be determined by the trial court and it is one as to which the evidence should be complete and the findings explicit.

Although defendant placed in evidence the Nevada decree he did not plead it nor rely upon it as an adjudication that the

property settlement agreement was valid. That question is not present.

The judgment is reversed.

PARKER WOOD and VALLÉE, JJ., concur.



147 Cal.App.2d 343

ALPHA BETA FOOD MARKETS, Inc., a corporation, et al., Plaintiffs and Respondents,

v.

AMALGAMATED MEAT CUTTERS AND BUTCHER WORKMEN OF NORTH AMERICA, an unincorporated voluntary association, et al., Defendants and Appellants.

Civ. 22090.

District Court of Appeal, Second District, Division 1, California.

Dec. 31, 1956.

Action by certain retail food market operators against unions representing their employees for a declaratory judgment determining the validity of a provision of the parties' collective bargaining agreements. The Superior Court, Los Angeles County, Philip H. Richards, J., entered judgment adverse to the unions and they appealed. The District Court of Appeal, Fourt, J., held that provision that all fresh meats, poultry, and fish shall be cut, prepared and packaged on the premises and dispensed by members of union, amounted to a restraint of trade on the sale of frozen commodities and was illegal and void as being in violation of federal and state anti-trust laws.

Judgment affirmed.

1. Monopolies ⇐12(9)

A union or group of unions cannot legally combine or conspire with an employer or group of employers, by means of a collective bargaining agreement, to restrain and prevent the manufacture and sale of commodities, such as frozen meats, poultry and fish, even though the objective of the union or unions may be to monopolize the work on such meat products for their own members to the exclusion of workmen employed in the plants of the processors or packers of such products. West's Ann.Bus. & Prof.Code, §§ 16720, 16722.

2. Monopolies ⇐12(9)

Provision in collective bargaining agreement between unions and employers, that all fresh meats, poultry, and fish shall be cut, prepared and packaged on the premises and dispensed by members of union, amounted to a restraint of trade on the sale of frozen commodities and was illegal and void as in violation of federal and state anti-trust laws. West's Ann.Bus. & Prof.Code, §§ 16720, 16722, 16755; Sherman Anti-Trust Act, §§ 1, 2 as amended 15 U.S.C.A. §§ 1, 2.

3. Monopolies ⇐12(8)

A union may be guilty of violation of anti-trust laws if it enters into an agreement unreasonably and illegally restraining trade, notwithstanding the fact that it may have entered into such agreement in order to fulfill a lawful objective. West's Ann.Bus. & Prof.Code, §§ 16720, 16722.

4. Labor Relations ⇐434

Where arbitration provisions of a collective bargaining agreement between employers and unions related only to controversies involving the interpretation of any provisions of the agreement, a controversy as to the legality of the terms of a provision of the agreement was not submissible to arbitration, since questions of legality are not arbitrable by arbitrators. West's Ann.Code Civ.Proc., § 1281.

5. Courts ⇐489(8)

A state court had jurisdiction to determine whether a provision in a collective bargaining agreement between employers and unions violated the anti-trust laws of the state, as well as federal anti-trust laws,

jurisdiction not resting solely in a federal court by virtue of the fact that enforcement of federal anti-trust laws was involved. Sherman Anti-Trust Act, §§ 1, 2 as amended 15 U.S.C.A. §§ 1, 2; West's Ann.Bus. & Prof.Code, §§ 16720, 16722; West's Ann.Code Civ.Proc., § 1060.

6. Labor Relations ⇐506

An action for a declaratory judgment as to whether a provision in a collective bargaining agreement between employers and unions was void as in violation of laws relating to monopolies and restraints of trade was not an action to enforce compliance with any provisions of the Labor Management Relations Act, did not involve any question as to a labor dispute, and National Labor Relations Board was without jurisdiction in such matter. Labor Management Relations Act of 1947, 29 U.S.C.A. § 141 et seq.; Sherman Anti-Trust Act, §§ 1, 2 as amended 15 U.S.C.A. §§ 1, 2; West's Ann.Bus. & Prof.Code, §§ 16720, 16722.

David Sokol, Los Angeles, for appellants.

Musick, Peeler & Garrett, Harold F. Collins, McLaughlin & Casey, James A. McLaughlin, Los Angeles, for respondents.

FOURT, Justice.

This is an appeal by the defendants from a judgment in a declaratory relief action wherein the court determined that certain controversial provisions of a collective bargaining agreement were void and invalid in that such provisions violated the laws of the United States and the laws of the state of California.

The facts are substantially as follows: The action was instituted by twelve retail market operators doing business in various localities in Southern California. The four appellant unions represent the employees who are employed in the various markets of the respondents. Each union represents certain employees in a distinct geographical area in which one or more of the respondents operate markets. Agreements were entered into between the respondents and appellants and in each instance the agreement contained substantially the following language: Self-Service Markets: All fresh meats, fresh poultry, fresh fish, fresh rabbits, shall be cut, prepared and packaged on the premises and dispensed by members of Meat Cutters Local.

The agreements with which we are concerned were negotiated during November and December of 1955, and were signed as of about December 10, 1955. The same, or substantially the same language as above set forth was in earlier agreements between the parties hereto for several years immediately prior to December 10, 1955. During the immediate previous years the practice of freezing and packaging frozen meats, fish and poultry had become more widespread, whereas at the time the agreements were first entered into, there apparently was little if any pre-packaged frozen meat available at retail markets. During the latter part of 1955, and the early part of 1956, large meat packers greatly expanded their business of pre-cutting, pre-packaging and freezing all of the usual types and cuts of meat. In this new procedure, there were utilized new types of wrapping materials which were more adaptable to the continued preservation of frozen foods whereby such products could be kept substantially fresh for indefinite periods of time in self-service freezers such as were used in the respondents' markets. The process used by the large meat packers was essentially an assembly-line system where the bones and fat were removed before the cuts were packaged and frozen. The products are quickly frozen to prevent destruction of the meats and to enable them to keep fresh for an extended period of time. They are machine wrapped and packaged with special materials which tend to keep out oxygen and moisture and thereby prevent deterioration.

About January 20, 1956, each of the appellant unions directed a notice to the respondents demanding that the sale of such pre-packaged frozen meat products be discontinued until the disputed provisions of

the collective bargaining agreements could be arbitrated. The respondents declined to arbitrate because they contended it was not subject to arbitration. The action here was in declaratory relief to have it determined whether the provisions of the agreement in question were illegal and void as constituting unlawful restraints of trade under both federal and state laws.

The respondents sought an injunction against the unions to restrain a threatened strike. However, the trial court denied any such injunction upon the ground, apparently, that the unions had not, in fact, called any strike.

[1] The sole question involved here, therefore, is whether a union or a group of unions can combine or conspire with an employer or group of employers, by means of a collective bargaining agreement, to restrain and prevent the manufacture and sale of commodities, such as frozen meats, poultry and fish, even though the objective of the union or unions may be to monopolize the work on such meat products for their own members to the exclusion of workmen employed in the plants of the processors or packers of such products, and regardless of whether such workmen are union members.

[2] We are of the opinion that such provisions in such a contract are illegal and void as being in violation of the federal and state anti-trust laws.

The frozen pre-packaged products are competitive to fresh meat, fish and poultry, which are regularly cut and wrapped in retail stores, and to enforce the terms of the agreement in question would obviously result in prohibiting the handling and sale of the pre-packaged frozen products in the retail markets. There is set forth in a footnote hereto the provisions of sections 16720 and 16722 of the Business and Professions Code.[1]

Section 16750 of the same Code provides a remedy to a person injured as a result of any combination or conspiracy, and section 16755 provides for criminal penalties for participating in any such violation.

In the case of Kold Kist, Inc., v. Amalgamated Meat Cutters, 99 Cal.App.2d 191, 221 P.2d 724, the defendants caused a provision to be placed in a collective bargaining agreement which prohibited the sale of frozen meat products after 6:00 o'clock p. m. from the refrigerated display cases in the retail markets. The court said,

1. "§ 16720. Trust defined: Purposes. A trust is a combination of capital, skill or acts by two or more persons for any of the following purposes:

"(a) To create or carry out restrictions in trade or commerce.

"(b) To limit or reduce the production, or increase the price of merchandise or of any commodity.

"(c) To prevent competition in manufacturing, making, transportation, sale or purchase of merchandise, produce or any commodity.

"(d) To fix at any standard or figure, whereby its price to the public or consumer shall be in any manner controlled or established, any article or commodity of merchandise, produce or commerce intended for sale, barter, use or consumption in this State.

"(e) To make or enter into or execute or carry out any contracts, obligations or agreements of any kind or description, by which they do all or any or any combination of any of the following:

"(1) Bind themselves not to sell, dispose of or transport any article or any commodity or any article of trade, use, merchandise, commerce or consumption below a common standard figure, or fixed value.

"(2) Agree in any manner to keep the price of such article, commodity or transportation at a fixed or graduated figure.

"(3) Establish or settle the price of any article, commodity or transportation between them or themselves and others, so as directly or indirectly to preclude a free and unrestricted competition among themselves, or any purchasers or consumers in the sale or transportation of any such article or commodity.

"(4) Agree to pool, combine or directly or indirectly unite any interests that they may have connected with the sale or transportation of any such article or commodity, that its price might in any manner be affected."

"§ 16722. Contracts void. Any contract or agreement in violation of this chapter is absolutely void and is not enforceable at law or in equity."

among other things, in deciding the case the following, 99 Cal.App.2d at page 197, 221 P.2d at page 729:

"While combined action which is in restraint of trade, as the term is commonly used, is illegal, regardless of the objective of the parties, it is also illegal if it is entered into for the purpose of restraining trade. Even though it appeared to be the purpose of the unions to improve the status of their members by limiting hours of work it was a proper inquiry whether it was intended to accomplish this purpose by placing restrictions upon the trade in plaintiffs' products through the prevention of the sale thereof except through union members."

[3] Further, in answer to the contention of the appellants that as long as they are seeking only that to which organized labor is entitled, there can be no violation of the anti-trust laws, the court in the Kold Kist case, supra, 99 Cal.App.2d at pages 200–201, 221 P.2d at page 730, stated:

"As we have heretofore pointed out, defendants have not denied that detriment has resulted and will continue to result to plaintiffs' business in the manner and to the extent alleged in the complaint and supporting affidavit. Nevertheless they argue that even though there has been and will be restraint there is no remedy available to plaintiffs for the reason that they, the unions, are seeking only to obtain uniform working hours for all employees. They say that it must be demonstrated from the face of the contract or from the pleadings of plaintiffs that the purpose of the provisions of the contract is to 'directly, intentionally and specifically' unreasonably and illegally restrain trade in a way which is unconcerned with the accomplishment of a legitimate labor objective or the contract cannot be deemed an illegal restraint of trade. This is to claim, in effect, that whenever their efforts are calculated to advance the interests of their members the effect upon others is not to be considered. This contention has frequently been advanced and rejected. If we were to agree with it, the result would be that the assertion of any lawful labor objective, regardless of the means proposed for the accomplishment thereof, would preclude the courts from making inquiry to determine whether the objective was indeed lawful.

"In Giboney v. Empire Storage & Ice Co., 336 U.S. 490, 69 S.Ct. 684, 93 L.Ed. 834, the union argued that the primary objective of their combination and picketing was to improve wage and working conditions, admittedly a lawful purpose, and that 'their violation of the state anti-trade restraint laws must be dismissed as merely incidental to this lawful purpose.' The Court said, quoting from International Harvester Co. v. State of Missouri, 234 U.S. 199, 209, 34 S.Ct. 859, 58 L.Ed. 1276, ' "It is too late in the day to assert against statutes which forbid combinations of competing companies that a particular combination was induced by good intentions. * * *" ' It was also said that 'To exalt all labor union conduct in restraint of trade above all state control would greatly reduce the traditional powers of states over their domestic economy and might conceivably make it impossible for them to enforce their antitrade restraint laws.' The courts of this state have held that the letter and paramount object of the law, Cartwright Act, is satisfied if the tendency of the action or proposed action is to restrain trade. [Citing cases.]

"Defendants also argue that only those combinations are in unlawful restraint of trade which seek to control prices and create a monopoly. A complete answer to this contention is found in the statute itself. Under subdivisions a, b, and c of section 16720, Business and Professions Code, it is unlawful for two or more persons to combine to create or carry out restrictions

in trade or commerce; to limit or reduce the production of any commodity; or to prevent competition in the sale or purchase of merchandise, produce or any commodity. These enactments are distinct from the remainder of the section which has to do with price fixing. Although price fixing and monopolistic practices tend to affect competition, production and restrictions in trade, the legislature has not limited illegal combinations in restraint of trade to those which involve price fixing or monopoly. People v. Sacramento Butchers' Protective Ass'n [12 Cal.App. 471, 107 P. 712; Overland Pub. Co. v. H. S. Crocker Co., 193 Cal. 109, 222 P. 812.]"

Similar statutes in other states have been similarly interpreted, as in Austin v. Painters' District Council No. 22, etc., 339 Mich. 462, 64 N.W.2d 550; Giboney v. Empire Storage & Ice Co., 336 U.S. 490, 69 S.Ct. 684, 93 L.Ed. 834; Foust v. Truck Drivers Union, (Ohio Court of Common Pleas, April 3, 1956) 38 L.R.R.M. 2645; Commonwealth v. McHugh, 326 Mass. 249, 93 N.E. 2d 751.

Appellants have cited three California cases in an effort to support the last mentioned contention, namely, that the provisions of the agreements do not violate the state anti-trust laws. One is a superior court decision, namely McDonnell v. Meat Drivers Local, 29 L.R.R.M. 2176; and the other two are Los Angeles Pie Bakers Ass'n v. Bakery Drivers, 122 Cal.App.2d 237, 264 P.2d 615, and Schweizer v. Local Joint Executive Board, 121 Cal.App.2d 45, 262 P.2d 568. None of the cases cited are, in our opinion, in point.

Coming now to the question whether the prohibitions in the agreement violated the federal anti-trust laws: We are of the belief that such language does so violate the federal law. Section 1, Title 15 U.S.C.A. specifies that contracts and combinations in restraint of trade are illegal. Section 2, Title 15 U.S.C.A., specifies that every person who shall participate in such unlawful acts is guilty of a misdemeanor and subject to a fine or imprisonment or both.

In Allen Bradley Co. v. Local Union No. 3, 325 U.S. 797, 808–810, 65 S.Ct. 1533, 1539, 89 L.Ed. 1939, the unions and employers contracted to exclude electrical equipment from use unless purchased from local manufacturers, and in determining the case the court said: "We have been pointed to no language in any act of Congress or in its reports or debates, nor have we found any, which indicates that it was ever suggested, considered, or legislatively determined that labor unions should be granted an immunity such as is sought in the present case. * * But when the unions participated with a combination of business men who had complete power to eliminate all competition among themselves and to prevent all competition from others, a situation was created not included within the exemptions of the Clayton and Norris-La Guardia Acts [15 U.S.C.A. § 12 et seq.; 29 U.S.C.A. § 101 et seq.].

"It must be remembered that the exemptions granted the unions were special exceptions to a general legislative plan. The primary objective of all the Anti-trust legislation has been to preserve business competition and to proscribe business monopoly. It would be a surprising thing if Congress, in order to prevent a misapplication of that legislation to labor unions, had bestowed upon such unions complete and unreviewable authority to aid business groups to frustrate its primary objective. For if business groups, by combining with labor unions, can fix prices and divide up markets, it was little more than a futile gesture for Congress to prohibit price fixing by business groups themselves. * * *

"Our holding means that the same labor union activities may or may not be in violation of the Sherman Act [15 U.S.C.A. §§ 1–7, 15 note], dependent upon whether the union acts alone or in combination with business groups."

Also see, Anderson-Friberg, Inc., v. Justin R. Clary & Son, D.C., 98 F.Supp. 75; Manaka v. Monterey Sardine Industries,

D.C., 41 F.Supp. 531; Gulf Coast Shrimpers & Oystermen's Ass'n v. United States, 5 Cir., 236 F.2d 658; United States v. Employing Plasterers Ass'n, 347 U.S. 186, 74 S.Ct. 452, 98 L.Ed. 618; Lystad v. Local Union No. 223, etc., D.C., 135 F. Supp. 337.

In our opinion the terms of the agreement in the instant case evidence a conspiracy, combination and unlawful agreement. The effect of the agreement is to bar from the markets any such frozen, pre-packaged products. To comply with the agreement would not only mean, among other things, that the sale of the products is restrained, but that the means for marketing such products are destroyed with the result that the sale and distribution of the products would be for all intents and purposes an impossibility in this area.

[4] The appellants contend that the matter should have been submitted to arbitration, under the arbitration provisions of the agreement. In the first place, the arbitration provisions relate only to "controversies involving the interpretation of any provisions of" the agreement. The controversy here is as to the legality of the terms of the agreement. Questions of legality are not arbitrable by arbitrators.

In Loving & Evans v. Blick, 33 Cal.2d 603, 610–611, 204 P.2d 23, 27, the court held that a claim arising out of an illegal provision in a contract was not subject to arbitration, saying, among other things: "Section 1281 of the Code of Civil Procedure, providing for submission to arbitration of 'any controversy * * * which arises out of a contract,' does not contemplate that the parties may provide for the arbitration of controversies arising out of contracts which are expressly declared by law to be illegal and against the public policy of the state. So it is generally held that 'a claim arising out of an illegal transaction is not a proper subject matter for submission to arbitration, and that an award springing out of an illegal contract, which no court can enforce, cannot stand on any higher ground than the contract itself.' 6 C.J.S., Arbitration and Award, § 12, p. 160. Aptly illustrative of this well-settled principle is the fairly recent case of Smith v. Gladney, 128 Tex. 354, 98 S.W. 2d 351, where a dispute arose between the parties as a result of trading in 'futures' upon the Chicago Board of Trade. The matter was submitted to arbitration. When suit was brought upon the award and it was affirmed 'on the theory that (it) was final,' the appellate court, in reversing the judgment, said, 98 S.W.2d at pages 351, 352: 'It appears to be almost universally recognized that a claim arising out of an illegal transaction, such as a speculation in futures, is not a legitimate subject of arbitration, and an award based thereon is void and unenforceable in courts of the country. [Citing cases.]"

[5] The appellants further contend that jurisdiction in this matter is either in the National Labor Relations Board because an unfair labor practice is involved, or in the federal courts because the enforcement of federal anti-trust laws is involved and that therefore the state court has no jurisdiction. This is merely an action for declaratory relief to secure a ruling as to whether certain language evidences an unlawful conspiracy between employers and unions to restrict and prohibit the sale of certain commodities. The agreement was executed in California and is performable here. We believe the state court has jurisdiction to determine whether the agreement violates the law of this state as well as the federal law. Morey v. Paladini, 187 Cal. 727, 736, 203 P. 760; Building Contractors v. Gugliemelli, N. Y. Supreme Ct., 30 L.R.R.M. 2439; Commonwealth v. McHugh, 326 Mass. 249, 93 N.E.2d 751; Hunt v. Plavsa, 103 Cal.App.2d 222, 229 P.2d 482; Code Civ.Proc., § 1060; Ralphs Grocery Co. v. Amalgamated Meat etc., 98 Cal.App.2d 539, 220 P.2d 802; Harvey Machine Co. v. Western Mechanics Local Union, 76 Cal.App.2d 421, 173 P.2d 330; Harvey Machine Co., Inc., v. Alvarez, 76 Cal.App.2d 427, 173 P.2d 65.

[6] This is not an action to enforce compliance with any provisions of the Labor Management Relations Act, 29 U.S.C.A. § 141 et seq. The pleadings do not show any unfair labor practices, as defined by that Act. There is no labor dispute with any employee who manufactures the products with which we are concerned. The laws which are violated relate to monopolies and restraints of trade and the National Labor Relations Board has no jurisdiction over such matters.

There was no allegation in the complaint in this instance to the effect that the Unions had used any coercion against any employees of the markets. In this case there is no question of any "hot cargo", or any secondary boycott. It was stated by counsel for respondent in the oral argument, and apparently concurred in by counsel for the appellants, that the products in question are processed and packaged by union labor in the first instance.

Subsequent to the filing of the briefs in this cause, the parties filed a stipulation in this court to the effect that a new collective bargaining agreement between the parties hereto, effective from November 5, 1956, to November 5, 1959, had been executed, which new agreement contains certain language in lieu of the disputed language in the contract now before us. The appellants state, "it would therefore appear that the entire matter is now moot". At the same time, appellants assert that they are confronted with the judgment of the trial court, and that they cannot dismiss the appeal, thus leaving as res judicata the judgment of the trial court.

As we view it, the matter of the new agreement is not before us for any determination, and it obviously was not before the trial court. Under the circumstances, the new agreement can have no bearing on the issue which is to be decided here. It might well be that the provisions of the new agreement are legal and proper, and at least counsel for each of the parties seemed to entertain the belief that such is the case. However, we are not called upon here to decide that question. It is also true that apparently the parties have reconciled their main differences, and there appears to be no controversy over the new agreement; nevertheless, as heretofore indicated, that can have no effect upon the questions submitted to this court.

For the reasons heretofore given, the judgment is affirmed.

WHITE, P. J., and DORAN, J., concur.



147 Cal.App.2d 275

John Maria MONICA, Plaintiff and Respondent,

v.

John OLIVEIRA and Maria Oliveira, Defendants and Appellants.

No. 17200.

District Court of Appeal, First District, Division 1, California.

Dec. 28, 1956.

Proceeding upon motion to set aside default in partition action. The Superior Court, County of Alameda, James R. Agee, J., denied motion, and defendants appealed. The District Court of Appeal, Bray, J., held that where motion to set aside default was filed more than six months from entry of default but not more than six months from entry of judgment confirming sale, motion was too late, under provision imposing six months' period of limitation on motions to set aside defaults, since period in such case ran from date of default, not from judgment confirming sale.

Order and judgment affirmed.

1. Judgment ⇐153(1)

Under provision imposing six months' period of limitation on motions to set aside

defaults, limitation period runs from date of entry of default, not from subsequent entry of judgment. West's Ann.Code Civ. Proc., § 473.

2. Judgment ⇐153(1)

Unless default itself can be set aside, none of proceedings thereafter may be set aside, under provision authorizing proceedings to set aside defaults if brought within six months. West's Ann.Code Civ.Proc., § 473.

3. Judgment ⇐153(1)

Where motion to set aside default in partition action was filed more than six months from entry of default but not more than six months from entry of judgment confirming sale, motion was too late, under provision imposing six months' period of limitation on motions to set aside defaults, since period ran from date of entry of default not from judgment confirming sale. West's Ann.Code Civ.Proc., § 473.

Edward J. Kilmartin, Oakland, for appellant.

Price, Macdonald & Knox, Oakland, Wagener, Brailsford & Knox, Oakland, for respondent.

BRAY, Justice.

The sole question raised by this appeal by defendants from an order denying defendants' motion to set aside default, default interlocutory decree and decree confirming sale, is whether the six months' period within which section 473, Code of Civil Procedure, provides that a default may be set aside, runs from the date of entry of the default, or from the subsequent date of entry of judgment.

Record.

Action in partition. Defendants were served with summons and complaint in the county of their residence, one on October 16, the other on October 27, 1953. They failed to appear and their default was entered November 12th. June 23, 1955, interlocutory decree of partition was filed. August 24th, judgment confirming sale and ordering referees to execute deed filed. November 15th (more than six months from entry of default but not from judgment confirming sale), defendants filed notice of motion to set aside the default, the interlocutory decree and the judgment. The proceeding was pursuant to section 473.[1]

Time to Move.

[1] It is well settled that relief may not be granted under section 473 after the expiration of six months from the entry of the *default*. See Solot v. Linch, 46 Cal. 2d 99, 105, 292 P.2d 887; Title Insurance & Trust Co. v. King Land & Improvement Co., 162 Cal. 44, 120 P. 1066; Jones v. Evarts, 114 Cal.App.2d 496, 498, 250 P.2d 671, and cases there cited; Castagnoli v. Castagnoli, 124 Cal.App.2d 39, 41, 268 P.2d 37. These were all cases where, as here, it was contended that the time runs from the entry of judgment and not from the entry of default.

[2] Defendants contend, however, that although there are no cases so holding, a different rule should apply in partition actions. They rather ingeniously refer to the language of section 473 authorizing relief to a party from a "judgment, order, or other proceeding * * *" and contend that the entry of default, the entry of the interlocutory decree and the entry of the judgment in a partition suit, are each a separate step, "judgment, order, or other proceeding" and that each may be vacated by an application for relief within six months of that particular "judgment, order, or other proceeding." The same argument could be made concerning the entry of default and the entry of judgment in any character of action, and yet as we have heretofore shown, it is well settled that unless the default itself can be set aside,

1. Inasmuch as the parties assume that the denial was on the ground that the six months' period set forth in the section had expired, we will not discuss the sufficiency of the moving papers.

none of the proceedings thereafter may be set aside.

As we pointed out in Cumberpatch v. Nolan, 125 Cal.App.2d 205, 207, 270 P.2d 540, vacating the judgment (if this could be done where more than six months had expired from the entry of default), would be of no value, as it would be the duty of the court immediately to enter a judgment of like effect, and the defendants, still being in default, could not be heard in opposition thereto.

[3] Stonesifer v. Kilburn, 94 Cal. 33, 29 P. 332, holding that a party may be relieved under section 473 from default due to failure to serve a bill of particulars in time, if application is made within six months, for the reason that the settlement of such a bill is a "proceeding" under the section, and there is no action of the court until such settlement, is no support for defendants' contention. Pollitz v. Wickersham, 150 Cal. 238, 88 P. 911, cited by defendants, held that where a proposed bill of exceptions was not served in time, the court had power under section 473 to relieve the party from such default if the motion was made within six months from the time when the objection to the late service is first made to the court by the opposing party on the theory that no "proceeding" has been taken by the adverse party until the objection is made. In Faeh v. Union Oil Co., 107 Cal.App.2d 163, 236 P.2d 667, it was held that this case is no longer the law, and moreover, that the situation in the Pollitz case does *"not refer to the initiatory steps which vest the court with jurisdiction* * * *", 107 Cal.App.2d at page 169, 236 P.2d at page 671. In Crossman v. Vivienda Water Co., 150 Cal. 575, 89 P. 335, 338, the court held that stockholders of a corporation that had become legally dead could move to vacate a default judgment against the corporation, where the motion was made within six months of entry of judgment but more than six months from entry of default. While the opinion stated that the motion to vacate did not come too late "even if it be assumed that the provisions of section 473, Code of Civ.Proc. * * * are applicable to a case of this character," it is obvious that the case was decided upon the theory that the judgment was void because a legally dead corporation cannot be served with process.[2] If it holds that relief can be granted from a default judgment although the default cannot be set aside, then the case is contrary to the great weight of authority in California.

Order and judgment affirmed.

PETERS, P. J., and FRED B. WOOD, J., concur.

2. See Llewellyn Iron Works v. Abbott Kinney Co., 172 Cal. 210, 212, 155 P. 986, which cites the Crossman case as authority to the effect that a judgment against a corporation which has forfeited its charter is a void judgment.



147 Cal.App.2d 252

Beatrice P. ARTHUR, Plaintiff, Respondent and Appellant,

v.

William L. ARTHUR, Defendant, Appellant and Respondent.

Civ. 21841.

District Court of Appeal, Second District, Division 3, California.

Dec. 27, 1956.

Wife's action to establish a Nevada decree of divorce as judgment of California and to enforce husband's obligations thereunder and under property settlement agreement incorporated therein. From a judgment and parts of a judgment of the Superior Court of Los Angeles County, Clarence B. Runkle, J., both parties appealed. The District Court of Appeal, Vallée, J., held that in property settlement agreement making the "earnings" of the

husband the measuring stick by which to determine amount to be paid for support of wife and children, quoted word was used to indicate amount produced, and not what might be left after deducting community interest of husband's second wife.

Affirmed in part and reversed in part with directions.

1. Husband and Wife ⇐279(1)

In property settlement agreement making the "earnings" of the husband the measuring stick by which to determine amount to be paid for support of wife and children, quoted word was used to indicate amount produced, and not what might be left after deducting community interest of husband's second wife.

See publication Words and Phrases, for other judicial constructions and definitions of "Earnings".

2. Evidence ⇐65

Parties to property settlement agreement would be presumed to have known at time agreement was executed that provision for support of children was subject to modification by order of court. West's Ann.Civ.Code, § 1655.

3. Husband and Wife ⇐279(1, 6)

Child custody and child support provisions of property settlement agreement were not severable, and provision for support of each child was impliedly conditioned on child's mother's having its custody; and, accordingly father was under no obligation to make payments for support of child whose custody had been relinquished by mother to father.

4. Divorce ⇐255

Nature of property settlement agreement, its provision that it should be embodied in and made part of divorce decree, and plain language of divorce decree made conclusion inescapable that merger was intended, thereby substituting rights and duties under decree for those under agreement.

Abraham Marcus, Beverly Hills, for plaintiff, respondent and appellant.

Erb, French, Picone & Griffin and John A. Griffin, Beverly Hills, for defendant, appellant and respondent.

VALLÉE, Justice.

Plaintiff brought this action to establish a Nevada decree of divorce as a judgment of this state and to enforce defendant's obligations thereunder and under a property settlement agreement.

The parties were married in 1936. They have two children. They separated in early 1946. On February 18, 1946 they entered into a property settlement agreement. The material parts of the agreement are these:

"The wife shall have the permanent and exclusive custody, care, maintenance and education of the children during their respective minorities. * * *

"The husband during his lifetime shall provide the means for the separate support and maintenance of the wife and for the support, maintenance and education of the children in the following manner:

"The sum of One Hundred Seventy-five ($175.00) Dollars commencing at the time of the signing of this agreement, and monthly thereafter. * * *

"In the event that the husband in any year shall earn a sum in excess of Six Thousand ($6,000.00) Dollars after the payment of State and Federal Income taxes upon his earnings, he shall be obligated to pay to the wife for her separate support and maintenance and for the support, amintenance [sic] and education of the children, in addition to the sums already provided for herein, Forty (40%) per cent of so much of such excess earnings as exceed Six Thousand ($6,000.00) Dollars and do not exceed Twelve Thousand ($12,000.-00) Dollars and thirty-three and one-third (33⅓%) of any excess over and above Twelve Thousand ($12,000.00) Dollars. For the purpose of determining the amount of the husband's liability under this provision the husband

shall be obligated to submit to the wife, not later than April 1, in each year, sworn, true and accurate copies of his State and Federal Income Tax Returns, evidencing his earnings for the preceding calendar year and such returns shall constitute the basis for computing the husband's liability. Any excess sums over and above the base and minimum figure of One Hundred Seventy-five ($175.00) Dollars monthly, hereinbefore provided for, shall be paid to the wife within ten days after such determination.

"All payments made to the wife shall be deemed to be apportioned as follows:

"One-third-(⅓) for the separate maintenance and support of the wife, and one-third (⅓) for the separate maintenance support and education of each of the children."

"The provisions of this agreement shall not be construed to prevent either party from suing for an absolute or limited divorce in this or any other competent jurisdiction upon such grounds as they shall elect or as they may be advised; buthany [sic] decree so obtained by either party shall in no way affect this agreement or any of the terms, covenants, or conditions hereof; it being agreed, that in the event a temporary or final judgment or decree shall be rendered in any action or proceedings between the parties hereto in which provision for the maintenance and support of the wife and minor may be appropriate, whether it may be a judgment or decree of absolute divorce or otherwise, such judgment or decree shall provide for the maintenance and support of the wife and said minor children according to the terms of this agreement, and this agreement shall be embodied in and made a part of such judgment or decree. It is agreed that this agreement is absolute, unconditional and irrevocable, and both parties intend during their respective lifetimes to be legally bound thereby."

On May 23, 1946 defendant obtained a decree of divorce in Nevada. The decree contained this provision:

> "It is further ordered, adjudged and decreed that the written agreement of plaintiff and defendant, entered into on February 18th, 1946, having been introduced in evidence as Exhibit 'A', is in all respects, just, fair, reasonable, equitable and it is, by this Court, ratified and approved and the provisions thereof are hereby adopted by this Court."

Since the decree, defendant has remarried. Plaintiff has not remarried. In 1950 defendant earned $1,438.81 in excess of $6,000 after payment of state and federal income taxes; in 1951, in excess of $3,841.92; in 1952, in excess of $4,064.80; in 1953, in excess of $1,176.63; in 1954, in excess of $4,080.77. He paid nothing to plaintiff on account of such excess earnings.

The judgment established the Nevada decree as a judgment of this state, declared it to be in full force and effect, and adjudged that plaintiff recover from defendant the agreed percentage of his excess earnings less certain credits. Defendant appealed from the entire judgment; plaintiff appealed from parts thereof. The case is here on an agreed statement. The findings of fact and conclusions of law are not included.

[1] The principal controversy is as to the meaning of the word "earnings" as used in the agreement—whether it means the earnings of defendant without deducting the community interest of his present wife therein or whether it means after deduction of her community interest. The trial judge held it means the earnings of defendant without deducting the community interest of his present wife therein. We agree.

The learned trial judge filed a memorandum opinion which is part of the record on appeal. Rules on Appeal, Rule 5(a), 36 Cal.2d 1, 5. We are partly in accord with that opinion, and the following portion is adopted and made a part of this decision:

"On the issue of the amount due plaintiff under the contract, the first questions [sic] is the meaning and effect of paragraph 4c thereof. This contract was executed in New York which does not have a community property system and its execution was apparently not in contemplation of any future marriage of defendant at all, much less one in a community property state. The language is very explicit: 'in the event that the husband in any year shall earn a sum in excess of $6,000.00 after the payment of State and Federal income taxes upon his earnings * * *' The condition is his earning such excess sum and not whether by reason of any subsequent contract entered into between him and someone else, his right to the ownership or retention of the full amount of such excess sum should be terminated or diminished in favor of someone else. Certainly he could not be heard now to say that he did not owe plaintiff her percentage of such excess earnings because he had assigned the whole or any part thereof to someone else. So far as plaintiff is concerned, his contracting a marriage with another woman thereafter and his removal to the State of California where such other woman had a vested interest in half of his earnings as community property are no different in effect than his execution of an assignment of half of such earnings to some finance company in consideration of a loan. The court holds, therefore, that paragraph 4c of the contract was not altered or affected in any way by defendant's subsequent marriage."

It seems clear that the parties fixed the earnings of defendant as the measuring stick by which to determine the amount to be paid for the support of plaintiff and the children. The word "earnings" is used to indicate the amount produced, not that part only which may vest in defendant by virtue of the community property law.

[2, 3] As noted, the agreement provides that payments to plaintiff shall be deemed apportioned one-third for her support and one-third for support of each child. On July 1, 1954 plaintiff voluntarily sent one of the children to reside with and to be cared for by defendant. Apparently the court allowed defendant a credit of one-third of the amount payable to plaintiff for the period of time that the child was in defendant's custody after July 1, 1954. Plaintiff asserts the court erred in doing so. She argues the agreement is not "subject to modification because it is a fully integrated agreement purporting to settle all property rights as well as support obligations." We think the court correctly construed the agreement.

The agreement provides separately for the support of plaintiff and for the support of each child—one-third of the amount agreed to be paid for plaintiff's support and one-third for each child's support. The parties are presumed to have known at the time the agreement was executed that the provision for support of the children was subject to modification by order of court. Civ.Code, § 1655; Rapp v. Rapp, 218 Cal. 505, 507–508, 24 P.2d 161. The agreement does not provide for custody of the child alone or for his support alone. It provides for custody and support. The support provision is not severable from the custody provision. The provision for support of each child is impliedly conditioned on plaintiff's having its custody. After July 1, 1954 defendant was under no obligation to make the payments for the support of the child who was in his custody.

[4] The court held the property settlement agreement was not merged in the Nevada decree, and merely awarded plaintiff the percentage of defendant's excess earnings with interest. Plaintiff contends the agreement was merged in the decree and that defendant should have been ordered to make the payments for support therein provided.

In the recent case of Foust v. Foust, 47 Cal.2d 121, 302 P.2d 11, 13, the decree of

annulment read: " 'That the properties and property rights of plaintiff and defendant herein are adjusted, settled and distributed as per the terms and conditions of that certain agreement dated July 21st, 1943, executed by plaintiff and defendant herein, a full and true copy of which agreement is on file herein attached to said Stipulation marked "Exhibit 'A' ", and which is hereby approved by the Court and by this reference embodied in and made a part of this Judgment.' " The court said "The only question to be determined is whether a property settlement agreement had been so merged into an annulment decree that its provision for monthly payments became an operative part thereof, enforceable by execution" and held 47 Cal.2d 123, 302 P.2d at page 13:

"The nature of the agreement, its attachment to the stipulation for judgment, the filing of both documents with the court, and the plain language of the stipulation and the judgment entered thereon make the conclusion inescapable that merger was intended, thereby substituting rights and duties under the decree for those under the agreement. See Rest., Judgments, § 47, com. a; Flynn v. Flynn, 42 Cal.2d 55, 58, 265 P.2d 865; Hough v. Hough, 26 Cal.2d 605, 609–610, 160 P.2d 15; 1 Armstrong, California Family Law, pp. 810–811. Since there is no evidence to the contrary, the trial court's conclusion that merger was not intended is not binding on this court. Fox v. Fox, 42 Cal.2d 49, 52, 265 P.2d 881; In re Estate of Platt, 21 Cal.2d 343, 352, 131 P. 2d 825.

"It was held in the Flynn case that incorporation of a property settlement agreement into a decree by reference does not preclude a merger. Flynn v. Flynn, supra, 42 Cal.2d at page 59, 265 P.2d at page 866. When an agreement has been incorporated into a decree, it is as effectively a part thereof as if recited therein *in haec verba*. It is of no consequence here that the agreement was complete in itself, for it lost its identity in the decree. It is now the decree that declares the rights and obligations of the parties, for it 'ordered and adjudged * * * that the properties and property rights of [the parties] are adjusted, settled and distributed as per the * * * agreement * * * and which is hereby approved by the court and by this reference embodied in and made a part of this judgment.' * * *

"[47 Cal.2d 125, 302 P.2d at page 14.] Whenever it is intended that a property settlement agreement shall become merged in the decree, it is undoubtedly the better practice to have the terms of the agreement set forth *in haec verba* in the decree or by way of exhibit attached thereto, and to have the court employ explicit language in the decree showing that the rights and obligations of the parties are adjudicated by the decree in accordance with the terms of the agreement. And while 'greater certainty and clarity' may well be required to support contempt proceedings, we are satisfied that the language of the decree here shows that the agreement, filed with the stipulation, was merged in the decree, and that the manner in which the merger was effected makes the decree sufficiently certain to render it enforceable by execution. To hold otherwise would require the parties to engage in needless further litigation to merge the agreement into another decree or judgment in order to obtain the enforcement thereof by any legal process. Such idle act should not be required."

So in the present case the nature of the agreement, its provision that "this agreement shall be embodied in and made a part of such [divorce] judgment or decree," its introduction in evidence, and the plain language of the decree "make the conclusion inescapable that merger was intended, thereby substituting rights and duties under the decree for those under the agreement." There is no evidence to the contrary.

The judgment is affirmed insofar as it establishes the Nevada decree as a judgment of this state and awards plaintiff the agreed percentage of defendant's excess earnings. It is reversed insofar as it fails to adjudge that the property settlement agreement had been merged in the Nevada decree with directions to the superior court to amend the judgment accordingly and to order defendant to make the payments therein provided. Plaintiff shall recover costs on appeal.

SHINN, P. J., and PARKER WOOD, J., concur.



147 Cal.App.2d 172

Mitchell F. INSOLO and Pearl E. Insolo, Plaintiffs and Appellants,

v.

IMPERIAL IRRIGATION DISTRICT, Defendant and Respondent.

Civ. 5294.

District Court of Appeal, Fourth District, California.

Dec. 21, 1956.

Action to enjoin alleged nuisance and for damages resulting from location of irrigation district's electrical equipment on property adjacent to the plaintiffs' property. The Superior Court, Riverside County, Hilton H. McCabe, J., granted nonsuit, and plaintiff appealed. The District Court of Appeal, Barnard, P. J., held that substantial compliance with statutory provision that a verified claim shall be presented in writing and served on secretary of district was sufficiently shown, to make it improper to grant a motion for nonsuit.

Judgment reversed.

1. Appeal and Error ⇐927(3)

Where a nonsuit has been granted, plaintiff must be given benefit of every piece of evidence which tends to sustain his averments, any inferences or presumptions which might reasonably be drawn are to be drawn in his favor, and in all respects court must view evidence in the light most favorable to plaintiff.

2. Waters and Water Courses ⇐228¾

Substantial compliance with requirement of statute providing that where any person or property under control of irrigation district or any officer or employee of district, has been damaged or injured, verified claim for damages shall be presented in writing and filed with officer or employee involved and with secretary of district, is all that is required. West's Ann.Water Code, § 22727.

3. Waters and Water Courses ⇐228¾

In action to enjoin alleged nuisance and for damages resulting from location of irrigation district's electrical equipment, which emitted continuous loud noises, adjacent to plaintiffs' property, substantial compliance with statute requiring that a verified claim shall be presented in writing and served on secretary of district was sufficiently shown by evidence, including disclosure that district received verified claim by registered mail, to make it improper to grant motion for nonsuit. West's Ann. Water Code, § 22727.

Best, Best & Krieger, Arthur L. Littleworth, Riverside, for appellants.

Horton & Knox, El Centro, for respondent.

BARNARD, Presiding Justice.

This is an appeal from a judgment of nonsuit. The action was one to enjoin an alleged nuisance and for damages. The plaintiffs alleged in their complaint that the defendant district had erected and installed adjacent to plaintiffs' property, certain electrical equipment which emitted a continuous loud humming noise which greatly diminished the value of plaintiffs' property. It was further alleged that on or about July 15, 1953 "a verified claim was pre-

sented to the Imperial Irrigation District by the plaintiffs herein", stating the facts upon which the claim was based. The original answer filed by the district contained, among other things, Paragraph IV, which reads: "Admits that on or about July 15th, 1953, plaintiffs filed a verified claim to which reference is made for the contents thereof." The clerk's transcript does not show the verification of this answer but it is stated by the appellants, and not denied by the respondent, that this answer was verified by the secretary of the district, Mr. Mathis, who swore that he was authorized to make the verification on behalf of the district, that he had read the answer and knew its contents, and that the facts stated therein were true of his own knowledge.

Thereafter, Mr. Mathis died and about a year and a half after the original answer had been filed the district moved for permission to amend its answer by striking therefrom Paragraph IV, and substituting a new Paragraph IV, on the ground that it was ambiguous and that by inadvertence the defendant had neglected to deny that a verified claim was served or filed in accordance with Section 22727 of the Water Code. Permission to do this was given and the answer was amended so that the new Paragraph IV reads:

> "Admits that on or about July 15th, 1953, the operating headquarters of Imperial Irrigation District, at Imperial, California, received by registered United States mail a document purporting to be the verified claim referred to in paragraph VIII of plaintiffs' complaint. Reference is made to said document for the contents thereof. Denies that a verified claim for damages was presented and/or filed as required by Water Code Section 22727."

At the trial of the case the plaintiffs introduced considerable evidence concerning the filing of their verified claim, and the claim itself was admitted as an exhibit. At the conclusion of plaintiffs' case the district moved for a nonsuit on the grounds that no cause of action had been proved, and that the plaintiffs had failed to prove that a verified claim was presented, filed, served or received by the secretary of the district as required by Section 22727 of the Water Code. The court denied the motion on the ground that no cause of action had been proved, but granted it on the ground "that no proper presentation or service was made under Section 22727 of the Water Code." A judgment for nonsuit was then entered, from which the plaintiffs have appealed.

[1] No question is raised about the validity of the claim itself, its contents or its verification. The only question raised is as to whether the evidence produced was sufficient to show a substantial compliance on the part of the appellants with the requirement of Section 22727 that a verified claim shall be presented in writing and served on the secretary of the district. In passing upon this question, where a nonsuit has been granted, the plaintiff must be given the benefit of every piece of evidence which tends to sustain his averments, any inferences or presumptions which might reasonably be drawn are to be drawn in his favor, and in all respects the court must view the evidence in the light most favorable to the plaintiff. Bosqui v. City of San Bernardino, 2 Cal.2d 747, 43 P.2d 547.

It appears from the evidence here that the attorney for the appellants sent this verified claim by registered mail to Imperial Irrigation District, and that he requested and received a registered return receipt. The original answer admits that a verified claim was filed and the amended answer admits that the operating headquarters of the district at Imperial, California, received by registered mail a verified claim but denies that it was presented or filed as required by the Water Code. The return receipt for the claim was signed by a clerk in the mailing department of the office of the district. She testified that she generally signed for registered mail, that it was the function of her department to open the mail and "distribute it to whomever it is concerned with", and that on other occasions she had seen letters making claims for

damages and such letters were sent to the business manager, Mr. Jefferies. The attorney for the plaintiffs testified that he had personally investigated the filing of the claim; that he went to El Centro and talked to Mr. Jefferies, the business manager of the district; and that Mr. Jefferies stated that he remembered receiving this claim and that he gave it to Mr. Mathis, who was then secretary of the district. On cross-examination he testified that Mr. Jefferies did not say that he had delivered the claim to the secretary personally, but did say that he sent it to the secretary. Apparently, the secretary of the district, in verifying the original answer, affirmed to the truth of the statement therein that a verified claim was filed on or about July 15, 1953.

[2] It is well settled that a substantial compliance with the requirement of statutes providing for the filing of such claims is all that is required. Knight v. City of Los Angeles, 26 Cal.2d 764, 160 P.2d 779, and cases there cited. In such cases the courts look to see if the purpose of the statute has been satisfied, whether there has been a bona fide attempt to comply with the statute, and whether any prejudice to the other party appears. Natural Soda Prod. Co. v. City of Los Angeles, 23 Cal.2d 193, 143 P.2d 12; Sandstoe v. Atchison, T. & S. F. Ry. Co., 28 Cal.App.2d 215, 82 P.2d 216; Cruise v. City & County of San Francisco, 101 Cal.App.2d 558, 225 P.2d 988; Uttley v. City of Santa Ana, 136 Cal.App. 23, 28 P.2d 377.

The respondent concedes that substantial compliance with the terms of claim statutes is all that is required by recent decisions, but argues that in each of the cases so holding it appears that the governing body considered and acted upon the claim in question, and that no such evidence here appears. The fact that the claim was actually acted upon does not appear in all of the cases where it has been held that there has been a substantial compliance with the statute. Under the authorities, the controlling fact is what the claimant has done in filing or attempting to file the claim, and not whether or not the public body has had actual knowledge or has acted upon the claim. If the rule were otherwise, the public body could defeat any "substantial compliance" by failing to act on the matter.

[3] Under the authorities cited, and many others, it must be held that a substantial compliance with Section 22727 of the Water Code was sufficiently shown by the evidence to make it improper to grant a motion for a nonsuit.

It is unnecessary to consider the further question raised as to whether or not the filing of a claim was required in this action for an injunction, because of the absence of certain allegations in the complaint.

The judgment is reversed.

GRIFFIN and MUSSELL, JJ., concur.



147 Cal.App.2d 233

The PEOPLE of the State of California, Plaintiff and Respondent,

v.

Ellwood Martin MUELLER, Defendant and Appellant.

Cr. 5668.

District Court of Appeal, Second District, Division 2, California.

Dec. 27, 1956.

Rehearing Denied Jan. 11, 1957.

Hearing Denied Jan. 23, 1957.

Prosecution for assault with a deadly weapon. The Superior Court of Los Angeles County, Charles W. Fricke, J., entered judgment of conviction and order denying new trial, and defendant appealed. The District Court of Appeal, Ashburn, J., held that there was no error by court in the giving of and in refusing to give certain instructions and remark of district attorney was not so inflammatory as to make

it reasonably probable that without such remark a result more favorable to defendant would have been reached.

Affirmed.

1. Assault and Battery ⇐96(1)

Where defendant was charged with assault with a deadly weapon, defendant was not entitled to an instruction that offense of assault with a deadly weapon necessarily included the lesser crime of assault and battery. West's Ann.Pen.Code, § 245.

2. Assault and Battery ⇐66

Mere words will not justify an assault with a deadly weapon. West's Ann. Pen.Code, § 245.

3. Criminal Law ⇐814(17)

In a criminal case in which the prosecution relies for conviction upon direct evidence, circumstantial evidence, if any, being merely incidental to and corroborative of the direct evidence, an instruction on the law of circumstantial evidence need not be given, and in such case it should not be intimated to jury that case of the People is one of circumstantial evidence.

4. Criminal Law ⇐824(9)

In prosecution for assault with deadly weapon where conviction rested upon direct evidence furnished by witnesses and presented circumstantial proof only in the incidental and corroborative circumstances, there was no error by court in failing to give appropriate instructions upon circumstantial evidence of its own motion. West's Ann.Pen.Code, § 245.

5. Criminal Law ⇐959

On a motion for new trial in criminal case because of alleged misconduct of counsel, primarily it is the duty of the trial judge to determine whether there has been a miscarriage of justice.

6. Criminal Law ⇐730(14)

In prosecution of defendant, a labor union worker, for assault with a deadly weapon upon nonunion employee working at job site, remarks of district attorney respecting "goon-squads" and "poor colored workers", that were promptly stricken by court with admonition to jury, were not so inflammatory to make it appear that in absence of such remarks, it was reasonably probable that a result more favorable to the defendant would have been reached. West's Ann.Pen.Code, § 245.

Ball, Hunt & Hart, by Clark Heggeness, Long Beach, for appellant.

Edmund G. Brown, Atty. Gen., Joan D. Gross, Deputy Atty. Gen., for respondent.

ASHBURN, Justice.

Defendant, having been charged with assault with a deadly weapon upon one Dene Qualls, Pen.Code § 245, was convicted and sentenced to serve three months in the county jail. He appeals from the judgment and an order denying his motion for new trial. Prejudicial errors in the matter of instructions and misconduct of the deputy district attorney are asserted.

The assault was immediately followed by a vicious battery which inflicted serious injuries upon Qualls. While no claim is made of insufficiency of the evidence to support the verdict, the evaluation of the alleged errors requires a brief summarization of the evidence, which is sharply conflicting upon the central question of whether defendant started a fight or acted in self-defense.

On August 11, 1955, a group of five colored laborers were working upon the foundation of a building which was being constructed for Superior Overhead Garage Door Company, in the city of Compton. It had a collective bargaining agreement which covered and included Laborer's Local Union 507 of Long Beach, and which required that the workmen be union members. A subcontract has been let to Tom Erland, who claimed to the Door Company officials that he was employing union men. He had five colored laborers on the job and they did not belong to the union. About three days before August 11th a union picket was placed in front of the premises; he be-

longed to Local 507. In the early morning of that day the men were finishing their job when a former workman came to the property, talked with the picket and left. Soon a group of six field representatives of Local 507 arrived, led by defendant Mueller who was business manager of said Local. There were stakes lying on the ground which had been used to support foundation forms. According to the version of the prosecution witnesses defendant and his group picked up stakes as they approached the workmen. Their foreman was Pearson Petty; he met defendant and his group, asked what they wanted, and Mueller replied that it was not any of their business. Petty asked, "What are you doing on this property?" and Mueller started walking away. Petty then said, "Look, we don't want any trouble here." Mueller: "Well, I'm going to give you plenty of trouble." Petty: "I'll call the police." Mueller: "You don't know who I am, I might be the police. I'm going to give you plenty of trouble and put you in jail besides." One Evans was close to Mueller and as they raised their clubs Petty, according to his own version, ran to the truck and got a shovel to use as protection. According to other witnesses he started toward the street as if to telephone the police. When he left, Qualls, who was sub-foreman, started toward defendant. He had been using a trowel but had nothing in his hands and made no threat of any kind. Before he said anything Evans hit him from behind with a two-by-four stake, the blow landing on his shoulder. Evans then grabbed him and held his arms behind him. Thereupon defendant beat him across the head with a one-by-three piece of timber, striking him six or seven times, inflicting an open wound above the ear which bled freely. While this was going on other workmen ran to their truck to get shovels or other instruments of protection. Some got shovels, one a mattock, another two hammers. As they returned toward Qualls and Mueller, Petty and Morrah kept saying, "Dene, don't fight back. Don't fight back. You fellows please go, we don't want any trouble." As the shovel brigade neared them, Evans dropped Qualls who fell to his knees. Mueller and his group ran for his car and departed for the Union hall. In about 20 or 30 minutes they returned with about 15 men but the police were on the scene and no further violence occurred. The prosecution witnesses agreed that none of them had struck a blow or made a threat of any kind before defendant attacked Qualls; that Qualls did not start the fight and had nothing whatever in his hands when approaching Mueller. In substance the foregoing is the testimony of the five laborers, Qualls, Jones, Morrah, Abrams and Petty.

The defense version of the trouble was quite different. Mueller did hit Qualls several times with a stick but only in self-defense after Qualls had hit him with a shovel. According to the defense witnesses Mueller and his associates, though they conversed with the picket, did not know that the colored laborers were not union men. These union representatives were engaged in checking jobs that morning. They went to this one for the purpose of checking the men's cards and to ask about Jace Marshall's insurance, if perchance he was there; he was not. Mueller and Evans entered the job first. Mueller identified Petty as foreman, presented his building trades card, said he was there to check the job and to talk to Marshall if he was there. Forthwith Petty, the foreman, became violent, ordered Mueller off the job, using many nasty words. "He told me that they wasn't any so-and-so union man going to check that job and for us to get off the job." Mueller walked away from Petty, who was still calling the union men S.B.'s and ordering them off the property. As he did so, Brimhall yelled to him to watch out. Defendant turned and saw Qualls coming at him with a shovel, swinging it. He tried to dodge the blow but was knocked to the ground on one knee. He grabbed a stake as he went down and came up swinging it. Qualls was trying to hit him with a shovel but he dodged those blows and hit Qualls several times on the head, "trying to stop his advance on me." Defendant called to

Evans for aid. Evans grabbed Qualls, held his arms and Mueller did not strike Qualls any more. By that time other laborers were approaching with shovels and "were all screaming and hollering to kill them." Petty hit Evans on the head with a shovel, then ran for the truck saying he had a gun in it and was going to "kill all of us union * * * [S.B.'s] if we didn't get off the job." Brimhall then asked the Petty group to please stop using shovels and "that we would get off of the job, and they was one of the colored boys that agreed to that, so everybody dropped everything they had in their hands," and the union group left. Such was the version of the defense witnesses as furnished by Mueller, Evans, Scharer, McGinnis (four of the six union men who had arrived together at the job), and one O'Malley who was working on adjoining property.

Obviously the jurors adopted the version of the facts which had been presented by the prosecution witnesses.

The first claim of error is refusal to give the following instruction which was requested by defendant: "You may find the defendant guilty of any offense, the commission of which is necessarily included in that with which he is charged, [or of an attempt to commit the offense,] if, in your judgment, the evidence supports such a verdict under my instructions.

"To enable you to apply the foregoing instruction, if your findings of fact require you to do so, I instruct you that the offense of assault with a deadly weapon, of which the defendant is charged in [~~count~~ ~~of~~] the information, necessarily include the crime[s] of assault and battery." The judge in refusing it endorsed the following words: "Assault & battery not included either as a matter of fact or matter of law."

Appellant argues that the judge was mistakenly relying upon cases such as People v. McCoy, 25 Cal.2d 177, 187, 153 P.2d 315, which hold that it is not necessary to give an instruction on a lesser offense when the evidence establishes that defendant was guilty of the greater one as charged or not guilty of any crime. It appears more probable that the ruling rests upon the principles stated in Fricke on California Criminal Law, Fifth Edition: "It has been said that 'The test in this state of a necessarily included offense is simply that where an offense cannot be committed without necessarily committing another offense, the latter is a necessarily included offense.' (People v. Greer, 30 Cal.2d 589 [184 P.2d 512].) 'If, in the commission of acts made unlawful by one statute, the offender must always violate another, the one offense is necessarily included in the other' (People v. Whitlow, 113 Cal.App.2d 804 [249 P.2d 35]; People v. Krupa, 64 Cal.App.2d [592] 598 [149 P.2d 416]). Before a lesser offense can be said to constitute a necessary part of the greater, all of the elements of the corpus delicti of the lesser offense must be included in the elements of the greater offense (People v. Whitlow, supra; People v. Greer, 30 Cal.2d 589 [184 P.2d 512].)" (P. 36.) "A charge of assault with a deadly weapon does not include battery (People v. Helbing, 61 Cal. 620; People v. McCaffrey, 118 Cal.App.2d 611 [258 P.2d 557]) or the offense (Penal Code, sec. 417) of exhibiting a deadly weapon in an angry and threatening manner (People v. Diamond, 33 Cal.App.2d 518 [92 P.2d 486]; People v. Piercy, 16 Cal.App. 13 [116 P. 322])." (P. 38.) The cited cases of Helbing and McCaffrey support the text, holding that the offense charged under § 245, Penal Code, does not include battery; that that is not an element of the offense of assault with a deadly weapon. See also, People v. McDaniels, 137 Cal. 192, 195, 69 P. 1006, 59 L.R.A. 578.

In the McCaffrey case this court said, 118 Cal.App.2d at page 618, 258 P.2d at page 562: "Simple assault is nothing more than an unlawful attempt to commit a violent injury on another. Penal Code, § 240. A battery cannot be committed without assaulting the victim. But an assault can occur without committing a battery. The gravamen of the crime defined by section 245 is *the likelihood that the force applied or attempted to be applied* will result in

great bodily injury. Therefore, to make one guilty of violating section 245, evidence of an actual blow is not necessary; but it is requisite that proof be made of an attempt to beat another (1) with a deadly weapon or other instrument not ordinarily defined as a deadly weapon, or (2) by a means or with a force likely to produce great bodily injury. Because a battery is not essential to the crime here charged and because one may violate section 245 without actually striking another, a battery is not a 'necessarily' included offense in the crime defined by section 245. Therefore, the trial court properly refused to give defendant's instructions IV and V. People v. Meichtry, 37 Cal.2d 385, 390, 231 P.2d 847." People v. McCaffrey, 118 Cal.App.2d 611, 618, 258 P.2d 557.

[1] The tendered instruction was erroneous in that it told the jury that the offense of assault with a deadly weapon necessarily includes "the crimes of assault and battery." If the request had been confined to assault, with no reference to battery, a different question would arise. But it is unnecessary to inquire whether refusal of such request would have been error, for the evidence of simple assault is too tenuous to require the court to modify the instruction and to give it as modified upon its own motion. See People v. Warren, 16 Cal.2d 103, 117, 104 P.2d 1024.[1]

[2] Appellant argues that there was prejudicial error in the giving of the following instruction: "No words of abuse, insult or reproach addressed to a person or uttered concerning him, howsoever grievous or opprobrious the words may be, if unaccompanied by any threat of great bodily injury or any assault upon the person or any trespass against lands or goods, will justify him in an assault with a deadly weapon and the provocation only of such words will not constitute a defense to a charge of having committed such an assault." Counsel argue the matter as one of error in a self-defense instruction. It does not fall in that category, however, for it deals only with justification or excuse for assault with a deadly weapon. It correctly states the law to be that mere words will not justify such an assault. 5 Cal.Jur. 2d § 13, p. 233; People v. Iams, 57 Cal. 115, 120, 126–127, 130; People v. Washburn, 54 Cal.App. 124, 128, 201 P. 335; People v. Westlake, 62 Cal. 303, 305–306; 6 C.J.S., Assault and Battery, § 91, p. 943; 4 Am.Jur. § 53, p. 154.

Counsel for appellant place mistaken reliance upon People v. Valentine, 28 Cal.2d 121, 144, 169 P.2d 1, which deals not with words as provocation for an assault, but with the question of whether provocatory words " 'are of themselves sufficient to reduce the offense of an intentional homicide with a deadly weapon from murder to manslaughter' ", 28 Cal.2d at page 137, 169 P.2d at page 13, as a matter of law; it being held a question for the jury to decide whether the facts were sufficient to show that defendant acted under the heat of such passion as would naturally be aroused in an ordinarily reasonable person. Such cases deal with the state of defendant's mind and

1. In the case of People v. Fuentes, 74 Cal. App.2d 737, at page 742, 169 P.2d 391, at page 394, which is cited by appellant, the court held the evidence insufficient to sustain conviction of assault by means of force likely to produce great bodily injury, but it said: "This conclusion does not relieve defendant from the results of his admitted and unprovoked assault on Garcia. There can be no question that he is guilty of the crime of battery and that he should receive punishment therefor. As battery is a crime included in the one charged we may reduce the judgment and direct the resentence of defendant. People v. Kelley, 208 Cal. 387, 281 P. 609; People v. Cowan, 38 Cal.App.2d 231, 101 P.2d 125, [135]." The cited cases support the proposition that an appellate court in such circumstances may reduce the judgment and direct a resentencing of the defendant upon a necessarily included offense, but they do not support the statement that "battery is a crime included in the one charged," namely, assault by means of force likely to produce great bodily injury. In this respect the Fuentes case is out of line with the views heretofore expressed by the Supreme Court.

the effect of provocatory words upon it. That is not the problem here, which is the bald one of whether words alone will justify an assault with a deadly weapon. The instruction of which appellant complains is CALJIC No. 606. The 1953 pocket part contains the following apt discussion of the matter. "In People v. Valentine, 28 Cal.2d 121, 169 P.2d 1, the Supreme Court of California establishes the rule that words of abuse, insult or reproach may incite the heat of passion specified in Penal Code, § 192 (Manslaughter Defined), and hence may constitute sufficient provocation to reduce the offense of intentional homicide from murder to manslaughter. * * * The law thus announced in People v. Valentine has to do merely with the reduction of a homicide from murder to manslaughter, not with a total defense to or justification of homicide, or of any other attack upon the body. Penal Code §§ 692, 693 and 694 state when an assault is justifiable and not a crime. Provocation by words of abuse, insult or reproach is not among the listed circumstances. The purpose of this Instruction 606 is to state the effect of the clear statutory law." (P. 163.) There was no error in giving the instruction at bar.

[3] Failure to give appropriate instructions upon circumstantial evidence of the court's own motion is claimed to be prejudicial error here. Counsel rely upon cases holding that such instructions are imperative in a trial where the prosecution relies solely or substantially upon circumstantial evidence to convict. Obviously this limitation to a case involving substantial reliance upon that type of evidence is necessary because every trial presents some circumstantial evidence, that being but another name for indirect evidence, which in turn means inferences or presumptions. (See definitions in 18 Cal.Jur.2d § 12, p. 434.) The governing rule is thus stated in People v. Lapara, 181 Cal. 66, 70, 183 P. 545, 546: "It is not now open to question that in a criminal case in which the prosecution relies for conviction upon direct evidence, the circumstantial evidence, if any, being merely incidental to and corroborative of the direct evidence, an instruction on the law of circumstantial evidence need not be given, and that, in such case, it should not be intimated to the jury that the case of the people is one of circumstantial evidence. [Citations.] The reason for the general rule in this behalf is to be found in the danger of misleading and confusing the jury, where the inculpatory evidence consists wholly or largely of direct evidence of the crime. In such cases, as courts have repeatedly pointed out, it would be most mischievous to intimate to the jury that the prosecution was relying for a conviction upon circumstantial evidence." To the same effect are: People v. Jerman, 29 Cal. 2d 189, 197, 173 P.2d 805; People v. Alexander, 92 Cal.App.2d 230, 235, 206 P.2d 657; People v. Arias, 118 Cal.App.2d 656, 659, 258 P.2d 535; People v. Shaheen, 120 Cal.App.2d 629, 637, 638, 261 P.2d 752; People v. Brophy, 122 Cal.App.2d 638, 646, 265 P.2d 593, 46 A.L.R.2d 1410; People v. Van Eyk, 133 Cal.App.2d 562, 567, 284 P.2d 970; People v. Harmon, 89 Cal.App.2d 55, 59, 60, 200 P.2d 32.

[4] The instant conviction rests upon direct evidence furnished by witnesses and presents circumstantial proof only in the incidental and corroborative circumstances which give meaning and force to the positive testimony. The claim of error in this regard is not well taken.

Lastly it is argued that there was misconduct of the deputy district attorney of such magnitude that the court's prompt admonition to the jury could not cure it. During the opening argument the following occurred: Mr. Jackson: "* * * Now, here is six men there, and five poor colored fellows. But listen to the testimony of the defendant's witnesses. What did they have to say? They arrived at the scene, they're just passing by looking for some fellow named Jason Marshall, works around there. Also going to check on the job there to see. Of course, what the evidence, what are the presumptions of the picket-man out there. Already they know it is not union. They

go back there with six of them just to check on it. We have heard a lot of stories about how unions operate goon-squads—Mr. Sokol: To which we will object and ask the Court to advise the jury to disregard that statement. (Record read by the reporter.) The Court: That argument should not have been made. The jury is instructed to entirely disregard it. The sole question we have here, regardless of everything else, is whether or not the defendant committed an assault or whether he was acting in self-defense. You may proceed. Mr. Jackson: I'm sorry."

Counsel for appellant argue that these were highly inflammatory statements, that the district attorney was clearly seeking to convict defendant upon the prejudice that many persons undoubtedly feel toward unions and union workers, and upon prejudice in favor of a "poor colored worker" trying to hold the job. It appears, however, that the whole trial had the atmosphere of a battle between a group of non-union negroes and a delegation of white union representatives. The prosecution witnesses claimed the union men were bent on driving them off their jobs and the union group asserted that they were being assaulted and chased away. The remarks of the district attorney characterized defendant's activities in a manner which was not far removed from the evidence furnished by the prosecution witnesses. That the jurors were not carried away by extraneous considerations or by passion seems apparent. They retired to consider their verdict at 9:42 a. m.; at 11:30 they returned to court with two questions for the judge, which went to the heart of the case, and a further request to have the testimony of Qualls and Mueller read to them. The questions were, "at what time was Mr. Qualls held?" and "who struck the first blow?" Of course the court told them it was their business to answer both. The requested testimony was read and the jurors again retired at 3:10 p. m., returning with their verdict of guilty at 4:00 p. m.

[5, 6] Upon hearing of the motion for new trial, at which defendant's counsel made the same arguments of misconduct, the trial judge said: "I think that was a somewhat intemperate remark, but I don't think it was one of those improprieties which could not be removed by the instruction of the Court." Primarily it was his duty to determine whether there had been a miscarriage of justice, and denial of the motion for new trial furnished a negative answer to that question. We in turn cannot conclude that this is a case in which a miscarriage of justice has been worked. People v. Watson, 46 Cal.2d 818, 836–837, 299 P.2d 243, 254: "That a 'miscarriage of justice' should be declared only when the court, 'after an examination of the entire cause, including the evidence,' is of the 'opinion' that it is reasonably probable that a result more favorable to the appealing party would have been reached in the absence of the error. * * * Nevertheless, the test, as stated in any of the several ways, must necessarily be based upon reasonable probabilities rather than upon mere possibilities; otherwise the entire purpose of the constitutional provision would be defeated." It does not appear that in the absence of the incident under discussion it is reasonably probable that a result more favorable to the defendant would have been reached.

The judgment and the order denying motion for new trial are affirmed.

MOORE, P. J., and FOX, J., concur.

147 Cal.App.2d 125

In the Matter of the ADOPTION of Maurice Lynn BURTON and William Darrell Burton, Minors.

Civ. 5278.

District Court of Appeal, Fourth District, California.

Dec. 20, 1956.

Proceeding by stepfather to adopt his wife's two sons by a former marriage, who had been awarded to the mother by a Kansas divorce decree. From an order of the Superior Court of Orange County, John Shea, J., granting the adoption, the natural father appeals. The District Court of Appeal, Coughlin, J. pro tem., construed the statute respecting the adoption of children and held that the adoption of the children was authorized without consent of the natural father.

Order granting adoption affirmed.

1. Domicile ⇐11

Residence is a question of fact involving largely a matter of intention.

2. Adoption ⇐13

In proceeding by stepfather to adopt wife's two sons by former marriage, substantial evidence sustained finding that the children were residents of California, where the custody of the children had been awarded to their mother in prior Kansas divorce decree and the mother was a resident of California.

3. Adoption ⇐13

In proceeding by stepfather to adopt his wife's two sons by a former marriage, where custody of the children had been awarded to the mother by a Kansas divorce decree finding that children were residents of California was not in conflict with a further finding that children were removed to California upon posting of a bond conditioned upon their being returned to Kansas if court of that state so ordered, since such fact did not alter mother's intention to continue their residence in California.

4. Adoption ⇐10

In proceeding by stepfather to adopt his wife's two sons by a former marriage, where sons had been awarded to mother by a Kansas divorce decree and the children were residents of California, the California court had jurisdiction.

5. Statutes ⇐190

Where meaning of statute is plain, there is no room for judicial interpretation, and only function of the court is the application of the enactment to the facts.

6. Statutes ⇐184

The interpretation of a statute must be reasonable and compatible with common sense and the dictates of justice. West's Ann.Civ.Code, § 3542.

7. Adoption ⇐7

The statute respecting adoption of a child and requiring consent of the parents if living, means that a legitimate child may not be adopted without consent of both parents, unless custody of child has been given to mother by a judicial decree, and, during time child is in custody of mother, father has wilfully failed to pay for support of child for one year, when able to do so, in which event child may be adopted with consent of mother alone, but only after father is served with citation requiring appearance at adoption proceeding. West's Ann.Civ.Code, §§ 224, 226.

8. Adoption ⇐7

The statute permits adoption of legitimate children without their father's consent only when their mother has custody of them during whole of the one year period and when father fails to pay for their care, although his consent would not be necessary if he failed to pay for their care for a one year period "after" their custody was given to the mother, even though she did not retain custody during the whole of that period. West's Ann.Civ.Code, § 224.

9. Adoption ⇐7

Under the statute relating to adoption of children, if father for one year wilfully fails to pay for support and education of children when able to do so, after custody

of children has been given to mother by a decree, they may be adopted without his consent and failure to support for one year must occur "after" custody of the children has been given to mother. West's Ann.Civ. Code, § 224.

10. Adoption ⇐7

Under statute relating to the adoption of children, at any time after conditions of statute, with respect to neglect by the father, had been fulfilled, a child may be adopted with consent of mother alone, unless court, in discharge of its obligation to approve adoption only if it is for best interests of child, should determine otherwise. West's Ann.Civ.Code, §§ 224, 226.

11. Adoption ⇐12, 13

Under statute respecting adoption of legitimate children, father must be given notice of hearing, and court is authorized to deny the petition if best interests of child would be served by maintaining existing relation with a natural parent, in event custody has been restored to the father or he had resumed acceptance of his responsibilities. West's Ann.Civ.Code, § 224.

12. Parent and Child ⇐2(1)

The law has a solicitous regard towards maintaining integrity of natural relation of parent and child, but such relation may be terminated by conduct of father regarded as unnatural and destructive.

13. Adoption ⇐7

Under statute respecting adoption of children, purpose of statute cannot be defeated by natural father who has failed to provide for child under conditions described in statute with consent of mother alone by obtaining a change in custody order, or making a support payment after filing of petition for adoption. West's Ann. Civ.Code, §§ 224, 226.

14. Adoption ⇐10

In proceeding by stepfather to adopt his wife's two sons by a former marriage, where custody of children was awarded to mother by Kansas divorce decree, fact that Kansas court amended its order after filing of adoption petition, and awarded custody of children to natural father for the part of a year, did not preclude a California court with jurisdiction from proceeding with adoption hearing. West's Ann.Civ. Code, § 224.

15. Infants ⇐18

Different courts and different proceedings may have jurisdiction over the custody of children independent of each other.

16. Infants ⇐19

A California court is not foreclosed from providing for best interests of a minor who is a resident of California because custody of that minor has been the subject of a judicial decree in another state.

17. Adoption ⇐13

In proceeding by stepfather to adopt his wife's two sons by a former marriage who had been awarded to wife by a Kansas divorce decree where father had failed to support them for a period of several years, fact that father was ill during a part of any year when he failed to provide for the children was not determinative of his ability to pay for their care during that year. West's Ann.Civ.Code, § 224.

18. Adoption ⇐13

In proceeding by stepfather to adopt wife's two sons by a former marriage, which had been awarded to wife by a Kansas divorce decree, whether natural father was able to pay for support of the children during a period of more than one year prior to the filing of the adoption petition, was a question of fact. West's Ann.Civ.Code, § 224.

19. Adoption ⇐13

In proceeding by stepfather to adopt wife's two sons by former marriage, awarded to wife by a Kansas divorce decree, where there were several one year periods during which natural father failed to support his children, fact that parties involved were residents of Kansas during some of such periods did not prevent a consideration thereof in applying statute respecting adoption of children. West's Ann.Civ.Code, §§ 224, 226.

20. Adoption ⇐13

In proceeding by stepfather to adopt wife's two sons by a former marriage, awarded to the wife by a Kansas divorce decree, father's inability to provide for the children for a short time during the one year period immediately prior to adoption was not determinative of the right to adopt. West's Ann.Civ.Code, §§ 224, 226.

Jerry B. Riseley, Studio City, for appellant.

Launer, Chaffee & Launer, Fullerton, and Thomas J. Koerber, Van Nuys, for respondent.

COUGHLIN, Justice pro tem.

This is an appeal from an order approving a stepparent adoption.

George Stanley filed a petition to adopt his wife's two sons by a former marriage. His petition alleges that he and Ruth Stanley, the mother of the boys, were married on June 2, 1946; formerly she was married to Maurice Burton, the father of these children, and obtained a divorce from him through a decree granted by the District Court of Rooks County, Kansas; by order of that court, in the divorce proceedings, the custody of the children was awarded to their mother; their father "for more than a year prior to the filing of this petition, to wit: since the year 1946, * * * although able to do so * * * wilfully failed to pay for their care, support and education;" and their mother is desirous that petitioner adopt these children as his own.

On September 22, 1945, the District Court of Rooks County, in the divorce action referred to, ordered that the custody of the Burton children be awarded to their mother during the nine school months of the year, and to their father during the summer months, and directed the father to pay for their support. This order was amended on June 15, 1946, when the court awarded "sole custody" to the mother, and directed that the father should have the right to visit the children at all reasonable times. On June 2, 1946, Mrs. Burton had married Mr. Stanley. Thereafter, the two boys, who then were five and seven years of age, respectively, lived with their mother and stepfather.

In August, 1952, Mrs. Stanley, the former Mrs. Burton, filed a petition in the said District Court asking permission to take the children to the state of California and alleging that Mr. Burton was "in default of child support payments in the sum of approximately $2,700"; that her present husband was required to support the children; and, for this reason, they desired to move to California where he could earn more money. The court found that the allegations in the petition were true and granted the permission requested, providing Mrs. Stanley post a bond in the sum of $1,000, conditioned upon her returning the children to the state of Kansas should the court order such return.

Thereafter, the two boys, with their mother and stepfather, moved to California; lived together; continued to be supported by their stepfather; and received no communication or support from their father.

On October 13, 1954, the petition for adoption was filed and on December 19, 1954, Mr. Burton, the children's father, was served with a citation issued out of the Superior Court of Orange county, California, pursuant to the provisions of section 224 of the Civil Code. About two weeks later, he petitioned the District Court of Rooks county, Kansas, to modify the custody decree theretofore entered. Service of the petition was made upon the mother's attorney in the divorce action. Thereupon, this attorney, purporting to act for Mrs. Stanley, the former Mrs. Burton, moved for and obtained an order from the Kansas court directing her former husband to pay her travel expenses to attend the hearing of the petition for modification. Subsequently, Mrs. Stanley discharged her Kansas attorney. On January 27, 1955, the Kansas court modified the former custody order by awarding custody of the children to their father "for a period of at least thirty (30) days during the summer school vacation."

A stipulation, dated January 24, 1955, agreeing that the hearing of the adoption be continued and stating that "Maurice W. Burton does hereby appear" was filed in the California court on February 1, 1955.

On March 11, 1955, the children's mother signed and filed a written consent to their adoption by her husband, on the form and in the manner prescribed by section 226 of the Civil Code.

The petition for adoption was heard on March 15, 1955, at which time the boys' natural father appeared in person, and by an attorney, although no written objections or answer to the petition had been filed on his behalf. Evidence was introduced. The court found that it was for the best interests of the two boys that they be adopted by their stepfather; that the mother's consent alone was sufficient to effect such adoption; and that the natural father's consent thereto was not necessary as he had wilfully failed to pay for the care, support and education of his children, when able to do so, for a period of one year during the time they were in the custody of their mother by judicial decree.

[1–4] The children involved in this proceeding had resided in California for almost two years prior to the filing of the petition for adoption. During all of this time they were in the sole custody of their mother under an order of the Kansas court. Residence is a question of fact involving "very largely a matter of intention." Dreher v. Superior Court, 124 Cal.App. 469, 476, 12 P.2d 671, 674. Upon substantial evidence the trial court found that these children were residents of California. This conclusion was legally sound, as the residence of the minor children whose custody has been awarded to their mother is determined by her residence. Titcomb v. Superior Court, 220 Cal. 34, 42, 29 P.2d 206. Contrary to appellant's contention, the finding in question is not in conflict with a further finding that the children were removed to California upon the posting of a bond conditioned upon their being returned to Kansas if the court of that state so ordered. Even though it be assumed, as argued, that the children's mother intended to return them to Kansas in the event the court of that state so ordered, this fact did not alter her intention to continue their residence in the state of California. As the children were residents of this state, the California court had jurisdiction over them, Foster v. Foster, 8 Cal.2d 719, 68 P.2d 719; Titcomb v. Superior Court, 220 Cal. 34, 39, 29 P.2d 206, which attached at the time the petition was filed. Sampell v. Superior Court, 32 Cal.2d 763, 776, 197 P.2d 739.

The natural father contends that the order of adoption should be reversed because he did not consent thereto, as required by law.

The merit of this contention depends primarily upon an interpretation of the following provisions of section 224 of the Civil Code:

> "A legitimate child cannot be adopted without the consent of its parents if living; however, after the custody of any child has by any judicial decree, been given to the mother, and the father for a period of one year shall wilfully fail to pay for the care, support and education of such child when able to do so, then the mother alone may consent to such adoption, but only after the father has been personally served with a copy of a citation requiring him to appear at the time and place set for the appearance in court * * *."

[5–6] "Where the meaning of the statute is plain, there is no room or justification for judicial interpretation, and the only function of the court is the application of the enactment to the facts at bar." Riley v. Robbins, 1 Cal.2d 285, 287–288, 34 P.2d 715, 716. Where interpretation is in order it must be reasonable. Civ.Code, sec. 3542. The interpretation of a statute as a whole must be reasonable and " 'when opportunity arises, made compatible with common sense and the dictates of justice.' In other words, it is the duty of courts not to be ingenious to find ambiguity in statutes because of extraneous matters, but to in-

terpret them in such a manner that they may be free from ambiguity, and to give, if possible, a construction which not only renders them constitutional, but which is consistent with sound sense and wise policy, with a view to promoting justice.'" In re Estate of Todd, 17 Cal.2d 270, 275, 109 P.2d 913, 915.

[7] It is our opinion that the plain intent of said section 224 is to provide that a legitimate child may not be adopted without the consent of both parents, unless custody of such child has been given to the mother by judicial decree, and, during the time the child is in the custody of the mother, the father has wilfully failed to pay for the support, care and education of that child for a period of one year, when able to do so, in which event the child may be adopted with the consent of the mother alone, but only after the father is served with a citation requiring him to appear at the adoption hearing.

Appellant contends that the facts of this case do not bring it within those provisions of the code authorizing the adoption of a child with the consent of the mother alone. This contention is based upon the premise that, under the code section in question, the mother's consent alone is sufficient *only* if she has sole custody of the child to be adopted at the time she files her written consent with the court, and the father has wilfully failed to pay for the care of such child, having the ability to do so, for the one year period immediately prior to the filing of such consent. In the case at bar, after the petition for adoption had been filed but before the mother of the children to be adopted had signed and filed her consent to the adoption, as required by section 226 of the Civil Code, the order awarding her sole custody had been modified by the Kansas court, as heretofore noted.

Appellant cites the case of Miller v. Higgins, 14 Cal.App. 156, 111 P. 403, in support of his position. When that case was decided, under the provisions of section 224 of the Civil Code a child could be adopted without the consent of a parent adjudged guilty of cruelty and for such cause divorced. However, the court conducting the adoption hearing was obliged to determine from the evidence, as a jurisdictional fact, whether the parent allegedly guilty of cruelty should be present. In re Estate of McKeag, 141 Cal. 403, 408, 74 P. 1039. The cited case held that it was a fraud on the court hearing a petition to adopt a child, based on the consent of the mother alone, who had been awarded custody of that child in a proceeding in which she was granted a divorce from the father on the ground of cruelty, to withhold knowledge of a contemplated change of the custody order by the divorce court, which would have given custody to the father; and that such a fraud prevented a determination of the jurisdictional fact relating to the need for notice to the father, which authorized setting aside the adoption order.

Three other cases relied upon by appellant, in Re De Leon, 70 Cal.App. 1, 232 P. 738; In re Christie, 98 Cal.App. 158, 276 P. 1045; and Bruns v. State Bar, 213 Cal. 151, 1 P.2d 989, involved adoptions under the provisions of the former statute considered in Miller v. Higgins, supra, and held that a nonconsenting parent who had custody of the child to be adopted was entitled to notice of the adoption hearing.

In the case at bar, no fraud was committed on the court and the father was present at the hearing pursuant to a citation requiring his presence in accord with the mandate of the statute at it now exists and in conformity with the decisions in the cited cases.

Appellant also relies upon the decision in the Matter of Adoption of Cozza, 163 Cal. 514, 126 P. 161, 164, in which the court was considering the former adoption statute, which provided "that consent is not necessary from a father or mother * * adjudged guilty of adultery or cruelty and for either cause divorced * * *" and held that these provisions did not apply to the adoption of a child whose custody had been awarded to the mother in the divorce action even though she was guilty of cruel-

ty resulting in a divorce. Literally construed, the provisions of the statute under consideration in the cited case dispensing with consent applied to any parent guilty of cruelty resulting in a divorce. No exceptions were made. Nevertheless, considering the statute as a whole, the court declared that it was the intent of the legislature to dispense with the necessity of parental consent to an adoption only "where a decree of divorce is granted on certain specified grounds and the innocent spouse is given absolutely the custody of the children—a judicial determination that he or she, on account of specific matrimonial misconduct should not have future control or custody of them—or where the children have been deserted or abandoned by their parents, and such unnatural conduct dispenses with such consent."

[8, 9] Applying the reasoning of the decision in Matter of Cozza, supra, to an interpretation of the provisions of section 224 of the Civil Code as they now exist, justifies the conclusion that those provisions permit the adoption of children without their father's consent only when their mother has custody of them during the whole of the one year period when the father fails to pay for their care, although, under a strict construction of the statute, his consent would not be necessary if he failed to pay for their care for a one year period "after" their custody was given to the mother, even though she did not retain custody during the whole of that period. However, the contention of appellant that his children were not subject to adoption without his consent, because their mother did not have sole custody of them at the time she filed her consent with the court, is not supported by the rule or reason of the cases cited by him, or the language of the statute as it now exists. Likewise, his contention that the one year period referred to in the code section, during which the father fails to pay for the care of his children, when able to do so, is the one year period immediately preceding the filing of the mother's consent, finds no support in these authorities. Section 224 of the Civil Code does not provide that the "mother alone may consent" to the adoption of her children only if she has sole custody of them at the time she files her consent with the court. Under that code section if "the father for a period of one year shall wilfully fail to pay for the care, support and education" of his children "when able to do so", after the custody of such children has been given to the mother by judicial decree, they may be adopted without his consent. The failure to support for one year must occur "after" custody of the children has been given to the mother. The statute makes no other provision relating this one year period of neglect to any other time or event.

[10, 11] In substance, Civil Code section 224 recognizes a father's right to effectively object to the adoption of his children, by requiring that he give his consent to such adoption, and provides that he may lose that right upon the happening of events which are tantamount to an abandonment. At any time after the conditions of the statute, with respect to neglect by the father, have been fulfilled, a child may be adopted with the consent of the mother alone, unless the court, in the discharge of its obligation to approve the adoption only if it is for the best interests of the child, should determine otherwise. In re Sharon's Estate, 179 Cal. 447, 454, 177 P. 283; In re Johnson's Estate, 98 Cal. 531, 536, 33 P. 460, 21 L.R.A. 380. Under the present statute, the father must be given notice of the hearing. This affords him an opportunity to contest the contention that his children may be adopted with the consent of the mother alone, and also to show that the adoption would not be for their best interests. The court is authorized to deny the petition if the best interests of the child would be served by maintaining the existing relation with a natural parent, in the event custody had been restored to the father or he had resumed acceptance of his responsibilities.

[12, 13] This interpretation is in accord with the spirit of our law which, although

"solicitous towards maintaining the integrity of the natural relation of parent and child", Matter of Cozza, supra, 163 Cal. 514, 524, 126 P. 161, 165, recognizes that this relation may be terminated by conduct of the father regarded as unnatural and destructive. The obvious purpose of the statute under consideration is to provide a child with a real father instead of one who, by his past conduct, is proven to be a father in name only, even though related by blood. This purpose would be defeated if a father who had failed to provide for his child under the conditions described in the statute could prevent the child's adoption with the consent of the mother alone by obtaining a change in the custody order, or making a support payment after the filing of the petition for adoption. A statute should not be interpreted in favor of a father who seeks the benefit of parental rights but shuns the burden of parental obligations.

[14–16] The fact that the Kansas court amended its order after the filing of the adoption petition, and awarded custody of the children to appellant for part of a year, did not preclude the California court from proceeding with the adoption hearing. Different courts in different proceedings may have jurisdiction over the custody of children independent of each other. Even though one of the elements essential to an adoption upon consent of the mother alone is a judicial decree giving her custody of the children, the adoption proceeding as such and the custody proceeding in the divorce action are not dependent on or subject to each other. Younger v. Younger, 106 Cal. 377, 381, 39 P. 779; In re Kelly, 47 Cal.App.2d 577, 118 P.2d 479. A California court is not foreclosed from providing for the best interests of a minor who is a resident of this state because the custody of that minor has been the subject of a judicial decree in another state. Sampsell v. Superior Court, 32 Cal.2d 763, 778, 197 P.2d 739; Foster v. Foster, 8 Cal. 2d 719, 726, 68 P.2d 719; Titcomb v. Superior Court, 220 Cal. 34, 39, 29 P.2d 206; Anthony v. Tarpley, 45 Cal.App. 72, 79, 187 P. 779.

[17] In the case at bar, after the custody of the children had been given to the mother, the father failed to support them for a period of several years, continuing up to the time the petition for adoption was filed. Appellant contends that the evidence does not support the findings of the trial court that he "was able to pay for the care, support and education" of his children during a "period of more than one year prior to the date of filing the petition herein" because he was under a doctor's care from February to June, 1954, and in a state hospital from July 12 to August 10, 1954.

The fact that a father may be ill during a part of any year when he has failed to provide for his children is not determinative of his ability to pay for their care during that year. Adoption of Kelly, 47 Cal.App. 2d 577, 118 P.2d 479.

[18] In this case, whether the natural father was able to pay for the support of his children during a "period of more than one year prior to the filing of the petition" for adoption, was a question of fact. The evidence shows that from some time late in 1947 up to February, 1955, appellant paid nothing for the care of his children; they received no Christmas presents, birthday cards, letters, food or clothing from him; he went to college part of the time during the years 1947, 1948 and 1949; during May and June, 1952, he was employed as an accountant, which employment came to an end because he decided not to go back to work; in July and August of 1953, his employment by the State Department of Administration was terminated in the same way; from 1950 to date he edited and published a sports magazine owned by himself and his father; although he claims this enterprise was unprofitable, he has not tried to get any part time work since 1953, and had sufficient funds to buy a new automobile in 1951, another new automo-

bile in 1953, and a third new automobile shortly thereafter; he has been married and divorced three times since divorced by his children's mother; although he claims to be suffering from a service connected nervous affliction, on more than three occasions he was arrested and convicted for drunkenness, and on another occasion became involved in a drunken brawl which hospitalized him for three months, and it may be inferred that his alleged nervousness is the result of his intemperance. The finding of the trial court with respect to appellant's ability is adequately supported by the evidence.

[19, 20] In this case, there were several one year periods during which appellant failed to support his children. The fact that the parties involved were residents of Kansas during some of these periods does not prevent a consideration thereof in applying the statute. In re Williams' Estate, 102 Cal. 70, 80, 36 P. 407. Even though appellant might have been ill or hospitalized during a part of the one year period prior to the filing of the petition for adoption, the trial court, nevertheless, was justified in finding that he was able to pay for the care of his children during such period. Moreover, contrary to appellant's contention section 224 of the Civil Code does not provide that a child may be adopted with the consent of the mother alone only when the father's wilful failure to pay for the care of such child, when able to do so, has occurred during the one year period immediately prior to the filing of the petition for adoption. As heretofore noted, no reason appears for inferring that the legislature intended other than the plain meaning of the language used in this section to govern its application. Under these circumstances, the father's inability to provide for his children for a short time during the one year period immediately prior to the adoption is not determinative.

The order granting the petition for adoption is affirmed.

BARNARD, P. J., and GRIFFIN, J., concur.

147 Cal.App.2d 308

The PEOPLE of the State of California, Plaintiff and Respondent,

v.

Donald Eugene HAHN and Thomas George Wood, Defendants and Appellants.

Cr. 5737.

District Court of Appeal, Second District, Division 2, California.

Dec. 28, 1956.

Defendants were convicted of assault by means of force likely to produce great bodily injury. From judgment granting probation and from an order denying motion for a new trial in the Superior Court, Los Angeles County, Charles W. Fricke, J., the defendants appealed. The District Court of Appeal, Moore, P. J., held that the evidence sustained conviction that the confessions were properly admitted on the ground that they were free and voluntary.

Judgment and order affirmed.

1. Assault and Battery ⇐92

In prosecution for assault by means of force likely to produce great bodily injury, evidence sustained conviction. West's Ann.Pen.Code, § 245.

2. Assault and Battery ⇐71

In prosecution for assault by means of force likely to produce great bodily injury where both defendants were acting in concert and together in assaulting the victim and both enjoyed the fruits of the crime, both were guilty of doing whatever either did. West's Ann.Pen.Code, § 245.

3. Assault and Battery ⇐55

The gravaman of the offense denounced by the statute is the likelihood of bodily injury as the result of force used or attempted to be used, and degree of force is not as important as the manner in which it is used and the measure to be applied is whether the force was likely to cause serious bodily injury and it is not measured by the intent or the injuries suffered by the victim and such

injuries need not necessarily be serious. West's Ann.Pen.Code, § 245.

4. Assault and Battery ⇐55

A conviction under the statute of assault by means of force likely to produce great bodily injury could be had where the victim was beaten with a tin beer can, though such is not regarded as a deadly weapon where the can, as applied to the victim's head, was force likely to produce great bodily injury. West's Ann.Pen.Code, § 245.

5. Criminal Law ⇐1159(2)

A reviewing court is powerless to reverse a judgment where the facts established warrant inferences of defendant's guilt.

6. Criminal Law ⇐1153(6)

Admissibility of a confession is preliminarily addressed to the trial court and exercise of discretion will not be disturbed unless clearly shown on appeal to have been abused. West's Ann.Code Civ.Proc., § 2102.

7. Criminal Law ⇐531(3)

Evidence justified the admission of confessions of defendants in evidence on the ground that they were free and voluntary. West's Ann.Code Civ.Proc., § 2102.

Culver Van Buren, Burbank, for appellants.

Edmund G. Brown, Atty. Gen., Clarence A. Linn, Asst. Atty. Gen., John S. McInerny, Deputy Atty. Gen., for respondent.

MOORE, Presiding Justice.

Pursuant to verdict appellants were adjudged guilty of assault by means of force likely to produce great bodily injury. Pen. Code, § 245. They appeal from both the judgment granting them probation and from the order denying their motion for a new trial. They now demand reversal on the grounds of insufficiency of the evidence and the admission of their confession assertedly not free and voluntary. They were accused in three counts, to wit: robbery, kidnapping for the purpose of robbery and assault by means of force likely to produce great bodily injury. Acquittal on the first two charges followed the trial.

Appellants met one Adams in a saloon in Burbank during the evening of January 5, 1956. He was a stranger to them and to a woman with whom they were drinking, but on request he agreed to drive the three to their homes after closing time at 2:00 a. m. All four left the sanctuary of Bacchus together, Hahn carrying a six-pack carton of beer. They were soon compelled to stop by reason of some defect of the conveyance. While they waited, appellants and the woman imbibed the beer in which Adams did not participate. He drove on and after letting the woman out near her apartment, the men continued. Hahn sat by Adams who drove while Wood occupied the rear seat. Pursuant to Hahn's directions, Adams drove off Olive Street. He was told to stop and as he did so he was struck on the back of his head by Wood with a beer can. He pretended to be unconscious as someone removed his wallet from his hip pocket but left undisturbed his money in other pockets. One of the men said, "If he makes a move, kill him." Hahn thereupon took the wheel and drove for several blocks. Unable to turn on the headlights, they stopped, revived Adams and as they were in the act of removing him to the rear seat, he made his escape, sought refuge in the nearby home of one Kinzler who called police. Appellants drove away in Adams' automobile while the officers conveyed Adams to the hospital where he was treated for cuts on his head. His car was soon discovered and appellants were apprehended while sitting in a conveyance at the rear of Hahn's home.

Appellants relate a rejected account of the above occurrences. Hahn testified that the three drove around, drinking beer; that Adams refused to turn off the ignition at Hahn's request; that when Hahn reached over and shut off the motor a scuffle ensued; that when Wood attempted

to stop the fight he might unintentionally have hit Adams.

After appellants had been incarcerated, they signed their confessions on January ninth and tenth.

Evidence Sufficient

[1] It is contended that there was no evidence as to the size of the head wounds, nor as to the severity of the cuts; that the identity of the party guilty of the battery was not proved; that at the time he appeared at Kinzler's door there was neither blood on Adams nor any unusual mark; that his cuts did not require sutures or any follow-up treatment; that "the record is devoid of any evidence whatsoever that the force applied was likely to have effected great bodily injury."

[2] The record shows that the three men were in the automobile. Hahn sat beside the driver while Wood sat behind him. There is no proof that Adams was hit by a total stranger. The inference is reasonable that the blow was directed by Wood. But since Hahn and Wood were acting in concert and together, they both enjoyed the fruits of their crime, it follows that both were guilty of doing whatever either did. As to whether the battery was severe enough to warrant a conviction under Penal Code section 245, that was a question of fact and the jury found it against appellants. Adams testified that he was hit on the back of the head "with an empty beer can four times" but was not made unconscious; was hit "in the back of the head towards the top with a beer can"; he did "not know whether they took any stitches in his head"; was hit "in the back of the head towards the top, and a couple of other times, a total of four times" he was struck; was hit "fairly hard" the first time; was conscious but made no outcry.

[3, 4] Inasmuch as the evidence was in conflict as to whether appellants beat Adams with a tin can, the jury enjoyed the prerogative of determining whether appellants had assaulted him "by means of force likely to produce great bodily injury." While a tin beer can is not regarded as a deadly weapon, yet under the facts of this case the jury could fairly find that it was applied to Adams' head with a force likely to produce a great bodily injury. It is not necessary that it be found that the can was actually used with such force that it did cause great bodily injury. The gravamen of the offense denounced by section 245 is "the likelihood of bodily injury as a result of the force used or attempted to be used. The degree of force used is not as important as the manner in which it is used." People v. McIlvain, 55 Cal.App.2d 322, 331, 130 P.2d 131, 136. The measure to be applied to the force is whether it was likely to cause serious bodily injury. People v. Pullins, 95 Cal.App.2d 902, 904, 214 P.2d 436; People v. Schmidt, 66 Cal. App.2d 253, 256, 152 P.2d 1021. It is not to be measured by the extent of the injuries suffered by the victim. Such injuries need not be necessarily serious. Ibidem. A conviction under the section may be had where the defendant used only his fist if the circumstances of the assault and the manner of its execution warrant the jury in finding that the force used was likely to produce great bodily injury. People v. Score, 48 Cal.App.2d 495, 498, 120 P.2d 62. The crime is complete where the act of defendant was "a 'means of force likely to produce' the injury." People v. Pullins, supra [95 Cal.App.2d 902, 214 P.2d 437].

[5] Inasmuch as the reviewing court is powerless to reverse a judgment where the facts established warrant inferences of a defendant's guilt, this appeal must on that ground be denied. People v. Newland, 15 Cal.2d 678, 681, 104 P.2d 778. Appellants induced their victim to drive them to a residential section of their city. He trusted their camaraderie and ostensible good will. While he was unconscious of their intentions, and was confident that his kindness had not been misdirected, he was suddenly and repeatedly struck on

the head by the person who sat behind him. He probably avoided further punishment solely by virtue of his ability to escape. The jury could hardly have been mistaken in finding that Wood delivered the blows that struck Adams down. While Hahn sat to his right, Wood sat in the rear seat. Although Adams did not see the instrument used, he knew the cans were in the car and available. The jury were reasonably justified in inferring that Wood struck him with a can.

While the wounds on Adams' head did not appear to be incurable, they were such as to require medical attention and because life-long nervous disorders are known to have resulted from no more violence than was applied to Adams, it required no great strain of the deductive processes to infer that the force used upon him was "likely to produce great bodily injuries." Such was the problem posed for the jury, People v. McCaffrey, 118 Cal.App.2d 611, 616, 258 P.2d 557, and the evidence was sufficient to support their implied findings. People v. Schmidt, 66 Cal.App.2d 253, 152 P.2d 1021.

People v. Fuentes, 74 Cal.App.2d 737, 169 P.2d 391, cited by appellants is not pertinent. Fuentes struck his victim with his fist. The latter's misfortune lay in the fact that in falling his head struck a steel rail whereby the injuries were suffered.

Confessions Free?

[6] Appellants gave written confessions to the police which at the trial they contended were not freely and voluntarily given. They now contend that they were prejudiced by the admission of such confessions. At the outset appellants are confronted with two handicaps namely, (1) the trial judge admitted the confessions on the strength of the testimony of officer Dailey supported by that of officer Sartoris who testified that he had heard the confessions, made prior to the preparation of the statements, at which time he heard them confess orally to having beaten and robbed Adams. (2) The evidence as to the signing of the documents was fully presented to the jury and they impliedly found that they were freely and voluntarily made. It is the law that the admissibility of a confession is preliminarily addressed to the court and the exercise of its discretion will not be disturbed unless clearly shown on appeal to have been abused. Code Civ.Proc., § 2102; People v. Mehaffey, 32 Cal.2d 535, 548, 197 P.2d 12; People v. Jackson, 125 Cal. App.2d 776, 778, 271 P.2d 196. But in such action the law has provided an appeal from the judge to the jury.

Because the court's ruling in admitting the confessions was not binding on the jury, after officer Dailey had positively denied that he had told both defendants or either of them that if they would sign a statement they would be charged with robbery only and would get probation, defendants and their witnesses severally testified to the contrary, that is, if Hahn did not make a statement he "would throw a book at him"; that Dailey told Hahn that the latter might go to jail for life for kidnapping but that he, Dailey, would not press the kidnapping charge and get him off with probation for second degree robbery; that Dailey induced Mrs. Hahn to get her husband to make a statement admitting the charges. Hahn testified that he had copied part of a form supplied by Dailey but was ignorant of its meaning; that Dailey had promised both appellants that for their cooperation he would get them probation; that Dailey telephoned an unidentified party and reported to appellants that all was set for them to get second degree robbery. Mrs. Hahn testified that when she talked to officer Dailey he told her that her husband stood accused of kidnapping, grand the theft and robbery and although his crimes called for lifetime in jail, he, Dailey would do all he could if she would try to get her husband to sign a confession.

Wood testified that Dailey told him that if he would make a statement, one charge of only second degree robbery would be made against him and that probation would be granted. He was supported by Wood's father who testified that Dailey had promised him that if Thomas would cooperate with the police the charge would be reduced

to second degree robbery and probation would be granted.

[7] Because of the conflict in the evidence, the court properly submitted the issue to the jury for their "own independent judgment as to the free and voluntary character of the confessions to determine whether they are admissible or could be considered by you or not." By such statement and the court's subsequent charge, the jury were empowered to determine whether the confessions were free and voluntary. They found in the affirmative. Such finding left no issue undecided and the evidence was sufficient.

Judgment and the order denying their motion for a new trial are affirmed.

FOX and ASHBURN, JJ., concur.



Florence E. CARNEY, administratrix of the Estate of Rose Simmonds, deceased, substituted for Rose Simmonds, Plaintiff, Respondent and Appellant,

v.

Anna SIMMONDS and Berdella Marie McMinn, individually and as administratrix of the Estate of Thomas J. Simmonds, deceased, et al., Defendants, Appellants and Respondents.*

No. 16914.

District Court of Appeal, First District, Division 1, California.

Dec. 18, 1956.

Rehearing Denied Jan. 17, 1957.

Hearing Granted Feb. 13, 1957.

Action to set aside decree distributing estate. The Superior Court, County of Santa Clara, Leonard R. Avilla, J., gave judgment on the pleadings against plaintiff and entered order granting new trial. Defendants appealed from the order and plaintiff cross-appealed from the judgment on the pleadings. The District Court, Bray, J., held, inter alia, that where case was set for trial and as soon as case was called both sides stated that they were ready and defendant moved for judgment on the pleadings and such motion was granted, there was a "trial" within statute providing that new trial may be granted for error in law occurring at the trial, and this was so even though the motion was not accompanied or associated with other rulings.

Appeal from judgment dismissed; order granting new trial affirmed.

* Opinion vacated 315 P.2d 305.

1. New Trial ⇐33

Where case was set for trial and as soon as case was called both sides stated that they were ready and defendant moved for judgment on the pleadings and such motion was granted, there was a "trial" within statute providing that new trial may be granted for error in law occurring at the trial, and this was so even though the motion was not accompanied or associated with other rulings. West's Ann.Code Civ. Proc., §§ 656, 657.

See publication Words and Phrases, for other judicial constructions and definitions of "Trial".

2. Judgment ⇐443(1)

Intentional failure to give notice in a probate proceeding is extrinsic and not intrinsic fraud. West's Ann.Prob.Code, § 1200.

3. Pleading ⇐72

The failure to ask for a particular remedy to which the facts show that the plaintiff is entitled does not constitute a failure to plead a cause of action.

4. Pleading ⇐245(7)

If the plaintiff has a good cause of action, which by accident or mistake he has failed to set out in his complaint, the court, on motion for judgment on the pleadings, should, on plaintiff's application so to do, permit him to amend.

5. Judgment ⇐460(4)
Pleading ⇐236(6)

In heir's action to set aside distribution order in estate on ground that same was procured by fraud of administratrix in failing to notify heir of proceedings after request for special notice had been served, where complaint alleged matters as to failure to give notice and as to fraud on information and belief, there was no error in finding that complaint did not state a cause of action, but it was an abuse of discretion to deny plaintiff permission to file an amended complaint so that she could allege fraud positively. West's Ann.Prob. Code, § 1200.

6. New Trial ⇐18

Where court order properly granted judgment on pleadings because of insufficiency of complaint but also erroneously denied a right to amend, motion for new trial could be made either under subdivision of new trial statute dealing with abuse of discretion by which either party was prevented from having a fair trial, or subdivision dealing with error in law. West's Ann.Code Civ.Proc., § 657, subds. 1, 7.

7. New Trial ⇐137

Notice of motion for new trial does not have to specifically mention the subdivision or subdivisions under which it is brought or set forth the language of the subdivisions. West's Ann.Code Civ.Proc., §§ 657, 658.

8. New Trial ⇐137

Notice of motion for new trial is sufficient if the statement of the fact of refusal is a sufficient specification of error to acquaint both court and counsel with the particular error claimed. West's Ann. Code Civ.Proc., §§ 657, 658.

9. New Trial ⇐137

In action by heir to set aside order of distribution of estate on ground of fraud of administratrix, where court granted defendant's motion for judgment on the pleadings, notice of motion for new trial on ground that judgment was against the law and that court erred in refusing to grant leave to amend complaint, was sufficient to fully apprise the adverse party of the grounds to be urged. West's Ann.Code Civ.Proc., §§ 657, 658.

10. New Trial ⇐140(3)

Ordinarily, a motion for new trial under subdivision dealing with irregularity and proceeding of court or abuse of discretion by court, cannot be granted if the motion is not supported by affidavits except where the facts upon which the party moving for new trial relies, appear on the face of the record. West's Ann.Code Civ. Proc., §§ 657, 658.

11. New Trial ⇐140(3)

Where court granted defendant's motion for judgment on the pleadings and denied plaintiff the right to amend, and motion was made for new trial under subdivision of new trial statute respecting abuse of discretion by court, and facts relied on appeared on face of record, it was unnecessary that an affidavit accompany motion. West's Ann.Code Civ.Proc., §§ 657, subd. 1, 658.

Jacobsen & Tobin, San Francisco, for defendants appellants.

Eugene S. Clifford, Heller, Ehrman, White & McAuliffe, San Francisco, for plaintiff appellant.

BRAY, Justice.

Defendants appeal from an "Order Granting New Trial and For Filing Amended Complaint." Plaintiff[1] Rose Simmonds cross-appeals from the judgment on the pleadings entered against her.

Questions Presented.

1. Is a motion for new trial proper to review a judgment on the pleadings?

2. Did the court err in granting a new trial on the ground (a) either that the judg-

1. During this appeal Rose Simmonds died, and the administratrix of her estate was substituted as plaintiff. For convenience, however, "plaintiff" as used herein will refer to Rose Simmonds.

ment was against law or of error in law occurring at the trial; (b) on the ground that the notice of motion was insufficient and not accompanied by affidavits?

Record.

Plaintiff filed a complaint for partition of real property. Defendants' demurrer thereto was overruled. Plaintiff, however, filed an amended complaint.[2] Its allegations follow:

Plaintiff is the mother of Thomas J. Simmonds and is the owner as tenant in common of an undivided one-half interest in the described real property. At the time of Thomas' death, the property was his separate property, his wife Kathleen having predeceased him, without issue.[3] Thomas then remarried. He died intestate, leaving as surviving heirs, plaintiff, and his widow, Anna Simmonds. Defendant McMinn was appointed administratrix of Thomas' estate. On October 2, 1951, plaintiff filed and served on the attorneys for the administratrix a request for special notice. On October 15th defendant McMinn fraudulently obtained a decree assigning the whole of the estate to the surviving widow, Anna. After alleging that defendants claim an adverse interest in the property, plaintiff prays that the decree of distribution be vacated and that plaintiff be adjudged to be the owner of said property; that the rights of the defendants be determined and that the property be partitioned if defendants have any interest therein. Defendants did not demur but answered. At the time set for trial both parties answered "Ready." Defendants moved for judgment on the pleadings. The motion was granted without leave to amend, although plaintiff requested permission to amend as soon as the court announced its ruling. The court first made an order granting the motion for judgment on the pleadings "without leave to amend" and then a judgment on such order. Plaintiff then filed "Notice of Intention to Move for New Trial and for Order Vacating and Setting Aside Judgment on the Pleadings and for Order Allowing the Filing of an Amended Complaint or, in Lieu Thereof, for an Order Granting Dismissal of the Action Without Prejudice to Plaintiff," accompanying it with a proposed "Second Amended Complaint to Impose a Trust, for an Accounting, for Conspiracy and for Equitable, Injunctive and Other Relief." Upon the hearing thereof, the court vacated the judgment, granted a new trial and leave to plaintiff to file the proposed amended complaint.

1. Power To Grant New Trial.

[1] Defendants contend that on the theory that there has been no trial, a trial court has no power to grant a new trial on a judgment on the pleadings. Section 657, subdivision 7, Code of Civil Procedure, provides that a new trial may be granted for "Error in law, *occurring at the trial* * * *." (Emphasis added.) In our case, the case was set for trial. As soon as the case was called defendant moved for judgment on the pleadings.[4] Prior to the decision in Bice v. Stevens, 129 Cal. App.2d 342, 277 P.2d 106, there seemed to be some confusion in this state as to whether a new trial could be granted on a judgment on the pleadings, where no evidence had been introduced and there were no other rulings on motions. However, that confusion was ended by the Bice case. There the court in a well reasoned opinion reviewed the various cases in California on the subject,[5] concluded that a "trial" is

2. Hereinafter the amended complaint will be referred to as "complaint."

3. She held the other undivided one-half interest. It went to her heirs and is not involved here.

4. The order granting motion for judgment on the pleadings recites "The above-entitled cause came on regularly for trial * * *"

5. Including Allen v. California Mut. Building & Loan Ass'n, 40 Cal.App.2d 374, 104 P.2d 851; Abbey Land & Improvement Co. v. San Mateo County, 167 Cal. 434, 139 P. 1068, 52 L.R.A.,N.S., 408; Confar v. Whelan, 8 Cal.App.2d 101, 46 P.2d 991; Hotel Park Central v. Security-First Bank, 15 Cal.App.2d 293, 59 P.2d 606, cited by defendants.

the examination of the facts *or law* put in issue in a cause for the purpose of determining the rights of the parties, and held that a motion for judgment on the pleadings and determination thereof constituted a trial within the meaning of section 657, subdivision 7, giving the trial court jurisdiction to grant a new trial for error in law in granting such motion.

Defendants rely on a statement in Hotel Park Central v. Security-First Bank, supra, 15 Cal.App.2d 293, 59 P.2d 606, appearing in a quotation therefrom in the Bice case, to the effect that a motion for judgment on the pleadings not accompanied or associated with other rulings made at the time of the trial falls within the rule denying the power of the court to grant a new trial. They couple this quotation with the fact that in the Bice case the motion for judgment on the pleadings did not come until after counsel for the plaintiff had made an opening statement and called one of the defendants as a witness. Thereupon the defendants moved to exclude all evidence on the ground the complaint did not state a cause of action. When this was granted and plaintiff was refused an opportunity to amend, the motion for judgment on the pleadings was made and granted. From these two factors defendants contend that the Bice case is authority for the proposition that only if other rulings besides a motion for judgment are made a new trial may be granted. But this construction of the holding in the Bice case overlooks the fact that the court there approved the holding in Tregambo v. Comanche Mill & Mining Co., 57 Cal. 501, 505, quoted from Smith v. City of Los Angeles, 84 Cal.App.2d 297, 190 P.2d 943; "'"A trial is the examination before a competent tribunal, according to the law of the land, of the facts or *law* put in issue in a cause for the purpose of determining such issue. When a court hears and determines any issue of fact *or of law for the purpose of determining the rights of the parties,* it may be considered a trial." (Emphasis added.)'" [129 Cal.App.2d 342, 277 P.2d 114.] It also quoted with approval from cases holding that orders sustaining demurrers constituted trials on the merits and that the judgments based thereon could be vacated on motions for new trial. We can see no good reason why, when a case is called for trial, there have to be preliminary motions considered in order for the action of the court in ruling on a motion for judgment on the pleadings to constitute a trial of issues of law.

It may be that the holding in the Bice case, 129 Cal.App.2d at page 356, 277 P.2d at page 115, that "whether evidence is received or not, a motion for judgment on the pleadings is granted, the ruling may be reviewed on a motion for a new trial" is dictum, for the reason that in that case, prior to the making of the motion for judgment on the pleadings the plaintiff made an opening statement and the defendant moved to exclude all evidence upon the ground that the complaint failed to state a cause of action and the court granted the motion. However, on appeal, the same contention was made by the plaintiffs as is made by plaintiff here, namely, that no issue of fact was decided by the trial court and that the judgment was decided on issues of law alone. The reviewing court analyzed cases like Abbey Land & Improvement Co. v. San Mateo County, supra, 167 Cal. 434, 139 P. 1068, and Hotel Park Central v. Security-First Bank, supra, 15 Cal.App.2d 293, 59 P.2d 606, which had held that motions for judgment on the pleadings unaccompanied by other procedure did not constitute trials of an issue of *fact* and that therefore no new trial would lie. The court then pointed out a number of instances in which it has been held that the determination of issues of *law* constituted a trial for the purposes of section 657, which provides grounds for new trial, such as granting a nonsuit upon an opening statement, Craig v. Hesperia Land & Water Co., 107 Cal. 675, 40 P. 1057; Carton Corp. v. Superior Court, 76 Cal.App. 434, 436, 244 P. 932; dismissal of a case for failure of the plaintiff to deposit in court a certain sum of money, Green v. Duvergey, 146 Cal. 379, 80 P. 234; the granting of a directed

verdict, Steele v. Werner, 28 Cal.App.2d 554, 556, 83 P.2d 56. The court then quoted, 129 Cal.App.2d at page 353, 277 P.2d at page 114, with approval from Smith v. City of Los Angeles, supra, 84 Cal.App.2d 297, 190 P.2d 943; "'A definition of the word "trial," one quoted and never to our knowledge disapproved, is found in the case of Tregambo v. Comanche Mill & Mining Co., 57 Cal. 501, 505, * * *'" following with the quotation hereinbefore set forth. It further quoted from the Smith case to the effect that the sustaining of a demurrer without leave to amend constitutes "'a trial on the merits * * *'", 129 Cal.App.2d at page 354, 277 P.2d at page 114, for the reason: "'The foregoing definition of a "trial" includes trials which involve only questions of law. * * *'" 129 Cal.App.2d at page 354, 277 P.2d at page 114. The court also stated 129 Cal. App.2d at page 352, 277 P.2d at page 113: "The Code of Civil Procedure declares that 'Issues arise upon the pleadings when a fact or a conclusion of law is maintained by the one party and is controverted by the other. They are two kinds: 1. Of law; and, 2. Of fact', § 588, and that 'An issue of law must be tried by the court, unless it is referred upon consent', § 591. Section 657 provides that a new trial may be granted on any one of several grounds, one of which is error in law occurring at the 'trial.'"

Illustrating the confusion in the authorities upon the subject of what is "a trial" is the situation with reference to the granting of a judgment upon the sustaining of a demurrer without leave to amend. In Confar v. Whelan, supra, 1935, 8 Cal.App.2d 101, 46 P.2d 991, the court without considering the fact that the new trial section, Code Civ.Proc. § 657, provides for new trial on questions of law, held that because section 656 states "A new trial is a re-examination of an issue of fact in the same court after a trial and decision by a jury, court, or referee," a new trial can be granted only where there was an issue of fact, and could not be granted after a judgment on an order sustaining demurrer without leave to amend. Then in Smith v. City of Los Angeles, supra, 1948, 84 Cal.App.2d 297, 190 P.2d 943, the court reviewed most of the cases upon the subject prior thereto, although it did not consider the Confar case, and flatly held such judgment constituted judgment "after trial." 84 Cal.App. 2d at page 305, 190 P.2d at page 948. Among other reasons it said, 84 Cal.App.2d at pages 304–305, 190 P.2d at page 948: "The very fact that judgments have been rendered would seem to strongly imply that a 'trial' has been had, for as said by the Supreme Court in Matter of Lambert, 134 Cal. 626, 632, 66 P. 851, 854, 55 L.R.A. 856, 86 Am.St.Rep. 296:

"'* * * It is a cardinal principle in English jurisprudence that, before any judgment can be pronounced against a person, there must have been a trial of the issue upon which the judgment is given.'"

Then we have the situation with reference to a judgment upon an agreed statement of facts. In Smith v. City of Los Angeles, supra, 84 Cal.App.2d 297, at page 304, 190 P.2d at page 947, the court said in denying the respondent's contention: "Were we to follow respondents' contentions regarding what constitutes a 'trial' it would necessarily result in a determination that where a cause is submitted on an agreed statement of facts, there was no 'trial' because no determination of any issue of fact was involved, but only one of law, viz., what judgment should be entered."

Yet in Pahlka v. McCormick, 123 Cal. App.2d 763, 267 P.2d 390, Quist v. Sandman, 154 Cal. 748, 753, 99 P. 204, and Gregory v. Gregory, 102 Cal. 50, 36 P. 364, it has been flatly held that a new trial cannot be granted upon a judgment upon agreed facts for the reason that because of such agreement there can be no issue of fact before the court for decision. We would like to point out, however, that such conclusion completely eliminates without consideration subdivisions 6 and 7 of section 657. Strictly speaking, too, it would eliminate many matters which would be entitled to consideration under subdivision 1: "Ir-

regularity in the proceedings of the court, jury or adverse party, or any order of the court or abuse of discretion by which either party was prevented from having a fair trial; * * *." Many matters covered by this subdivision are questions of law and not of fact. Section 656 must be read with section 657.

Budrow v. Wheatcraft, 115 Cal.App.2d 517, 252 P.2d 637, and Hotel Park Central v. Security-First Bank, supra, 15 Cal.App. 2d 293, 59 P.2d 606, the cases which have held that the granting of a motion for judgment on the pleadings is not a "trial" for the purposes of section 657, base their decisions primarily upon Abbey Land & Improvement Co. v. San Mateo County, supra, 167 Cal. 434, 139 P. 1068, which so held, without, however, giving any consideration to the effect of subdivisions 6 and 7 of section 657. The Abbey case, in turn, is based upon four cases, none of which dealt with this problem and none of which likewise considered subdivisions 6 and 7. The four cases are Foley v. Foley, 120 Cal. 33, 36, 52 P. 122, and Younger v. Moore, 8 Cal.App. 237, 96 P. 1093, which dealt with default judgments, Gregory v. Gregory, supra, 102 Cal. 52, 36 P. 364, which dealt with a judgment upon an agreed statement of facts, and In re Heldt's Estate, 98 Cal. 553, 33 P. 549, which dealt with an order appointing administrator in which there was no issue joined as to any fact alleged in the petitions.

We are unable to find any case other than the Bice case, which in considering new trials after judgment on the pleadings has considered the effect of subdivisions 6 and 7 of section 657. Because of that fact, we believe that the reasoning and the determination in the Bice case are the better ones. In Stow v. Superior Court, 178 Cal. 140, 172 P. 598, and Allen v. California Mut. Building & Loan Ass'n, supra, 40 Cal.App. 2d 374, 104 P.2d 851, it was held that a new trial could be granted after judgment on the pleadings because the defendant had first objected to the introduction of any evidence, and his objection had been sustained. Even the cases following the rule of the Abbey case concede that if before the defendant moves for judgment on the pleadings, he objects to the introduction of any evidence and that objection is sustained, a motion for new trial after such judgment will lie, as there has been a trial. But how is the refusal to admit evidence because the complaint fails to state a cause of action any more a "trial * * * of an issue of fact" § 656, than the granting of a judgment for the same reason? It is completely unrealistic, and bordering somewhat upon the absurd, to require such an action precedent to a determination that the defendant is entitled to a judgment not upon any issue of fact, but because the plaintiff has failed to state a case in his complaint. And how does a judgment on the pleadings differ in effect from a judgment after the sustaining of a demurrer without leave to amend, which in Smith v. City of Los Angeles, supra, 84 Cal.App.2d 297, 190 P.2d 943, and Erganian v. Brightman, 13 Cal.App.2d 696, 700, 57 P.2d 971, was held to be a "trial"?

Reading sections 656 and 657 together and following the reasoning of Bice v. Stevens, supra, 129 Cal.App.2d 342, 277 P.2d 106, we are compelled to the conclusion that where, as here, a case is called for trial, the parties answer ready, and then judgment on the pleadings is granted, there has been a "trial" as contemplated by those sections.

Moreover, as will hereafter be pointed out, it has been held that the only method of obtaining in the trial court a review of that court's refusal to permit an amendment is by motion for new trial. Cook v. Suburban Realty Co., 20 Cal.App. 538, 542, 129 P. 801.

Thus the question for us to determine is whether the court erred in granting the judgment because the complaint did not state a cause of action or in refusing to permit amendment because a cause of action could be stated, or both.

2. Error. (a) *Did the Amended Complaint State a Cause of Action?*

[2] The gravamen of plaintiff's complaint seems to be the failure of defendant McMinn as administratrix of Thomas Simmonds' estate to give plaintiff notice of the application to set aside his estate to Anna, after plaintiff had filed request for notice. The complaint charges that she fraudulently procured the decree, that in order to do so she fraudulently and with intent to deceive represented to the court that notice had been given in all respects as required by section 1200, Probate Code (the section requiring notice to those who have requested it). The complaint then alleges certain misrepresentations concerning the value and character of the estate and other matters made by defendant McMinn to the court upon the hearing of the petition. Plaintiff was not made aware of the proceeding and therefore did not appear in court to present the true facts. Defendants contend that this is a collateral attack upon the decree because, say they, the fraud alleged is intrinsic fraud. However, the intentional failure to give notice in a probate proceeding is extrinsic and not intrinsic fraud and was so held in Purinton v. Dyson, 8 Cal.2d 322, 65 P.2d 777, 113 A.L.R. 1230. There the executor alleged in a petition for probate of a will that the only heir at law of the testatrix was a named son, well knowing that the plaintiff was a pretermitted granddaughter of the testatrix. The will left $100 to this son and $50 to another person and the residue of the estate to the executor. Without giving any notice to the plaintiff, the executor obtained a decree of distribution distributing the estate, after payment of the specific bequests, to himself. The granddaughter then learned of the situation and brought a suit in equity to recover her share of the estate. There, as do defendants here, the defendant contended that the fraud alleged was intrinsic fraud which made the attack on the decree of distribution a collateral one. The court said, 8 Cal.2d at pages 325, 326, 65 P.2d at page 779: "It is well settled that equity may afford relief from orders and decrees in probate proceedings for extrinsic fraud. [Citation.] But appellant insists that any fraud practiced by Schaffer was intrinsic. The theory of this contention is, principally, that fraud to be extrinsic must be practiced directly upon the plaintiff in such an action. * * * However, it is difficult to see how fraud could be practiced more directly upon one entitled to present his rights to a court than by keeping him in ignorance of the proceedings. It is true that in most cases of extrinsic fraud the defendant has said something directly to the person whose rights were involved amounting to representations that it was not necessary for such person to take any part in the proceedings. In other cases, acts have been held to amount to such representations. But the rule allowing the maintenance of an action in equity for extrinsic fraud should not be limited so strictly as to require as a basis evidence of representations made directly to the one defrauded."

[3] That case differs from ours in that there the fraud was practiced by the executor for his own benefit. Here it is alleged that the fraud was practiced by defendant McMinn for the benefit of defendant Anna. This fact, however, would not change the situation. In equity defendant Anna (even if she did not know of the fraud—plaintiff does not allege she did) would not be permitted to profit by defendant McMinn's fraud. The complaint prayed for the setting aside of the decree of distribution which relief could not now be granted as the estate has been closed and the administratrix discharged. The fact that plaintiff asked for relief to which she was not entitled would not deny her relief to which she was entitled. The failure to ask for a particular remedy to which the facts show that the plaintiff is entitled does not constitute a failure to plead a cause of action. MacIsaac v. Pozzo, 26 Cal.2d 809, 815, 161 P.2d 449. Plaintiff's proper request should have been to have it declared that Anna held in trust for plaintiff whatever interest the court should find plaintiff had in the property. As said in Purinton v. Dyson, supra, 8 Cal.2d 322, 327, 65 P.2d 777, 780: "The judgment in an equita-

ble action of this nature does not set aside the judgment or order attacked, but holds the one who fraudulently secured the property under it as a trustee for the person defrauded." In effect, plaintiff did ask for that relief. She first asked that she be adjudged the owner of the property, then that defendants be required to prove their interests, if any, and that if the court should find they had any interest, the property should be partitioned according to their and her interests.

[4, 5] While badly stated and demurrable specially, had a demurrer been interposed, the complaint would have stated a cause of action for extrinsic fraud, except for the fact that it appears that the allegations as to failure to give notice and as to the fraud are on information and belief. Plaintiff should know positively whether notice was or was not given her. (In the amended complaint which the court granted her permission to file on the motion for new trial, such fact and all the allegations of fraud are alleged positively.) See Dowling v. Spring Valley Water Co., 174 Cal. 218, 222, 162 P. 894, holding that a complaint in which the allegations of fraud are on information and belief and the facts upon which that belief is based are not set forth fails to state a cause of action. For that reason the court was justified in finding that the complaint here did not state a cause of action, but at the time of the motion for judgment should have permitted plaintiff to file an amended complaint alleging the fraud positively, asking that the court decree that defendants hold in trust whatever interest the court may find plaintiff has in the property, and that if defendants have any interest therein, such interest and that of plaintiff be partitioned. "As stated in Kelley v. Kriess, 68 Cal. 210, 212, 9 P. 129: 'If plaintiff has a good cause of action, which by accident or mistake he has failed to set out in his complaint, the court, on motion for judgment on the pleadings, should, on his application so to do, permit him to amend.' The same rule applies to the defendants' pleadings; and when the facts stated indicate that the party probably has a good cause of action or defense, but that it has been pleaded imperfectly or defectively, and the defects have not been called to his attention by demurrer or by a notice of motion for judgment on the pleadings, the court should not grant the motion without first giving the party an opportunity to elect whether he will stand on his pleadings or amend them. The granting of the motion without leave to amend would in many cases be an absolute denial of justice, and is directly opposed to the policy of the law that cases should be tried and decided on the merits." MacIsaac v. Pozzo, supra, 26 Cal.2d 809, 815–816, 161 P.2d 449, 452; see also Beverage v. Canton Placer Mining Co., 43 Cal.2d 769, 772, 278 P.2d 694. The failure to do so was an abuse of discretion and as hereafter set forth justified the granting of a new trial and of permission to file an amended complaint.

2. Error.[6] (b) *Notice of Motion.*

[6] Plaintiff's motion was based upon two grounds: (1) that the judgment is against law; (2) that the court erred in refusing to grant plaintiff leave to amend her complaint. Defendants contend that the second ground is not mentioned in section 657, Code of Civil Procedure, which sets forth the grounds for a new trial, and that plaintiff is limited to the other ground specified in her motion, that the judgment is against law, which is a ground provided in subdivision 6. Defendants then contend that "against law" would not cover error in refusing to grant permission to amend. See Brumagim v. Bradshaw, 39 Cal. 24, 35, to the effect that subdivision 6 of section 657 is exclusive of any of the other subdivisions. Bice v. Stevens, supra, 129 Cal.App. 2d 342, 277 P.2d 106, holds in effect that an

6. "In determining the propriety of the action of the trial court in granting defendants' motion for a judgment on the pleadings, its ruling should be reviewed in the same manner as would be a judgment of dismissal following the sustaining of a general demurrer to the complaint." Beverage v. Canton Placer Mining Co., supra, 43 Cal.2d 769, 772, 278 P.2d 694, 697.

improper granting of a judgment on the pleadings does not come within subdivision 6 but does come within subdivision 7 as "Error in law, occurring at the trial * * *." As we have heretofore shown, that portion of the court's order which granted judgment on the pleadings (in effect, sustaining a demurrer to the complaint) was proper because of the allegations of the complaint being merely on information and belief. But the court included in the order a denial of the right to amend. This was improper. Thus the order as a whole, being partially valid and partially invalid, would be reviewable under subdivision 7 of section 657 as an "Error in law, occurring at the trial * *." It could also be reviewed under that portion of subdivision 1 which reads "* * * any order of the court or abuse of discretion by which either party was prevented from having a fair trial; * * *."

In Cook v. Suburban Realty Co., supra, 20 Cal.App. 538, 542, 129 P. 801, 803, it was held: "The action of a trial court refusing a party leave to amend his pleading after issue joined can only be reviewed on a motion for a new trial, and in such case, in order that a review of such action may be had, the notice '* * * must set forth" the portion of subdivision 1 of section 657 above quoted. While the Cook case states, in effect, that abuse of discretion in denying a motion to amend can only be brought under subdivision 1, that statement must be considered in connection with the type of order being there considered. The defendant had moved for permission to amend its answer. The order merely denied the motion. In our case the order did two things, one right, one wrong. In such a situation the motion for new trial to consider the order may be made either under subdivision 1 or 7.

[7–9] This brings us to the question whether the notice of motion for new trial has to specifically mention the subdivision or subdivisions under which it is brought or set forth the language of the subdivisions. We do not think so. It is sufficient if the statement of the fact of refusal (here, "That the court erred in refusing to grant plaintiff leave to amend her complaint") is a sufficient specification of error to acquaint both court and counsel with the particular error claimed. It appears that a test of the sufficiency of the notice of motion is whether the adverse party "is fully apprised of the grounds to be urged * * *." Bauer v. Helene Curtis Industries, Inc., 117 Cal. App.2d 66, 68, 254 P.2d 931, 932. Another test appears in Williams v. Hawley, 144 Cal. 97, 99, 77 P. 762, 763, see American Type Founders' Co. v. Packer, 130 Cal. 459, 461, 62 P. 744: "To enable this court to review the action of the court below, the record must show precisely what action was invoked in that court, and the precise ruling that was made therein, and consequently it is necessary to state in the motion the particular reasons upon which it will be based." The specification in our case meets both of these tests. In McNeely v. Hill, 52 Cal. App. 184, 186, 198 P. 427, 429, it was held that an order granting new trial specifying as the ground therefor "plaintiff's contributory negligence," was, in effect, an order granting the motion upon the ground of the insufficiency of the evidence.

[10, 11] In connection with the ground mentioned in subdivision 1 of section 657, one other matter must be considered. Section 658 provides that when an application is made under said subdivision 1, it must be made on affidavits. Ordinarily a motion for new trial under that subdivision cannot be granted if the motion is not supported by affidavits. Bakurjian v. Pugh, 4 Cal.App.2d 450, 452, 41 P.2d 175. An exception exists where the facts upon which the party moving for new trial relies appear on the face of the record. In Webber v. Webber, 33 Cal.2d 153, 199 P.2d 934, the plaintiff moved for a new trial under subdivision 1 of section 657, specifying irregularities and abuse of discretion by the court by which she was prevented from having a fair trial. The defendant contended that because she had filed no affidavits the action of the trial court in granting her a new trial on said grounds

was erroneous. The reviewing court said, 33 Cal.2d at page 164, 199 P.2d at page 941: "* * * where, as here, the party moving for a new trial under subdivision one of section 657 relies wholly upon facts appearing upon the face of the record, the reason for the rule requiring affidavits ceases and such rule should be held inapplicable (Civ. Code, sec. 3510). To hold otherwise would do violence to the principle that the law does not require idle acts. (Civ.Code, sec. 3532.) While there is language in two decisions indicating a contrary view (In re Estate of Magerl, 201 Cal. 162, 168, 256 P. 204; Jennings v. Day, 7 Cal.App.2d 555, 558, 46 P.2d 193), such language is based upon a slavish adherence to the letter of the statute without consideration of the obvious reason and purpose thereof, resulting in an undue limitation upon the power of the trial court in passing upon a motion for new trial, and of the reviewing court on appeal. We therefore believe that such language should be disapproved." In our case the facts appear upon the face of the record, and to repeat in an affidavit the record showing the court's refusal to permit an amendment would be an idle and unnecessary act. To require it would be carrying technicalities to an extreme.

While it is true that the right to move for a new trial is statutory and requires that the procedure provided by section 657 et seq. be followed, as stated in Smith v. Ibos, 22 Cal.App.2d 551, 552, 71 P.2d 847, and that there must be a strict compliance therewith, we find nothing in that case or others upon the subject which conflicts with the views herein expressed to the effect that such compliance exists when the tests above mentioned have been met.

Holding, as we do, that the order granting the new trial was proper, plaintiff's appeal from the judgment becomes moot and should be and hereby is dismissed. The order granting new trial is affirmed.

PETERS, P. J., and FRED B. WOOD, J., concur.

In the Matter of the ESTATE of Edgar Laurence DOW, a/k/a E. L. Dow, Deceased.

Maxine Patricia HUTCHINSON, Appellant,

v.

Maxine B. DOW, Respondent.*

No. 16994.

District Court of Appeal, First District, Division 1, California.

Dec. 21, 1956.

As Modified on Denial of Rehearing Jan. 18, 1957.

Hearing Granted Feb. 13, 1957.

Estate proceeding wherein widow sought allowance during daughter's appeal from decree of final distribution. The Superior Court, City and County of San Francisco, Thomas M. Foley, J., granted allowance, and daughter appealed. The District Court of Appeal, Fred B. Wood, J., held that decree of final distribution which awarded residue of estate to widow and daughter of decedent, put all property of estate beyond reach of any subsequent order and made it incompetent for court to order widow's allowance to be paid from estate.

Order reversed.

1. Courts ⇐99(1)
Executors and Administrators ⇐194(6)

Prior decision terminating widow's allowance from estate upon finding that there were no matters pending which called for further administration did not, by way of res judicata or as law of case, preclude probate court from granting widow's allowance during daughter's appeal of decree of final distribution.

2. Executors and Administrators ⇐315(6)

Decree of final distribution which awarded residue of estate to widow and daughter of decedent, put all property of estate beyond reach of any subsequent order and made it incompetent for court to order widow's allowance paid from estate during daughter's appeal from decree of

* Opinion vacated 312 P.2d 1.

final distribution, in absence of reservation of jurisdiction to grant widow's allowance. West's Ann.Prob.Code, §§ 300, 680.

3. Executors and Administrators ⇐315(6)

Where Probate Code provision that decree of distribution "when it becomes final, is conclusive as to rights of heirs, devisees and legatees," was substituted for provision in Code of Civil Procedure that such a decree "is conclusive as to the rights of heirs, legatees, or devisees, subject only to be reversed, set aside, or modified on appeal," the amendment did not make a substantive change for a decree was never recognized as conclusive until it became final. Probate Code, § 1021 and for § 1666 see note under § 1021.

William A. White, Hutchinson & Quattrin, San Francisco, for appellant.

J. Oscar Goldstein, P. M. Barceloux, Burton J. Goldstein, Goldstein, Barceloux & Goldstein, San Francisco, Erskine, Erskine & Tulley, Morse Erskine, II, San Francisco, for respondent.

FRED B. WOOD, Justice.

In this estate a decree of final distribution was entered February 2, 1955, fixing and directing payment of certain debts, expenses of administration and a legacy, and awarding the residue in equal shares to Maxine Dow and Patricia Hutchinson, the widow and the daughter of the decedent. On the same day, Patricia appealed from the whole of the decree. On March 8, 1955, she modified the scope of her appeal by limiting it to the awards to Maxine (the legacy, a debt, reimbursement for certain expenses, and compensation as administratrix) and to awards to certain attorneys for services rendered the estate.

On February 18, 1955, the widow filed a petition for an allowance from the estate. After a hearing the petition was granted. The order (which is the subject of the instant appeal) was filed April 13, 1955. It directs that $500 a month "be appropriated from said Estate" for the maintenance of Maxine, commencing as of February 2, 1955, and continuing "during the progress of the settlement of the Estate, and the Appeal now pending from the Judgment and Decree of Final Distribution, or until the further Order of this Court."

[1] The evidence supports these findings, upon which the order is based: (1) the total assets of the estate are approximately $391,937, (2) the widow has no assets of her own to support and maintain herself pending the hearing of Patricia's appeal from the decree of distribution and is completely without funds for necessary medical care and hospitalization, (3) the widow is entitled to a reasonable allowance out of the property of the estate for her maintenance and support according to her circumstances, and (4) $500 a month is a reasonable amount to be paid therefrom for that purpose.

In view of these findings, the probate court was not precluded from making such an award by the rendition in September, 1953, of a decision, In re Estate of Dow, 120 Cal.App.2d 296, 260 P.2d 970, directing termination of a former similar award. That termination was predicated upon findings that at that time there were no matters pending which called for further administration except the payment of a claim of the administratrix (in her individual capacity) and the settlement and payment of certain expenses of administration, and that it was to the best interests of all parties interested to close the estate immediately; hence, no further time could properly be consumed in the settlement of the estate.

[2] That was a markedly different condition from that which obtained in April, 1955, when the order now under appeal was made, in view of Patricia's appeal from the final decree of settlement and distribution, following as it did a trial of some duration and presenting a number of complex problems of its own, respecting which we refer to our decision of April 2, 1956, in Dow v. Superior Court, 140 Cal.App.2d 399, 297 P.2d 30, for further details. Such a change

in conditions prevented the decision of September, 1953, from precluding (by way of res judicata or as the law of the case) consideration anew of the propriety of awarding an allowance to the widow. See In re Estate of Dow, 91 Cal.App.2d 420, 427–429, 205 P.2d 698.

But the disposition which the decree of distribution made of the property in the estate put that property, all of it, beyond the reach of any subsequent order purporting to subject it to any other purpose or use; made it incompetent for the court to "appropriate" any of it for the payment of a widow's allowance.

That decree settled the administratrix' third and her fourth and final accounts and reports; found that all debts, funeral expenses and expenses of the last illness, including claims presented and allowed, have been paid, except those which it listed and ordered now to be paid; ascertained and ordered paid certain expenses of administration, to certain persons designated as entitled thereto; authorized the administratrix "to withhold the sum of $100 as and for a reserve for the closing expenses of said Estate, and for the payment of any taxes which may be properly assessed against said Estate, and to distribute the unexpended balance thereof when the statutory period of liability for such taxes has expired in the propertion of one-half thereof to Maxine B. Dow, and one-half thereof to Maxine Patricia Hutchinson"; and then decreed that "all of the balance of the * * * property of said Estate, after payment of all obligations, costs, and attorneys' fees, *as herein provided* [italics supplied], be, and the same is hereby divided and distributed equally between" Maxine and Patricia; also, that the administratrix file a supplemental account showing all receipts and disbursements since the date of filing her fourth and final account, to be approved in the manner provided by law; and distributed all unknown property to Maxine and Patricia in equal shares.

Manifestly, this decree did not envisage a family allowance and did not leave any property of any kind unappropriated or undistributed. Hence, when later the order for the widow's allowance was made, there was in the estate no property that could be "appropriated" for payment of the allowance.

This principle was established in this state as early as 1868, when our Supreme Court held that an order "distributing the entire estate of the executrix as sole devisee under the will, was the final order of the Court in the matter of the estate, and its effect, unless subsequently modified or reversed on appeal, was a final disposition of all the funds of the estate, and an investiture of the absolute right and title thereto in the executrix as sole devisee; nothing of the estate remained for the Court to act upon. An appeal from that order, duly perfected, suspended and stayed its vital force and effect; and, pending such appeal, no action could be taken by the Court below for the enforcement of the order, or upon any subject matter embraced therein. The subject matter of that order, from which an appeal was pending at the time this subsequent order [for payment of attorney fees for preserving the estate] now under consideration was made, was the money belonging to the estate then subject to distribution by order of the Court. This subsequent order, if effectual for any purpose, operates upon the same subject matter as the former order, and disposes of a portion thereof in direct conflict with the former order, and is, therefore, null and void for want of jurisdiction of the Court at the time it was made." In re Estate of Garraud, 36 Cal. 277, 279–280.

That principle has been consistently adhered to and applied, illustrated by the following cases: In re Estate of Freud, 134 Cal. 333, 66 P. 476, reversing an order for partial distribution because the very property involved had previously been ordered sold to pay debts and expenses of administration (the fact that the order of sale was suspended by the taking of an appeal therefrom "would not justify the probate court in so disposing of the property as to defeat the execution of the decree [of sale]

in cases of its affirmance," 134 Cal. at page 337, 66 P. at page 478; In re Estate of Baird, 181 Cal. 742, 186 P. 351, reversing an order of sale of certain property which was made after the entry of and prior to the taking of an appeal from a decree distributing that very property to the sole heir; and In re Estate of Reiss, 68 Cal. App.2d 128, 155 P.2d 862, dismissing an appeal from an order denying a petition for compensation for services rendered in preserving the assets of the estate, the property of the estate having been distributed pursuant to a decree of distribution (the decree, apparently, had become final but its finality, it would seem, was not an indispensable factor for the court relied upon In re Estate of Baird, supra, also 11 Cal. Jur. 257–258, 11A Cal.Jur. 125–126, and 11B Cal.Jur. 785–786). The Supreme Court of Oklahoma, citing the Girraud and the Baird cases among others, has applied this same principle to an order for a widow's allowance made after entry of a decree distributing all of the property of the estate. In re Hicks' Estate, 189 Okl. 310, 116 P.2d 905.

[3] Respondent directs attention to the fact that, until the enactment of the Probate Code in 1931, section 1666 of the Code of Civil Procedure provided, in respect to the decree of distribution that, "Such order or decree is conclusive as to the rights of heirs, legatees, or devisees, subject only to be reversed, set aside, or modified on appeal,' and that when this provision was transferred to the Probate Code, as a part of section 1021 of the latter, it was changed to read "Such order or decree, when it becomes final, is conclusive as to the rights of heirs, devisees and legatees."

Petitioner contends that this amendment (particularly the interpolation of the words "when it becomes final") changed the very basis of the rulings in the Garraud, Freud, Baird and Reiss cases, with the result that those cases no longer correctly state the law. The 1931 amendment had no such effect. It made no substantive change. The statement that the decree is conclusive "when it becomes final" is really but a different manner of expressing the former statement that the decree is "conclusive * * *, subject only to be reversed, set aside, or modified on appeal." The decree never was regarded as conclusive until it became final. See In re Estate of Schmierer, 168 Cal. 747, 749, 145 P. 99; Drexler v. Washington Development Co., 172 Cal. 758, 760, 159 P. 166.

That this substitution of "when it becomes final" for the words previously used was made by the Code Commission and the Legislature for the purpose of simplification and uniformity additionally appears from similar changes which were made when the text of former section 1686 of the Code of Civil Procedure was carried into section 1054 of the Probate Code and the provisions of the last sentence of former section 1701 became a part of section 1123 of the Probate Code.

Moreover, the doctrine of the Garraud case was not predicated upon the finality of the decree of distribution. The decree there involved was not final; it was in a state of suspension due to an appeal which was still pending.

It seems clear, therefore, that the order appealed from must be reversed.

This, of course, is not a holding that when rendering a decree of final distribution the probate court is without power to grant or to continue or to reserve jurisdiction to grant a family allowance, nor that the entering of a decree of distribution necessarily terminates a previously issued and unrevoked order for a family allowance.

The property of a decedent is "chargeable with * * * the payment of * * * the allowance to the family." Probate Code, § 300 and the allowance is payable "during the progress of the settlement of the estate," limited to one year in the case of an insolvent estate, Prob.Code, § 680.

Precisely when "the progress of the settlement of the estate" is at an end seems not to have been definitely decided in this state, although there is some indication that

it does not necessarily end until the members of the family entitled to the allowance have received their distributive shares of the estate. Thus, it has been said that this statute was enacted "to make a provision for the family of the deceased prior to the time when the estate could be finally distributed to them." In re Estate of McSwain, 176 Cal. 280, 284, 168 P. 117, 119. See also Estate of Walkerley, 77 Cal. 642, 644–645, 20 P. 150; In re Estate of Jacobs, 61 Cal.App.2d 152, 155–156, 142 P.2d 454; In re Estate of Blair, 42 Cal.2d 728, 730–731, 269 P.2d 612.

The Supreme Court of Oklahoma, construing a similar statute, has held that the entry of a decree of distribution does not, as a matter of law, terminate an order for a widow's allowance which by its terms was made to run "'until said estate is closed,'" the court saying in part "[w]e think the clear intent of the Legislature, as expressed in the statute, supra, was to make provision for the widow out of her decedent's estate until such time as she has in due process of law received the possession and use of her share of the estate so that she might apply the same to her needs. We construe the statutory expression, 'during the progress of the settlement of the estate,' to mean until such time as the above eventuality shall have occurred and hold that the term, 'until said estate is closed,' as appears in the order here involved, has the same meaning." Crane v. Howard, 1952, 206 Okl. 447, 244 P.2d 559, 562.

Similarly, under such a statute, it might be competent in a decree of distribution to grant or reserve jurisdiction to grant a widow's allowance and then order distribution of the property of the estate subject to a charge for the payment of such an allowance until the widow has received the possession and use of her share of the estate unless the allowance is sooner terminated by subsequent order of the court.

We mention these possibilities to make it clear that this decision does not preclude them. We refrain from undertaking to decide them because the facts of this case do not necessarily present them.

The order for a widow's allowance is reversed.

PETERS, P. J., and BRAY, J., concur.



147 Cal.App.2d 278

R. BLUE, Petitioner,

v.

The SUPERIOR COURT of the State of California, in and for the COUNTY OF LOS ANGELES, Respondent.

Mavis C. Pepe and Raymond V. Pepe, Real Parties in Interest.

Civ. 21995.

District Court of Appeal, Second District, Division 1, California.

Dec. 28, 1956.

Proceeding for writ of mandate to compel the Superior Court for the County of Los Angeles to vacate a purported judgment and to grant petitioner's motion to appoint appraisers to appraise the value of property upon which petitioner had caused an execution to be levied and upon which the judgment debtor's wife had filed a declaration of homestead. The District Court of Appeal, Nourse, J. pro tem., held, inter alia, that in proceeding by the judgment creditor the court was not authorized to try any question of title or to make any order terminating the lien which judgment creditor had acquired on the property, by quashing the execution levied thereon, and in purporting so to do the court acted in excess of its jurisdiction.

Writ of mandate issued in accordance with opinion.

1. Homestead ⇐199

In judgment creditor's proceeding for execution against homestead of judgment debtor, an answer or other responsive pleading is neither required nor the filing thereof proper. West's Ann.Civ.Code, §§ 1237 et seq., 1246–1248.

2. Execution ⇐161, 163

No one except judgment debtor may move to quash a writ of execution or levy thereof unless the judgment upon which it is issued is, or the writ is, void on its face.

3. Execution ⇐161

A levy cannot be quashed on grounds that the judgment debtor has no interest in property levied upon.

4. Action ⇐36
Homestead ⇐199

In proceeding by judgment creditor for execution against homestead of judgment debtor, the court may not define the interest of judgment debtor in property levied on, or turn proceeding into plenary suit in equity in nature of a creditor's bill.

5. Fraudulent Conveyances ⇐230, 237(1)

A judgment creditor had right either to bring an action in nature of a creditor's bill to set aside conveyance from judgment debtor to his wife as being a fraudulent conveyance, or under statute to disregard the conveyance and attach or levy execution upon the property conveyed. West's Ann.Civ. Code, §§ 1237 et seq., 1246–1248, 3439.09(2).

6. Homestead ⇐201

In execution sale held after appointment of receivers and determination that property has a value in excess of homestead exemption, purchaser at execution sale will acquire only such interest as judgment debtor had in the property, and he may if he chooses take no further steps to perfect his title and await action by anyone claiming adversely, or may himself sue to quiet title against such adverse claims. West's Ann.Civ.Code, §§ 1237 et seq., 1246–1248.

7. Homestead ⇐199

Where judgment creditor caused an execution to be levied upon judgment debtor's realty upon which judgment debtor's wife had executed and caused to be recorded a declaration of homestead, which realty, after such declaration, had been conveyed by judgment debtor to the wife, court was not authorized to try any question of title, or to make any order terminating lien which judgment creditor had acquired on realty, by quashing execution levied thereon, and in purporting so to do, court acted in excess of its jurisdiction. West's Ann.Civ.Code, §§ 1237 et seq., 1246–1248, 3439.09(2).

8. Homestead ⇐199, 200

In proceeding by judgment creditor for levy of execution upon homestead of judgment debtor, the court, having found to be true all of allegations of petition and having found that property had a value in excess of homestead exemption, abused its discretion in refusing to either appoint appraisers in accordance with prayer of petition, or in the alternative to order a sale of property under execution with directions that proceeds of sale be applied in manner required by statute. West's Ann.Civ.Code, § 1256.

9. Courts ⇐37(3)

Except where court does not have jurisdiction of subject-matter of an action, one who invokes court's power and tenders an issue to be tried which ordinarily might not be tried in a proceeding of the character in which power of court is invoked, may be held estopped to challenge court's power to act.

10. Courts ⇐37(3)

A judgment creditor who had applied for execution against judgment debtor's homestead was not estopped to assert that court acted in excess of its powers in trying questions of title and making order terminating lien which judgment creditor had acquired, on theory that by his petition, judgment creditor tendered to court issue of fraudulent conveyance to judgment debtor's wife, where judgment creditor did not ask court to determine whether judgment

debtor had any interest in property, and in his points and authorities judgment creditor asserted his rights to pursue his remedies under Section 3439 through 3439.09 of the Civil Code. West's Ann.Civ. Code, §§ 1237 et seq., 1246–1248, 3439–3439.-09.

11. Mandamus ⇐4(4)

A judgment creditor whose execution against homestead had been improperly quashed was entitled to mandamus to compel court to vacate such judgment notwithstanding the judgment was an appealable one where remedy by appeal was inadequate inasmuch as lien of execution would expire within eight months after entry of judgment and it was improbable that record on appeal could be perfected and appeal disposed of within that time. West's Ann.Civ.Code, §§ 1237 et seq., 1246–1248, 3439–3439.09.

12. Mandamus ⇐53

A judgment creditor was not precluded from maintaining mandamus proceeding to compel court to vacate a judgment which quashed execution on ground that writ of mandate would not lie to control discretion of court, where court did not have the power to adjudicate any question of title or to quash the execution so that no question of its discretion in so doing was involved, and a writ commanding court to annul and vacate its judgment would not in anywise operate to control the court in exercise of its discretion. West's Ann.Civ. Code, §§ 1237 et seq., 1246–1248, 3439–3439.-09.

13. Mandamus ⇐53

Where court did not have power to adjudicate any question of title or to quash execution against homestead, and having found to be true all of essential facts which it was incumbent upon judgment creditor to allege and prove, court had no discretion other than to appoint appraisers or order a sale, judgment creditor was entitled to writ of mandamus to compel court to vacate the judgment quashing execution although writ of mandate has some of the aspects of a writ of certiorari. West's Ann. Civ.Code, §§ 1237 et seq., 1246–1248, 3439–3439.09.

Simon Taub and William M. Sternfeld, Beverly Hills, for petitioner.

Harold W. Kennedy, County Counsel; Wm. E. Lamoreaux, Asst. County Counsel; Thomas H. Carver, Deputy County Counsel, Los Angeles, for respondent.

K. E. Nungesser, Los Angeles, for real party in interest Mavis C. Pepe.

NOURSE, Justice pro tem.

Petitioner seeks a writ of mandate to compel the respondent court to vacate and set aside a "purported judgment" rendered and entered by that court, and to grant petitioner's motion to appoint appraisers pursuant to section 1245 et seq. of the Civil Code to appraise the value of certain property upon which petitioner had caused an execution to be levied and upon which Mavis Pepe (hereinafter called Mavis), real party in interest here, had filed a declaration of homestead.

The facts, insofar as they are relevant to the questions presented here, are:

On February 24, 1955, petitioner commenced an action against Raymond V. Pepe (hereinafter called Pepe), the husband of Mavis, to recover upon certain promissory notes alleged to have been executed by him. Mavis was not a party to the action. This proceeding will hereafter be called "the action."

On January 13, 1956, petitioner recovered judgment against Pepe. On March 15 of that year he caused an execution to be levied upon the subject real property, and on April 5 he filed his petition for the appointment of persons to appraise the value of said property. In this petition he alleged all of the facts required by section 1246 of the Civil Code, including the fact that on the 21st of February, 1955, Mavis had executed and caused to be recorded a declaration of homestead upon the subject real property. He further alleged that on the 28th of February, 1955, Pepe was the legal and record owner of the property;

that on the 28th of February Pepe executed and caused to be recorded a conveyance purporting to terminate his interest in said property and convey the same to Mavis as her sole and separate property; that said conveyance was fraudulent as a transfer in fraud of creditors in that it rendered Pepe insolvent and was made without a fair consideration; that Pepe intended and knew that he incurred debts beyond his ability to pay the same as they matured, and that the conveyance was made with actual intent to hinder, delay, and defraud his creditors; and further alleged that pursuant to section 3439.09, subdivision (2), of the Civil Code he elected to disregard said conveyance and levy upon the subject property.

Petitioner did not cause this petition to be served upon Mavis, and upon the petition coming on to be heard the trial court continued the matter and ordered that the petition be served upon Mavis that she should have the right to answer or otherwise plead to the petition within the time limited in the order.

Thereafter Mavis filed her answer in which all the allegations of the petition made in conformity with section 1246, except the allegation as to the filing by her of the declaration of homestead, were denied. She admitted the conveyance of the subject property to her by Pepe, but denied that said transfer was fraudulent or made without fair consideration or with the intent to defraud creditors. As an affirmative defense she alleged that she was not a party to the action or a judgment debtor of petitioner; that prior to February 25, 1955, she and Pepe held title to the property in question as joint tenants with the right of survivorship, but that on said date Pepe conveyed all of his interest in said property to her, and since that time she had held it as her separate property and as her homestead, and that the homestead has never been abandoned.

Upon the answer being filed the court set the matter down for trial, and after receiving evidence made and filed written findings of fact and conclusions of law. The court found that petitioner had obtained a judgment against Pepe, and that pursuant thereto and within 60 days prior to the filing of the petition for the appointment of appraisers petitioner had caused a writ of execution to be levied upon the subject real property and that said judgment was not one of the classes of judgments enumerated in section 1241 of the Civil Code; that Mavis had filed a declaration of homestead upon the subject property; that said homestead had not been abandoned; that the allegations of the petition as to the value of said real property were true; and that no previous execution arising out of the same judgment had been levied upon said homestead. The court further found that Pepe had conveyed said real property to Mavis as set forth in the petition, and found that said conveyance was for a full, complete, and adequate consideration and was not fraudulent. The court further found that the judgment obtained by petitioner against Pepe and upon which the execution levied had issued was a default judgment and was of no effect but had been rendered upon a purported note not signed nor delivered by Pepe, and further found that Pepe had no right, title, or interest in or to the subject property.

From the foregoing facts the court concluded as a matter of law that Mavis was the owner of the real property and that petitioner had no legal or equitable right, title, or interest therein; that the execution levied upon the subject property should be quashed; and that petitioner was not entitled to any of the remedies provided for by division 2, part 4, title 5, chapter 1, of the Civil Code. Judgment was made and entered in accordance with the court's conclusions of law.[1]

1. In the minutes of the trial and in the findings of fact and conclusions of law and in the judgment, Mavis is denominated "intervenor," although no complaint in intervention was or could have been filed, and although she did not pray for any affirmative relief by her answer to the petition.

It is petitioner's contention that the court, in purporting to determine the question as to whether title had vested in Mavis and whether Pepe had any right, title, or interest to the property which was subject to sale at execution, acted in excess of its jurisdiction; that the judgment rendered was therefore void; and further that his petition for the appointment of appraisers having alleged all of the facts required by section 1246 of the Civil Code, and the court having found all of those facts to be true, there was no room for exercise of any discretion by the court but it was obligated to grant the prayer of said petitioners and appoint the appraisers. It is his further contention that the court was without power to quash the execution upon the application of Mavis, she not being a party to the action in which the execution had issued.

[1–4] Division 2, part 4, title 5, chapter 1, of the Civil Code makes no provision for the trying of the question as to whether the judgment debtor is the owner of or has any interest in the real property which his judgment creditor seeks to have appraised and sold under execution pursuant to the provisions of that section, nor does it make any provision for the filing by the homestead claimant of an answer or other pleading responsive to a petition filed pursuant to sections 1246–48 of the Civil Code. It has long been established that an answer or other responsive pleading is neither required nor the filing thereof proper. Stone v. McCann, 79 Cal. 460, 21 P. 863; Martin v. Hildebrand, 190 Cal. 369, 212 P. 618. It is further established that no one except the judgment debtor may move to quash a writ of execution or the levy thereof unless the judgment upon which it is issued, is or the writ is void on its face. Associated Oil Co. v. Mullin, 110 Cal.App. 385, 392, 294 P. 421; Vest v. Superior Court, 140 Cal.App.2d 91, 93, 294 P.2d 988. A levy cannot be quashed on the grounds that the judgment debtor has no interest in the property levied upon Vest v. Superior Court, supra, 140 Cal.App.2d at page 93, 294 P.2d 988; and cases there cited, and the court may not, in a proceeding had pursuant to the provisions of the Civil Code above referred to, define the interest of the judgment debtor in the property levied upon, or turn the proceeding into a plenary suit in equity in the nature of a creditor's bill. Strangman v. Duke, 140 Cal.App.2d 185, 192, 295 P.2d 12.

[5] In the present case petitioner, as the judgment creditor of Pepe, had the right to bring an action in the nature of a creditor's bill to set aside the conveyance from Pepe to Mavis as being a fraudulent conveyance, or he had the right, under section 3439.09, subdivision (2), of the Civil Code, to "Disregard the conveyance and attach or levy execution upon the property conveyed." The property conveyed being subject to a valid homestead it was necessary, in the prosecution of the right thus given him to file his petition under section 1246, to have the property appraised and its value determined. It is evident therefore that if his right to have the property appraised and then sold under execution may be defeated by the court, upon the proceedings for the appointment of appraisers, holding that there was no fraudulent conveyance, the provisions of section 3439.09 which we have quoted are rendered meaningless.

[6] In an execution sale held after the appointment of receivers and the determination that the property has a value in excess of the homestead exemption, the purchaser at the execution sale will acquire only such interest as the judgment debtor had in the property; and he may if he chooses take no further steps to perfect his title and await action by anyone claiming adversely, or may himself sue to quiet title against such adverse claims. Strangman v. Duke, supra, 140 Cal.App.2d at pages 191, 192, 295 P.2d 12.

[7, 8] It is clear, therefore, that respondent court was not authorized, in the proceeding before it, to try any question of title or to make any order terminating the lien which petitioner had acquired on the subject property by quashing the execution levied thereon, and that therefore in purporting so to do it acted in excess of its

jurisdiction. Abelleira v. District Court of Appeal, 17 Cal.2d 280, 291, 109 P.2d 942, 132 A.L.R. 715. It is further evident that, having found to be true all of the allegations of the petition which were essential under section 1246 of the Civil Code, and having found that the property had a value in excess of the homestead exemption of $12,500, the court abused its discretion in refusing to either appoint appraisers in accordance with the prayer of the petition, or in the alternative to order a sale of the property under the execution with directions that the proceeds of the sale be applied in the manner required by section 1256 of the Civil Code. See Stockton Savings & Loan Bank v. Mello, 201 Cal. 194, 256 P. 202; Strangman v. Duke, supra, 140 Cal. App.2d at pages 192, 193, 295 P.2d 12.

[9] Mavis asserts, however, that by his petition Blue tendered to the respondent court the issue as to the conveyance to her of the property being fraudulent, and that he is therefore estopped to now assert that the court acted in excess of its powers. It is undoubtedly true that, except where the court does not have jurisdiction of the subject-matter of an action, one who invokes the court's power and tenders an issue to be tried which ordinarily might not be tried in a proceeding of the character in which the power of the court is invoked, may be held estopped to challenge the court's power to act. Dobbins v. Economic Gas Co., 182 Cal. 616, 625–626, 189 P. 1073; 15 Cal.Jur. sec. 198, pp. 152–3; 1 Witkin, California Procedure (1954) sec. 149, pp. 412–3.

[10] A careful examination of the record before us[2] convinces us that petitioner is not estopped to now assert that the respondent court acted in excess of its jurisdiction. Petitioner did not, by his motion for the appointment of appraisers or his petition filed in support thereof, ask the court to determine whether Pepe had any interest in the property. He sought only the appointment of appraisers in order that he might sell any interest that Pepe might have in the property, and his allegations as to the fraudulent character of the conveyance by Pepe to Mavis are, on their face, only made as an explanation of his election to pursue the remedy granted him by section 3439.09 of the Civil Code. In his points and authorities filed in support of his motion, before the court had on its own motion ordered that Mavis might plead to the petition, and in his points and authorities filed with the court at the purported trial of the issues tendered by Mavis' answer, petitioner asserted his right to pursue his remedies under sections 3439 through 3439.09 of the Civil Code. It is therefore evident that neither the trial court nor Mavis was misled into believing that petitioner was submitting for trial and decision the question as to whether Pepe had any interest in the subject property. It is true that in his points and authorities petitioner also submitted to the trial court authorities on the question of whether Pepe's conveyance to Mavis was a fraudulent transfer; but inasmuch as the court had, of its own motion, permitted an answer to be filed which purported to frame such an issue of fact, it was petitioner's duty to present to the court his views of the law upon that question.

Respondent maintains that a writ of mandate should not issue here because, so it asserts, the petitioner has an adequate remedy by appealing from the judgment attacked; and because, it says, a writ of mandate will not lie to control the discretion of the respondent court.

[11, 12] We cannot uphold respondent in these contentions. It is true that the judgment rendered by the trial court is an appealable one, but the remedy by appeal is not adequate inasmuch as the lien of appellant's execution would expire within eight months after the entry of that judgment, and it is improbable that the record

2. The entire record in the respondent court, other than the record of the oral proceedings, has been made a part of the record here by stipulation entered into at the oral argument.

on appeal could be perfected and the appeal disposed of within that time. See Vest v. Superior Court, supra, 140 Cal.App. 2d at page 96, 294 P.2d 988. As respondent court did not have the power to adjudicate any question of title or to quash the execution, no question of its discretion in so doing is involved, and a writ commanding it to annul and vacate its judgment will not in any wise operate to control the court in the exercise of its discretion, nor will a writ compelling the court to either appoint the appraisers in accordance with petitioner's petition or to order a sale upon the execution levied and an application of the proceeds of the sale in the manner provided by law in any wise control the court in the exercise of its discretion; for it having having found to be true all of the essential facts which it was incumbent upon the petitioner to allege and prove pursuant to the provisions of sections 1246 and 1249 of the Civil Code, the respondent court had no discretion other than to either appoint appraisers or order a sale as heretofore indicated.

[13] It is our opinion that although a writ of mandate compelling the court to vacate its judgment has some of the aspects of a writ of certiorari, it is nevertheless a proper writ under the circumstances of this case. Andrews v. Superior Court, 29 Cal.2d 208, 214–215, 174 P.2d 313; Vest v. Superior Court, supra.

It is therefore ordered that a peremptory writ of mandate issue directing the respondent court to vacate the judgment filed in proceeding No. 640626 in the respondent court on the 11th day of July, 1956, and further directing said court to make an order appointing appraisers as provided by law, to appraise the value of the premises described in the petition filed by petitioner herein for their appointment, to determine whether that property can be divided without material injury, and to take such further proceedings as are required by sections 1253, 1254, 1255, 1256, 1258, and 1259 of the Civil Code, or that in the alternative it order the sale of the subject property under the execution levied thereon on the 15th of March, 1956, and that the proceeds of said sale be applied in the manner required by law.

WHITE, P. J., and FOURT, J., concur.



147 Cal.App.2d 222

The PEOPLE of the State of California, Plaintiff and Respondent,

v.

Kenneth P. SCHMIDT, Defendant and Appellant.

Cr. 5624.

District Court of Appeal, Second District, Division 1, California.

Dec. 27, 1956.

Hearing Denied Jan. 23, 1957.

Defendant was convicted in the Superior Court of Los Angeles County, Kurtz Kauffman, J., of grand theft, and he appealed. The District Court of Appeal, Fourt, J., held that the evidence sustained the conviction.

Affirmed.

1. False Pretenses ⇐12

In prosecution of president of bankrupt, corporate builder, on information charging taking of property of savings and loan association, it was not necessary to show that association had lost money in question. West's Ann.Pen.Code, §§ 484, 490a, 952.

2. False Pretenses ⇐49(5)

It is not essential to conviction for grand theft that there be express testimony by victim that he was induced to part with money by false representations of defendant, it being sufficient if inference of reliance can be drawn from all of evidence. West's Ann.Pen.Code, §§ 484, 490a, 952.

3. False Pretenses ⇐12

That alleged victim had issued its check to corporation, of which defendant was president, and that such corporation had in turn deposited check in bank to its credit, would not require conclusion that defendant had not been guilty of grand theft, where money had, in large part, been under control of defendant, even though in physical possession of bank. West's Ann.Pen.Code, § 484.

4. Embezzlement ⇐11(1)

Any diversion of funds held in trust constitutes embezzlement, whether there is direct personal benefit or not, as long as owner is deprived of his money.

5. Embezzlement ⇐20

President of corporation would be guilty of grand theft in taking corporate funds for his personal use without authorization. West's Ann.Pen.Code, § 484.

6. Corporations ⇐1

Individual's sole ownership of all of capital stock of corporation does not necessarily destroy its separate existence.

7. Corporations ⇐1

In prosecution of president of bankrupt corporation for grand theft, on information charging that he had taken property of corporation, evidence would sustain finding that corporation was not defendant's alter ego, notwithstanding his contention that he owned all of corporation's stock.

8. Criminal Law ⇐678(1), 798½

It was not error to refuse to compel State to make election as to whether it was proceeding on basis of theft by larceny, false pretenses or embezzlement, nor was it error to omit an instruction that verdict must be unanimous as to type of theft committed.

9. Criminal Law ⇐444

In prosecution for grand theft, it was not necessary to admissibility of records of alleged victim that custodian of such records be produced. West's Ann.Code Civ. Proc., § 1953f.

Morris Lavine, Los Angeles, for appellant.

Edmund G. Brown, Atty. Gen., Norman H. Sokolow, Deputy Atty. Gen., S. Ernest Roll, Dist. Atty., of Los Angeles County, Robert Charles Lutz, Deputy Dist. Atty., Los Angeles, for respondent.

FOURT, Justice.

This is an appeal by the defendant from the judgment of conviction and the order denying a motion for a new trial.

In an information, the defendant was charged with fifteen counts of grand theft and with two counts of violating the Corporation Code. The defendant pleaded not guilty and the matter proceeded to trial with a jury, which found him guilty of grand theft as charged in counts V, VI, VII, VIII and XII, and not guilty as to all other counts.

Count V charged that the defendant took the sum of $10,330.88, the property of Mutual Savings and Loan Association, a corporation (hereinafter referred to as "Mutual"), on or about January 22, 1953; count VI charged that the defendant took the sum of $6,000, the property of Kenneth P. Schmidt Builders, Inc., a corporation, and Southwest Savings and Loan Association, a corporation (hereinafter referred to as "Southwest"), on or about February 25, 1953; count VII charged that the defendant took the sum of $5,132.44, the property of Kenneth P. Schmidt Builders, Inc., a corporation, and Mutual, on or about February 24, 1953; count VIII charged that the defendant took the sum of $4,762.25, the property of Mutual, on or about March 6, 1953; count XII charged that the defendant took the sum of $3,150, the property of Kenneth P. Schmidt Builders, Inc., a corporation, on or about March 6, 1953.

A résumé of the facts is as follows: Kenneth P. Schmidt Builders, Inc., hereinafter referred to as "the Corporation", was incorporated in California in 1947. The defendant was president of the Corporation from its inception to July, 1953, at or about which time it went into in-

voluntary bankruptcy. There were various other officers of the Corporation from time to time, among them being Lucille Clark, who was a vice-president and also a secretary to the defendant, Stanley Schmidt as secretary-treasurer, and after January 5, 1953, Kenneth Bohard as secretary-treasurer. From 1947 to April 30, 1953, the defendant was never a licensed contractor in California. However, the Corporation was licensed with Bohard and Stanley Schmidt, a brother of the defendant, as the responsible managing employees during the period July, 1952 to July, 1953. The Corporation had a minute book and stock transfer book, although neither was produced at the trial. There was a conflict in the testimony as to the ownership of the stock, the defendant stating that it was all owned by him personally, and at the same time the books of the Corporation indicated that the defendant owned about 85 per cent of the stock, and further there was testimony that Stanley Schmidt was an owner of stock in the Corporation at the outset of the building projects of the Corporation in 1952. Early in 1952 the Corporation prepared to construct seventy-seven houses in tract 17209 in the city of Monterey Park, California. The defendant conducted negotiations for the Corporation with Mutual and Southwest. On July 1, 1952 the Corporation entered into an agreement with Mutual in which the latter was to loan to the Corporation money for the construction of dwellings on each of twenty lots in tract 17209. On August 15, 1952, the Corporation, entered into agreements with Southwest wherein the remaining fifty-seven houses in tract 17209 were to be financed by Southwest. Each of the agreements as between Southwest and the Corporation contained a trust clause which read in part as follows:

"* * * The undersigned, and each of them agree that all funds received hereunder are received in trust for the purpose of paying in full all contractors and/or material men and/or laborers (other than the undersigned) then or theretofore engaged in said construction; and that the undersigned shall not have any beneficial interest in said funds unless and until said purpose has been fulfilled."

On April 18, 1952, a bank account was opened for the Corporation by corporate resolution of April 14, 1952, at the Monterey Park branch of the Bank of America. Dealings and transactions in regard to matters having to do with tract 17209 were in the name of the Corporation. Contracts were signed by the defendant in his corporate capacity and dealings were in the corporate name with the house buyers in tract 17209, and with material and labor contractors. Accounts in the books of the Corporation showed that there was $59,888.77, which was received as payments from house buyers which was used by the Corporation for general expenses, including personal expenses of the defendant, and which sums were not placed in escrow. The defendant, acting for the Corporation, bought the land (tract 17209) from the Security Development Company for $89,600, but executed a corporate note in that sum for the purchase price. The note was to be repaid at the rate of $1,500 from an escrow on each lot as it was sold.

The check records of the Corporation and other exhibits disclose that there were various expenditures on a personal residence of the defendant in Pasadena, and such checks were posted to the general ledger account of the Corporation. The personal residence of the defendant was never an asset of the Corporation before May 22, 1953, at which time it was deeded to the Corporation. Before that time, namely on April 1, 1953, the defendant had sought to divest himself of any interest he might have had in the house by executing a grant deed of his right, title and interest to his wife, Mary W. Schmidt. There were expenditures of large sums of Corporation funds on the yacht Hilaria, which was owned by the Harrison Finance Company and the defendant as an individual, and not by the Corporation. A race horse, Pusan, was carried on the books of the Corporation, having been purchased

with $4,000 of corporate moneys, and various expenditures were made on the race horse from corporate funds. No money came into the Corporation from activities of the horse with the exception of a cash deposit by the defendant in December of 1952, which apparently was the winnings, or a part of such, from a wager made on the horse when it ran at the Tanforan Race Track.

There is no contention that there were any corporate resolutions authorizing the purchase of a race horse, expenditures thereon, expenditures on a yacht, expenditures for living expenses, nor for a personal residence for the defendant, and expenditures thereon.

The funds received by the Corporation from Mutual and from Southwest were to be used solely for the construction of houses and not for preliminary expenses nor personal expense, and the proceeds of these loans were set up in the corporate books as funds held in trust.

The ledger sheets and deposit slips of the corporate bank account showed a pattern of expenditures, and considered with the books of the Corporation, showed that the books accurately reflect the business of the Corporation as to deposits and withdrawals of corporate funds, with the exception of some defalcations on the part of the defendant where information was kept from the employee of the Corporation charged with making entries in the books.

During the period from January 22, 1953, to March 6, 1953, the defendant made withdrawals from the corporate account for personal expenses in the amount of about $45,000. These consisted of expenditures on the yacht Hilaria, expenditures on the personal residence of the defendant, cash withdrawals, expenses of race horses, and living expenses, as well as the sum of $5,132.44, as charged in count VII, and $3,150, as charged in count XII, which sums were never deposited in the Corporation account and no information was given to the employee of the Corporation charged with making entries in the corporate books.

The defendant was fully aware that the Corporation was unable to meet its bills for material, labor and construction costs on tract 17209, and particularly the bills and debts in respect to the lots on which funds were advanced by the loan company.

As to count V the evidence shows that the loan from Mutual to the Corporation of July 1, 1952, included lots 48 and 51 through 57 of tract 17209, and that in accordance with the contract and in reliance upon the representations by the defendant to Mutual that all bills were paid for construction and labor on the lots above set forth, a check was issued by Mutual to the Corporation for $10,330.88, and the funds were received by the Corporation. The representations so made by the defendant were false, as shown by the books of the Corporation as of January 22, 1953, and the funds were not used for the purposes for which they were paid to the Corporation by Mutual, but were used by the defendant for his own purposes as hereinafter related.

As to counts VI and VII, the evidence showed that Southwest had agreed to loan to the Corporation about $372,000, in accordance with the agreement of August 15, 1952. In keeping with the trust clause an advance to the Corporation was made of such trust moneys by Southwest in the sum of $20,000, on February 25, 1953. This sum was deposited in the Corporation account at the Monterey Park branch of the Bank of America on February 25, 1953, and the defendant, on the same day, received $6,000 cash from the corporate bank account on a counter-receipt, and that money was paid from the trust moneys of Southwest. The $20,000 would not have been paid to the Corporation by Southwest if it had been known that the money would not be used for payment of bills on the particular lots. On the same day, February 25, 1953, the defendant cashed a check payable to the Corporation which had been issued by Mutual in accordance with the

loan agreement of July 1, 1952, in the sum of $5,132.44, receiving cash for it by having a locker room attendant at a country club serve as an accommodation endorser on the check. No information was given to the employee of the Corporation charged with making the proper entries on the corporate books of this check. The check from Mutual was paid under the terms of the agreement in reliance on the representation by the defendant that all of the bills were paid. The representation was false.

It would appear that the defendant had at least $11,132.44 in cash in funds of the Corporation in his possession on February 25, 1953. On February 27, 1953, the defendant gave about $1,000 to a Raymond Thomas, a horse trainer, for the purchase of a race horse named Digno, and the defendant gave $1,129.50 to the Sheriff of Los Angeles County to release an attachment on the race horse Pusan, which was then running at the Santa Anita Race Track. Further, on February 27, 1953, the defendant paid $2,400 in cash to the Balboa Bay Club.

As to count VIII, the evidence showed a receipt by the Corporation of $4,762.25 from Mutual (tract 17209) on March 6, 1953, which sum was paid to the Corporation in reliance upon the defendant's representations that all of the bills were paid. The representations were false, and the funds were used as hereinafter set forth.

As to count XII, the evidence showed that in accordance with an agreement between the Corporation and Mutual for construction loans on twenty-nine houses to be constructed in tract 10409, Mutual delivered a check dated March 5, 1953, for $3,150, to the Corporation. The defendant cashed the check at the Bank of America, Monterey Park branch, on March 6, 1953, and did not deposit the money in the Corporation account or use it for Corporation purposes.

[1–3] The defendant contends that the evidence is insufficient to support the verdicts. Considering first the contention as it pertains to count V, appellant states that the evidence does not disclose that Mutual ever lost the money in question. It has been held in cases of this type that it is not necessary to show that the victim was actually out of pocket. People v. Pugh, 137 Cal.App.2d 226, 233, 289 P.2d 826; People v. Gloster, 102 Cal.App.2d 872, 874, 228 P.2d 578. Further, appellant asserts that the president of Mutual was not necessarily cognizant of the particular transaction. The testimony was such that the jury could, and obviously did, conclude that the president was in a position to speak for Mutual, and that the loans would not have been made otherwise than under the conditions which were represented to them as being the truth. If there were any discrepancies or contradictions, it was up to the jury to determine such. People v. Gloster, supra. Furthermore, it is not essential that there be express testimony by the victim that he was induced to part with money by the false representations of the accused. As said in People v. Frankfort, 114 Cal.App.2d 680, at page 699, 251 P. 2d 401, at page 413: "This is not true. '* * * the express testimony of a victim of false pretense that he was induced to part with his money by the fraudulent statements of the accused is not essential. It is sufficient if the inference of his reliance could have been drawn from all the evidence.' People v. Gordon, supra, [71 Cal.App.2d 606, 163 P.2d 110]; People v. Schmidt, 79 Cal.App. 413, 418, 249 P. 832, 250 P. 1104. * * *" Appellant further makes the claim that Mutual did not deliver the money to him nor to the Corporation; that in fact, Mutual issued its check to the Corporation, which in turn deposited the check in the bank to its credit, and the funds thereby went into the general funds of the bank. There is no merit in this contention. See, People v. Frankfort, supra; People v. Hatch, 163 Cal. 368, 375, 125 P. 907. The money was, without question, in large part under the control of the defendant, even though it was, for a time, in the physical possession of the bank. It has been held that it was not necessary to

show that the defendant himself actually took the full amount in question, or that he benefited personally. People v. Jones, 36 Cal.2d 373, 381–382, 224 P.2d 353; People v. Ashley, 42 Cal.2d 246, 259, 267 P.2d 271; People v. Cheeley, 106 Cal.App.2d 748, 752–753, 236 P.2d 22.

[4, 5] Referring next to count VI, appellant contends that there was no theft from Southwest because Southwest transferred the money to the Corporation without requiring any special set up directing how the funds were to be used and that therefore the funds became the property of the bank. Appellant further sets forth that the money was used to carry on a collateral business matter in the name of the Corporation and that the appellant had a right to have a drawing account for salary and otherwise, and also that the Corporation was the alter ego of the defendant. We have already discussed a part of the appellant's contentions under count V. It is clear from the evidence that the defendant applied moneys to uses and for purposes entirely different from that for which they were received. There was the requisite parting with the moneys by Southwest. The agreement between Southwest and the defendant contained a trust clause specifying that the funds received in trust were to pay contractors, materialmen and laborers. It was appropriately said in People v. Pierce, 110 Cal.App.2d 598, at page 609, 243 P.2d 585, at page 592: "* * * Any diversion of funds held in trust constitutes embezzlement whether there is direct personal benefit or not as long as the owner is deprived of his money. People v. Talbot, 220 Cal. 3, 28 P.2d 1057; People v. Braiker, 61 Cal.App.2d 406, 143 P.2d 89. * * *" The jury could reasonably conclude that the purchase of race horses, running them at various race tracks, wagering on them, supporting a yacht and moneys to a yacht club were not wholly related to the legitimate business of the Corporation. In respect to the showing of theft from the Corporation, it is sufficient that the appellant took the money of the Corporation for personal use without authorization. People v. Moorhead, 104 Cal.App.2d 688, 694, 232 P.2d 268.

[6, 7] In respect to the claim that the Corporation was defendant's alter ego, the jury had ample evidence from which they could, and did determine that there was a distinct, formal corporate existence. However, even where the circumstances indicate that all of the capital stock of a corporation is owned or controlled by one person, this does not necessarily destroy its separate existence. Erkenbrecher v. Grant, 187 Cal. 7, 11, 200 P. 641. In the case of People v. Talbot, 220 Cal. 3, at page 14, 28 P.2d 1057, at page 1061, the court said, among other things: "The element of felonious intent in every contested criminal case must necessarily be determined from the facts and circumstances of the case. People v. Kirk, 94 Cal.App. 378, 271 P. 347. In our opinion the law is well expressed in the case of Mangham v. State, 11 Ga.App. 427, 75 S.E. 512, 516, where the court says: 'An officer or agent of a corporation cannot take money of the corporation which is entrusted to him, or which comes into his possession by virtue of his office or agency, and use it even temporarily for his personal benefit and avoid criminal responsibility by calling it a loan. The law calls such a transaction a wrongful conversion, from which a fraudulent intent can be inferred'. [Citing cases.]"

In People v. Foss, 7 Cal.2d 669, 62 P.2d 372, the appellant contended that he was a member and officer of the club involved, and that as one of the owners thereof, he could not embezzle from himself. The court said, 7 Cal.2d at page 670, 62 P.2d at page 373: "The profits or proceeds from the sale of the tickets for the performance to be given were primarily for the erection of or securing a clubhouse. It therefore appears that appellant was neither a partner nor one engaged with others in a joint enterprise. He falls within the definition of an 'Agent,' given in section 2295 of the Civil Code as 'one who represents another, called the principal, in dealings with third

persons.' In the transactions here complained of, and of which appellant was guilty, he was acting for and representing the Pasadena Stage and Screen Club. It has been found that he fraudulently appropriated money rightfully intended for, and the property of, the club, and he was guilty of embezzlement as defined in sections 503 and 504 of the Penal Code."

As to the remaining counts, appellant simply repeats the matters which have already been disposed of.

[8] With reference to the argument that the court erred in not compelling the plaintiff to make an election as to whether they were proceeding on the basis of theft by larceny, false pretenses or embezzlement, in our opinion an election is not required. In People v. Fewkes, 214 Cal. 142, at page 149, 4 P.2d 538, at page 541, the court said: "The information charged the offense as 'Grand Theft, a felony, committed as follows' (reciting the particulars), under the authority of sections 484, 490a, and 952 of the Penal Code as amended and added in 1927 (St.1927, pp. 1043, 1046, 1047). This was sufficient. [Citing cases.] It is not necessary that the information state the kind of grand theft with which the defendant is charged in order to comply with subdivision 2 of section 950 of the Penal Code. People v. Manchell, 91 Cal.App. 788, 267 P. 718.

"Under the new procedure, it is obviously unnecessary and improper to compel the district attorney, in advance of the proof, to elect upon what theory the prosecution is to proceed, whether larceny, false pretense, trick, and device, embezzlement, etc. These distinctions in the charge and proof obtained under the old practice, but are done away with in the new. They were eliminated, not only for the purpose of simplifying procedure, but also to relieve the courts of the necessity of drawing fine distinctions as to whether the particular crime charged had been proved, and the prosecution of charging in advance, at its peril, an offense which the evidence, because of such fine distinctions, might show not to exist, although the guilt of the defendant be manifest. People v. Myers, supra [206 Cal. 480, 275 P. 219]."

Also, in People v. Ashley, 42 Cal.2d 246, at page 258, 267 P.2d 271, at page 279, the court stated: "Although the crimes of larceny by trick and device and obtaining property by false pretenses are much alike, they are aimed at different criminal acquisitive techniques. Larceny by trick and device is the appropriation of property, the possession of which was fraudulently acquired; obtaining property by false pretenses is the fraudulent or deceitful acquisition of both title and possession. [Citing cases.] In this state, these two offenses, with other larcenous crimes, have been consolidated into the single crime of theft, Pen.Code, § 484, but their elements have not been changed thereby. [Citing cases.] The purpose of the consolidation was to remove the technicalities that existed in the pleading and proof of these crimes at common law. Indictments and informations charging the crime of 'theft' can now simply allege an 'unlawful taking.' Pen. Code, §§ 951, 952. Juries need no longer be concerned with the technical differences between the several types of theft, and can return a general verdict of guilty if they find that an 'unlawful taking' has been proved. [Citing cases.] The elements of the several types of theft included within section 484 have not been changed, however, and a judgment of conviction of theft, based on a general verdict of guilty, can be sustained only if the evidence discloses the elements of one of the consolidated offenses."

Further, in our opinnon, it was not error to omit an instruction that the verdict must be unanimous as to the type of theft committed. People v. Nor Woods, 37 Cal.2d 584, 586, 233 P.2d 897.

[9] Appellant asserts that the court erred in overruling his objections to the introduction into evidence of certain books, documents and records of the loan associations, on the ground that there was no proper foundation laid, we are of the opin-

ion that under the provisions of Code of Civil Procedure, section 1953f, the evidence was properly introduced and that the language used in People v. Fowzer, 127 Cal. App.2d 742, at pages 747–748, 274 P.2d 471, at page 474, is appropriate, where the court said: "The records here in question were not rendered inadmissible by failure to preliminarily show that the witness was the actual custodian thereof. Section 1953f of the Code of Civil Procedure specifically provides that such records shall be competent evidence '* * * if the custodian *or other qualified witness* testifies to its identity and the mode of its preparation, and if it was made in the regular course of business, at or near the time of the act, condition or event, and if, in the opinion of the court, the sources of information, method and time of preparation were such as to justify its admission.' (Emphasis added.)

"The hard and fast rule that the custodian of the records must be produced is specifically dispensed with by the statute. Undoubtedly the legislature determined that such a rule provoked undue interference with the operation of business enterprises and was unnecessary to insure reliable evidence. In the words of our Supreme Court in Loper v. Morrison, 23 Cal.2d 600, 608, 609, 145 P.2d 1, 5: 'It is the object of the business records statutes to eliminate the necessity of calling each witness, and to substitute the record of the transaction or event. It is not necessary that the person making the entry have personal knowledge of the transaction. (Citing cases.)' See also Nichols v. McCoy, 38 Cal.2d 447, 449, 450, 240 P.2d 569.

"Where, as in the case now before us, the determination of the trial court that the foundation laid was sufficient is a deduction reasonably drawn from the evidence, such conclusion is binding upon an appellate court [citing cases.] In the case at bar the testimony of the witness that he was an officer of the bank and had access to the records is quite sufficient to support the ruling of the trial judge. From the testimony given by the assistant cashier of the bank it could well be inferred that the records were prepared in the usual manner and regular course of the bank's business. As was said in Thompson v. Machado, 78 Cal.App.2d 870, 873, 178 P.2d 838 * * *: '"* * * In the case of the conduct of the business and affairs of an establishment, it is presumed that the regular course of business of such establishment is followed, Code Civ.Proc., § 1963, subd. 20, and that the books and records of an establishment truly reflect the facts set forth in such books Code Civ.Proc., § 1953f."'"

We are of the opinion that there is no merit in the remaining contentions of the appellant, and further that the jury was fully and fairly instructed, and that there was no prejudicial error in the case.

Judgment and order are, and each is, affirmed.

WHITE, P. J., and NOURSE, J. pro tem., concur.



147 Cal.App.2d 205

BRADEN COPPER COMPANY, Petitioner,

v.

INDUSTRIAL ACCIDENT COMMISSION of the State of California, and John C. Viera, and State of California (Subsequent Injuries Fund), Respondents.

No. 17047.

District Court of Appeal, First District, Division 1, California.

Dec. 27, 1956.

As Modified on Denial of Rehearing Jan. 25, 1957.

Hearing Denied Feb. 25, 1957.

Workmen's compensation case. The Commission made an award against for-

eign corporation, and it appealed. The District Court of Appeal, Fred B. Wood, J., held that the appellant had not made a general appearance, either by cross-examining defendant or by questioning constitutionality of Labor Code section.

Reversed with directions.

1. Workmen's Compensation ⇐1183

Where compensation claimant gave, on direct examination, testimony tending to show that defendant foreign corporation might have been active to some extent in California in recruiting engineers for work in its Chilean mine, doing so through medium of local engineering society which conducted an employment service for engineers and had been instrumental in putting claimant and defendant in touch with each other, cross-examination, by which defendant sought to keep claimant's testimony within limits of his personal knowledge, in furtherance of its theory that it had conducted no business activities of any kind in the state and had had no such contacts as would make it amenable to service of process by mail, was within scope of its special appearance, and did not constitute a general appearance. West's Ann.Labor Code, §§ 5305, 5500.5.

2. Workmen's Compensation ⇐1183

Labor Code section dealing with occupational diseases arising out of more than one employment and providing for joinder of all employers and for joint and several award, deals with subject-matter jurisdiction, rather than personal jurisdiction or manner of acquiring jurisdiction; but corporate defendant's joinder with representative of Subsequent Injuries Fund in questioning constitutionality of that section did not constitute a general appearance, where corporate defendant acted under mistaken belief that constitutionality of section might have bearing upon effect of service of process upon it by mail and where such action was not accompanied by motion or request for any relief, and was not followed up. West's Ann.Labor Code, § 5500.5.

3. Appearance ⇐9(3)

Defendant did not make general appearance when, in support of its motion to quash, it introduced (1) affidavit of one of its officers, showing it to be a foreign corporation that had not done business in California, and (2) a certificate by Secretary of State showing that it had not filed copy of its articles or other documents and had not qualified to do intrastate business in state.

4. Workmen's Compensation ⇐1930

Where Commission mistakenly found that defendant had made general appearance in workmen's compensation proceeding, but did not make finding with regard to whether single contract of employment made by defendant in state established sufficient contact or presence to justify service of process by mail, reviewing court would not make finding with regard to whether defendant was doing business in state, within purview of statutes providing for service of process upon foreign corporations. West's Ann.Labor Code, § 5305.

5. Workmen's Compensation ⇐1181

Labor Code section giving Commission jurisdiction over controversy arising out of injury received outside of state in performance of contract made in state deals with subject-matter jurisdiction, rather than jurisdiction over the person. West's Ann.Labor Code, § 5305.

Vincent H. O'Donnell, Fredrik S. Waiss, San Francisco, for petitioner.

Everett A. Corten, Daniel C. Murphy, San Francisco, for Industrial Accident Commission.

Henry G. Sanford, Stephen D. Maffini, San Francisco, for respondent John C. Viera.

Edmund G. Brown, Atty. Gen. of the State of California, Gerald F. Carreras, Deputy Atty. Gen., for respondent State of California and Subsequent Injuries Fund.

FRED B. WOOD, Justice.

The sole question upon this review of a decision of the Industrial Accident Commission is whether or not the commission acquired personal jurisdiction of the petitioner, Braden Copper Company, a Maine corporation that has an office in New York but none in California.

John C. Viera applied to the commission for a hearing of his claim that he contracted silicosis while working in mines of various employers during the period 1934 to 1945, including a Chilean mine operated by Braden. The commission caused a copy of the application and notice of the hearing (set for October 29, 1954) to be mailed to Braden at a New York address.

On the day of the hearing Braden appeared specially and moved to quash the service of the application and of the notice of hearing upon the ground of lack of jurisdiction of the person of Braden, a foreign corporation whose only mining operations are in Chile, who has never qualified to do business in California, never had an office or agent or representative here and never did business here, and the contract of employment with Viera was not made in California.

The referee thereupon said, "All right, I have your motion," and counsel for one of the other mining companies said, "before you act on it, may I refer you to" a certain case the name of which counsel did not recall at the moment. The referee replied, "You have plenty of time to cite authority as I don't intend to rule on it today," and proceeded with the hearing.

From these and other incidents it was a reasonable inference that the hearing would proceed for all purposes; i. e., for any evidence and oral argument or briefing that might be offered for or against the motion to quash or for or against any other motion that might be made (such as the motion, subsequently made by the attorney general, to dismiss as to the Subsequent Injuries Fund) or which might bear upon the merits of the application.

Quite naturally, therefore, Braden's counsel sat through the hearing and took part now and then concerning matters which seemed relevant to the question whether the commission had acquired jurisdiction over the person of Braden.

At the conclusion of the hearing, after all the evidence on every issue had been received, the referee orally announced that he was denying both motions, that of Braden and that of the attorney general. The commission in its decision, later rendered, found it had jurisdiction of Braden, made an award against Braden and dismissed as to the other mining companies and the Subsequent Injuries Fund. When denying Braden's petition for reconsideration the commission said "there is the problem of jurisdiction over the person of the defendant employer. The employer, by asking for affirmative relief, waived its defense of lack of jurisdiction of its person (by raising the issue of unconstitutionality of Labor Code section 5500.5)."

In this proceeding, before this court, the respondent commission takes the position that by questioning the constitutionality of section 5500.5 of the Labor Code and by participating in the cross-examination of Viera when he was on the witness stand, Braden went outside of the issues presented by its challenge of the personal jurisdiction of the commission, submitted itself to that jurisdiction and made a general appearance. We do not so view it.

[1] During his direct examination, Viera gave some testimony which tended to show that Braden may have been active to some extent in California in recruiting engineers for work in its Chilean mine, doing so through the medium of a local engineering society which conducted an

employment service for engineers and was instrumental in putting Viera and Braden in touch with each other. Braden sought by its questions and objections to keep Viera's testimony within the limits of the latter's personal knowledge, in furtherance of the theory that Braden had conducted no business activities of any kind in this state and had had no such contacts here as would make it amenable to service of process by mail under sanction of the principles enunciated in International Shoe Co. v. State of Washington, etc., 326 U.S. 310, 316–319, 66 S.Ct. 154, 90 L.Ed. 95, principles which have been considered and applied in California in such cases as Fielding v. Superior Court, 111 Cal.App.2d 490, 244 P.2d 968; Iowa Mfg. Co. v. Superior Court, 112 Cal.App.2d 503, 246 P.2d 681; Kneeland v. Ethicon Suture Laboratories, 118 Cal.App.2d 211, 257 P.2d 727; Martin Bros. Elec. Co. v. Superior Court, 121 Cal. App.2d 790, 264 P.2d 183; Estwing Mfg. Co. v. Superior Court, 128 Cal.App.2d 259, 275 P.2d 146; Duraladd Products Corp. v. Superior Court, 134 Cal.App.2d 226, 285 P.2d 699; and Smith & Wesson, Inc., v. Municipal Court, 136 Cal.App.2d 673, 289 P.2d 26.

Before entering upon this line of interrogation, Braden's counsel took the precaution to state that he would like to ask the witness questions "bearing on his initial contract of employment with the Braden Copper Company, solely in so far as these questions may bear upon the issue of jurisdiction over the Braden Copper Company," and the referee responded, "Very well. You may have all the time you want."

Such participation in the interrogation of Viera was within the scope of Braden's special appearance and did not constitute a general appearance. The fact that the same evidence may have been relevant also to the question of subject matter jurisdiction (whether the contract of employment was made in this state and thus within the purview of section 5305 of the Labor Code) does not deprive it of its bearing upon and relevancy to the question whether Braden was amenable to process, the question involved in its motion to quash.

[2] The incident concerning the constitutionality of section 5500.5 of the Labor Code occurred early in the hearing, during the period of taking stipulations and defining issues, before the taking of any testimony. After Braden announced its special appearance and made its motion to quash, stating the grounds thereof, the referee asked if there were any other motions or stipulations. The attorney general, representing the Subsequent Injuries Fund, responded: "Mr. Referee, perhaps it is premature, but we raise the constitutionality of Labor Code Section 5500.5 * * *." Thereupon, Braden's counsel said: "We will join with you in that question, or, that point." That is the whole of that incident. Nothing further was said concerning that section. It was not even mentioned in Braden's memorandum of points and authorities which it later filed with the commission.

Section 5500.5 deals with occupational diseases such as silicosis "which may have arisen out of more than one employment." It provides for joining all employers under whose employ the applicant may have been exposed to the hazards of the occupational disease in question, and for a joint and several award if two or more such employers are found liable. This section, as we read it, deals with subject matter jurisdiction, not with personal jurisdiction or with the manner of acquiring jurisdiction over the person of any such employer. However, counsel stoutly maintains that he made the quoted reference to section 5500.5 with the sole thought in mind of its bearing upon his motion to quash, an additional basis for his claim that the commission did not acquire jurisdiction of the person of Braden by serving process in the manner in which it did.

We think that is the fair import of counsel's remark, in the setting in which it was made. It followed almost immediately his motion to quash for asserted lack of personal jurisdiction and was not accompanied

by a motion or request for any relief. There was no indication of an intent to seek relief different from or additional to that sought by the motion to quash. The fact that counsel was mistaken in the thought (temporarily, it would seem, for he did not follow it up) that the constitutionality or unconstitutionality of section 5500.5 had a bearing upon the effectiveness or ineffectiveness of the service of process upon Braden by mail, would not justify us in treating that mistaken notion[1] and the remark which it engendered as an *intentional* request for relief which may properly be made only by a party over whom the court has acquired personal jurisdiction.

This is quite like the situation which obtained in Armstrong v. Superior Court, 144 Cal.App.2d 420, 301 P.2d 51, described by the reviewing court as follows: "A reading of the notice of motion to quash makes it apparent that the only relief sought by petitioner was to quash service of summons upon him upon the grounds that the court had not thereby acquired jurisdiction of his person. The fact that he attempted to demonstrate that the court did not have jurisdiction of his person because he was not a party to the action by citing authorities which he mistakenly believed supported his contention did not change his appearance from a special one to a general one." 144 Cal.App.2d 423, 301 P.2d at page 53.

Continuing, the court in that case said: "The test as to whether an appearance is general or special is, 'Did the party appear and object only to consideration of the case or any procedure in it because the court had not acquired jurisdiction over the person of the defendant or party? If so, then the appearance is special. If, however, he appears and asks for any relief which could be given only to a party in the pending case, or which itself would be a regular proceeding in the case, it is a general appearance regardless of how adroitly, carefully or directly the appearance may be denominated or characterized as special. * * * The rule in this regard may be epitomized by saying that if a defendant by his appearance insists only upon the objection that he is not in court for want of jurisdiction over his person and confines his appearance for that purpose only, then he has made a special appearance, but if he raises any other question, or asks any relief which can only be granted upon the hypothesis that the court has jurisdiction of his person, then he had made a general appearance.' Judson v. Superior Court, 21 Cal.2d 11, 13, 129 P.2d 361, 362; see also Hernandez v. National Dairy Products Co., 126 Cal.App.2d 490, 272 P.2d 799." 144 Cal.App.2d 423, 301 P.2d at page 53.

In this connection the following observations made by the Supreme Court in Davenport v. Superior Court, 183 Cal. 506, 511, 191 P. 911, are significant: "An act of a defendant by which he *intentionally* submits himself to the jurisdiction of the court in that action *for the purpose of obtaining any ruling* or order of the court *going to the merits of the case, as,* for example, *a motion* to strike out part of the complaint, or the making of stipulations, as in the cases above mentioned, *which may reasonably be construed to imply that the court has* in that action *acquired jurisdiction of the person* of the defendant, will be equivalent to an appearance, although not strictly in accordance with the terms of section 1014." (Emphasis added.)

Our view of Braden's reference to section 5500.5 finds additional support in Dickson v. Parker, 59 Cal.App. 778, 212 P. 42, in which the court made these pertinent observations: "Each time appellant appeared before the superior court she objected to its jurisdiction.' Contention is made that in voicing her objection she used language which constituted an appearance

1. The plausability of counsel's having harbored such a notion is enhanced by the very fact that Viera's counsel seriously yet mistakenly views another subject-matter jurisdiction section, § 5305, as one which deals with jurisdiction over the person.

in the action and thus conferred jurisdiction upon the court. With such contention we cannot agree. We think the record fairly shows that appellant *never intentionally submitted herself to the jurisdiction of the court 'for the purpose of obtaining any ruling or order going to the merits of the case.'* Davenport v. Superior Court, 183 Cal. 506, 191 P. 911." (59 Cal. App. at pages 780–781, 212 P. at page 43; emphasis added.)

[3] The attorney general erroneously contends that Braden made a general appearance when, in support of its motion to quash, it introduced the affidavit of one of its officers showing it to be a foreign corporation that had not done business in California, and a certificate by the Secretary of State of California showing that Braden has not filed a copy of its articles or other documents and is not qualified to do intrastate business in California, facts peculiarly pertinent to the issues presented by the motion to quash.

[4] Viera makes the additional argument that the commission did acquire jurisdiction over the person of Braden by the manner in which it served notice upon Braden. He starts with the commission's finding that the contract was made in California, argues that the making of a single contract in a state by a foreign corporation establishes a sufficient contact or presence to justify service of process by mail, and then points to section 5305 as, in effect, a legislative declaration (a) that the making of such a contract as that here involved establishes such contact and (b) that in such a case the employer may be served by mail. The answer to this argument is that the respondent commission has not found on this subject, has not found that it made a legally effective service of process upon Braden. Instead, it has found and here contends, simply, that Braden made a general appearance by the manner in which it participated in the hearing before the referee. Under the circumstances, we do not deem it appropriate for this reviewing court to act as a trial court and make findings that Braden was, or that it was not, doing business in this state within the meaning and purview of our statutes that provide for service of process upon a foreign corporation.

[5] For the guidance of the commission in the consideration of such a question, we may and do observe that section 5305 deals with subject-matter jurisdiction. It gives the commission jurisdiction over a *controversy* arising out of an injury received outside of this state in the performance of a contract made in this state. It is entirely silent as to the manner of acquiring personal jurisdiction over the employer in such a case, whether the employer be an individual or a corporation, a resident or a nonresident individual, a domestic or a foreign corporation, and if a foreign corporation whether it be qualified or not qualified to do business in this state. However, this does not necessarily mean that new or additional legislation is needed in this state to authorize the service of process upon Braden if the commission should find, upon sufficient evidence, that Braden had sufficient contacts in California to meet the minimum requirements prescribed by the Supreme Court of the United States in the International Shoe case. See Kneeland v. Ethicon Suture Laboratories, 118 Cal.App.2d 211, 222, 257 P.2d 727, 734, in which we expressed the view that " 'doing business in this State' " as used in section 411 of the Code of Civil Procedure "reflects the changing concept of 'doing business' as it has evolved over the years, and as it continues to evolve, through the decisions of the federal courts interpreting the due process clause and applying it to new and developing situations from time to time."

A further question to be considered by the commission in any such inquiry is whether the workmen's compensation statutes and the regulations of the commission effectively sanction service of process upon a foreign corporation in a manner different from that prescribed by section 411 of the Code of Civil Procedure and sec-

tions 6500 to 6504 of the Corporations Code. It does not appear, from the record before us, that Braden was served in that manner.

The decision is reversed as to Braden Copper Company with directions to take such further proceedings as may not be inconsistent with the views herein expressed.

PETERS, P. J., and BRAY, J., concur.

Hearing denied; GIBSON, C. J., and CARTER, J., dissenting.



147 Cal.App.2d 287

The PEOPLE of the State of California, Plaintiff and Respondent,

v.

Harry Thomas COMSTOCK and Winifred June Clark, Defendants,

Harry Thomas Comstock, Defendant and Appellant.

Cr. 5634.

District Court of Appeal, Second District, Division 2, California.

Dec. 28, 1956.

Prosecution for conspiracy, for commission of grand theft and for fraudulently falsifying corporate records. The Superior Court, Los Angeles County, Aubrey N. Irwin, J., entered judgment of conviction and defendant appealed. The District Court of Appeal, Moore, P. J., held, inter alia, that evidence was insufficient to sustain conviction on one count charging commission of grand theft, and on one count charging fraudulently falsifying corporate records.

Judgment affirmed in part, and reversed in part.

1. Criminal Law ⇐1159(2)

Where defendant, in a criminal prosecution, chose to submit his defense upon a transcript of preliminary hearing, he was not entitled to a virtual new trial on appeal from a judgment of conviction, but rather court would merely determine whether there was substantial evidence supporting his conviction. West's Ann.Civ.Code, § 3510.

2. Administrative Law and Procedure ⇐683

When an appellate court reviews the findings of a trial court following a trial de novo of a matter adjudicated by an administrative agency, the substantial evidence test prevails regardless of whether the only evidence before the trial court was a transcript of the administrative proceeding.

3. Criminal Law ⇐742(2), 1144(13)

If it may reasonably be inferred that a witness is not an accomplice, it is for the trier of fact to determine the question of complicity, and it will be presumed that the witness was found not to be implicated in the crime where such presumption would further tend to effect affirmation of a judgment.

4. Conspiracy ⇐24

In order to establish a "conspiracy", there must be proof of a corrupt agreement between at least two persons, since the gist of conspiracy is the enhanced danger to society from wrongful combination of purpose.

See publication Words and Phrases, for other judicial constructions and definitions of "Conspiracy".

5. Conspiracy ⇐47

Direct evidence of a formal understanding between confederates is not essential to proof of a conspiracy, and it is not necessary to prove that parties so

charged actually met, discussed their mutual design and understanding and reached a formal agreement, since the extent to which the minds of the alleged conspirators were in accord with respect to their conspiracy must usually, from the secrecy of the crime, be deduced from the circumstances which, when taken together, indicate that they are parts of the same complete whole.

6. Criminal Law ⇐422(1)

Where facts presented by the state in prosecution for conspiracy revealed a "prima facie" showing of conspiracy charged, evidence of an extrajudicial utterance of one conspirator to the prejudice of the other was admissible.

7. Conspiracy ⇐47

Evidence sustained conviction for conspiracy to cheat and defraud by criminal means, to make false promises with fraudulent intent not to perform them, to commit grand theft, to violate the Corporate Securities Law and to falsify corporate records. West's Ann.Corp.Code, §§ 3020(b), 25000 et seq.

8. Criminal Law ⇐510

Statutory requirement of corroboration of accomplice testimony is based primarily upon fact that experience has shown that evidence of an accomplice should be viewed with care, caution and suspicion because it comes from a tainted source and is often given in the hope or expectation of leniency or immunity. West's Ann.Pen.Code, § 1111.

9. Criminal Law ⇐511(2)

Corroboration of accomplice testimony is sufficient to sustain a conviction if it tends to connect the defendant with the commission of the crime charged in such a way as may reasonably satisfy the jury that the witness who must be corroborated is telling the truth. West's Ann.Pen.Code, § 1111.

10. Criminal Law ⇐372(1), 511(4)

Proof that a defendant committed other recent and similar offenses tending to show a consistent plan or method of his conduct is admissible to prove a particular crime charged, and such evidence may corroborate the testimony of an accomplice.

11. Corporations ⇐324
False Pretenses ⇐49(1)

Evidence was insufficient to sustain conviction on one count charging commission of grand theft and on one count charging fraudulently falsifying corporate records, and was sufficient to sustain conviction on two other counts charging such falsification and on other counts charging commission of grand theft. West's Ann. Corp.Code, § 3020(b).

12. Criminal Law ⇐1035(3)

Under ordinary circumstances, an accused may not complain for the first time on appeal of the inept conduct of trial counsel of his own choosing.

13. Criminal Law ⇐641(1)

Submission of defendant's case on preliminary transcripts did not amount to a denial of defendant's right to counsel, where defendant, with full knowledge of the consequences, allowed his trial to be so conducted.

Simpson, Wise & Kilpatrick, George E. Wise, and Adrian Kuyper, Long Beach, for appellant.

Edmund G. Brown, Atty. Gen., Norman H. Sokolow, Deputy Atty. Gen., Adolph Alexander, Chief Deputy Dist. Atty., acting as Dist. Atty. of Los Angeles County; Herman L. Arterberry, Deputy Dist. Atty., Los Angeles, for respondent.

MOORE, Presiding Justice.

Defendant appeals his conviction on the charges of conspiring with Winifred June

Clark (who died prior to the trial of the action) to cheat and defraud by criminal means, to make false promises with the fraudulent intent not to perform them, to commit grand theft, to violate the Corporate Securities Law, Corporations Code, § 25000 et seq., and to violate section 3020, subdivision (b) of the Corporations Code relating to the falsification of corporate records (Count I); commission of grand theft (Counts II, III, IV, V, VI, X and XI); and fraudulently falsifying corporate records (Counts VII, VIII and IX).

[1, 2] The basic facts underlying the perpetration of the foregoing offenses may best be set forth in the consideration of the evidence supporting the conspiracy count. Appellant advises us that in considering the record we should not apply the familiar "substantial evidence test" but rather should satisfy ourselves beyond a reasonable doubt as to the guilt of appellant. The reasoning suggested is as follows: The rule that an appellate court will not upset the judgment of a trial court where substantial evidence supports it is based upon the premise that the trier of fact is deemed to have had the superior advantage in appraising witnesses and in evaluating their credibility, Maslow v. Maslow, 117 Cal.App. 2d 237, 243, 255 P.2d 65; therefore, where the case is submitted to the trial court upon the transcript of the preliminary hearing, as here, the cited rule no longer should prevail. Civ.Code, § 3510. However, the accused had his choice as to how the facts were to be presented to the trial court. There might have been a complete hearing with oral testimony or confrontation, or a consideration of a written transcript or, perhaps, testimony taken by deposition. His choice of submitting his defense upon the transcript of the preliminary does not entitle him to a virtual new trial in the appellate court. A situation similar to submission upon a preliminary transcript may be found in the civil cases. When an appellate court reviews the findings of a trial court following a trial de novo of a matter adjudicated by an administrative agency, the substantial evidence test prevails regardless of whether the only evidence before the trial court was a transcript of the administrative proceeding. See Hutchinson v. Contractors' State License Board, 143 Cal.App.2d 628, 300 P.2d 216.

The Conspiracy

Appellant promoted the organization and incorporation of a company known as Finance Control of Long Beach in July 1952. The primary business purpose of the corporation was purportedly to factor automobile accounts receivable paper.

Approximately one year later, appellant promoted the formation of a concern known as Finance Clearing of Beverly Hills to engage in the business of "buying and selling notes, conditional sales contracts, and other negotiable paper and choses in action of all kinds." It is his activities in the management of this corporation which provide the substance of the information filed against him.

In promoting these ventures, appellant refrained from occupying an openly official status in the corporations. They were formed by dummy incorporators. Appellant "appointed" officers of the several concerns without regard to the legal amenities that are customarily observed in the election of corporate officers. He was careful to people the responsible offices of his several concerns with persons of no experience in business management and particularly unversed in conducting a factoring enterprise. A veritable parade of secretaries, stenographers and bookkeepers were "installed" by appellant as officers of the corporations at one time or another. For example, appellant designated one Frank Maierhofer as president of Finance Clearing for a period of time during which extensive financial mismanagement occurred. Mr. Maierhofer's previous business experience had been, primarily, employment as a head waiter. Miss Aida Ferrera, then nineteen years of age, was appointed secretary-treasurer five weeks after her employment as a secretary through an employment agency. Throughout, appellant maintained sole con-

trol over the management of the enterprise under the generic title of "General Manager." The evidence leaves no doubt that Finance Clearing was merely the right arm of appellant Comstock.

Appellant's co-conspirator Clark was employed by Finance Clearing sometime in October or December 1953. Thereafter, she became vice president of that company. Whatever might be said for the activities of Miss Clark, she was not wholly devoid of previous experience in financial management.

In order to do any business, it was essential for Finance Clearing to obtain money from lenders, or investors as the case may be, so that accounts receivable could be purchased from various merchants. However, a balance sheet of December 31, 1953, probably prepared by Comstock, showed a deficit of $9,000. At least one potential investor informed appellant that he would not consider risking his funds with an organization whose financial statement showed so poor an earnings record. A response to this invitation to do something about the adverse earnings record was not long delayed.

An accountant, Yawdick, hired by Finance Clearing testified that had a balance sheet been prepared for the months of January and February, a deficit would no doubt have been revealed. However, statements prepared by the accountant for March, April, May and June of 1954 on the basis of information furnished on transmittal sheets prepared in the office of Finance Clearing showed a remarkable enhancement in the affairs of the corporation. Earnings multiplied rapidly and a surplus soon mounted. Subsequent investigation revealed that this surplus was entirely the result of fabrication.

The first instance of outright fiscal skullduggery occurred in March. In that month Finance Clearing supposedly purchased over $11,000 in accounts receivable held by E. J. Grau and Son, a plumbing concern, for the consideration of one dollar. These accounts were, at the instance of appellant, carried on the books of the corporation as an asset at their face value of $11,000 instead of one dollar, their purchase price, which would have been the proper accounting practice. Moreover, the testimony of Mr. Grau established that no accounts had ever been sold by his concern to Finance Clearing. They were entirely bogus. The false accounts were apparently first written on some blue and green sheets in the handwriting of Miss Clark. She later admitted to various persons that she had copied the names of the purported debtors from the telephone directory. The accounts were subsequently recorded on account cards in the Beverly Hills office and from there transmitted to the accountant in Long Beach who recorded them on the books of the corporation. No direct evidence was presented as to who directed the transmittal of the Grau accounts to the accountant.

[3] In subsequent months, similar false transactions with Businessmen's Association, Maxwell's Department Store, Central Chevrolet and Utter-McKinley Morticians were recorded. By this time, Miss Ferrera had been employed by Finance Clearing. She testified that *both appellant and Miss Clark* directed her to copy the accounts directly from the blue and green sheets onto the account cards and the transmittal sheets prepared for the accountant. Therefore, appellant knew that accounts in large sums purchased for an incredibly small consideration were being carried into the books. Furthermore, Miss Ferrera testified that this procedure was not normal in the case of the purchase of accounts. Ordinarily the account cards and transmittal sheets were prepared directly from the very contracts assigning the accounts rather than from a list prepared upon some scratch paper. Appellant was well aware of this highly irregular circumstance. Appellant insists that this very important testimony of the witness Ferrera must be accorded the usual limitations placed upon the testimony of an "accomplice." However, if it may reasonably be inferred that a witness is not an accomplice, it is for the trier of fact to

determine the question of complicity. People v. Santo, 43 Cal.2d 319, 326, 327, 273 P.2d 249. It will be presumed that the witness was found not to be implicated in the crime where such presumption would further tend to effect affirmation of the judgment. (Ibid.) Here Ferrera denied any knowledge of the fictitious nature of the accounts at the time she entered them upon the records maintained by the corporation. In view of her youth, the short time she had been employed and her inexperience in business matters, it is entirely reasonable to infer that she obeyed orders issued by appellant without consideration of whether or not they were financially sound.

Appellant subsequently employed these falsely inflated financial statements to impress investors with the stability of his enterprise. Although he was the individual primarily responsible for inducing prospects to lend or invest money, Miss Clark accompanied him at least once to the home of a prospect for the purpose of inducing the victim to part with his funds.

However, the Corporation Commissioner had ordered appellant in November 1953 to cease and desist from the sale of securities without a permit. As the Commissioner began a closer and closer investigation of appellant's activities, the latter apparently became alarmed about the bogus accounts on the books. At any rate, he attempted a very transparent scheme to cleanse them from his records without affecting his statement of earnings. Miss Ferrera testified that appellant instructed her to draw checks upon the Finance Clearing account, to record those checks as payments upon the fictitious accounts whereby to reduce their credit balance, and then to deposit the checks in the very same account upon which they were drawn. In other words, total "wash" transactions whose effect would be to reduce the valuation of the fictitious assets without affording a corresponding increase in cash. When his accountant asked him what he hoped to accomplish by these transactions, appellant answered that he wished to credit the accounts with these sums but not to charge them against profit and loss. When the accountant told him that it could not be done, appellant told him to "forget it." The "wash" transactions were treated as void and were not entered on the books.

Finally, appellant decided that the accounts must be removed from the books. He instructed Miss Ferrera to prepare a transmittal sheet which would show these accounts, totaling more than $123,000, entirely charged off as bad debts. The charge-off was made as of July 31, 1954. The resultant balance sheet as of that date showed an $89,000 deficit. Although no statements were prepared during intervening months, a subsequent balance prepared as of December 31, 1954, showed that the ill-fated Finance Clearing had slumped still further into a $114,000 deficit balance. Even that final balance sheet was described as excessively optimistic by the accountant who aided in its preparation. However, appellant took care that no financial statement should reach his investors following the charge-off. He made various misrepresentations explaining his failure to continue sending the sheets. He told one investor that over $100,000 in asset accounts had been written off so as to effectuate a "tax saving."

Further to demonstrate appellant's intimate connections with his co-conspirator Clark, upon at least one occasion he showed considerable largesse in siphoning funds of the corporation into her hands. Upon learning that Miss Clark desired to own a certain collection agency in Palm Springs, appellant without further ado instructed her to write two checks totaling $5,000 against the account of Finance Clearing. The checks were signed by appellant and Clark, payable to appellant, endorsed by him and used by Clark to purchase the agency. Appellant told Miss Ferrera that he was giving Clark the sums so that she could "have something in her hip pocket." Although he took her promissory note for the sums, he did not expect Miss Clark to repay it and never demanded that she do so.

[4, 5] In order to establish a conspiracy, there must be proof of a corrupt agreement between at least two persons, People v. Gem Hang, 131 Cal.App.2d 69, 71–72, 280 P.2d 28; People v. Frankfort, 114 Cal.App.2d 680, 688, 251 P.2d 401, since the gist of conspiracy is the enhanced danger to society from wrongful combination of purpose. (Comment, 26 So.Cal.L.Rev. 64, 68.) Appellant argues that there is no evidence that he and Miss Clark ever combined forces to defraud investors or falsify corporate records; that each operated in a vacuum without common agreement or purpose. But direct evidence of a formal understanding between confederates is not essential to the proof of a conspiracy. It is not necessary to prove that the parties actually met, discussed their mutual design and understanding, and reached a formal agreement. The extent to which the minds of conspirators are in accord with respect to their conspiracy must usually, from the secrecy of the crime, be deduced from the circumstances which, when taken together, indicate that they are parts of the same complete whole. People v. Rissman, 143 Cal.App.2d 488, 299 P.2d 944; Lorenson v. Superior Court, 35 Cal.2d 49, 57–58, 216 P.2d 859. The actions of the alleged conspirators when considered in conjunction with what must have been within their knowledge may irresistably tend to establish the existence of an agreement, tacit, perhaps, in character but nevertheless corrupt. See People v. Fratianno, 132 Cal.App.2d 610, 282 P.2d 1002; People v. Bennett, 132 Cal.App.2d 569, 282 P.2d 590; People v. Daener, 96 Cal.App.2d 827, 216 P.2d 511.

Appellant was in sole command of Finance Clearing operations, surrounded only by those subservient to him. He knew that $123,000 worth of assets were added by Miss Clark to the corporate books upon the payment of a ridiculously petty consideration. He knew that they were incorporated into the records in a highly irregular fashion from a list prepared by Miss Clark on scratch paper. He supervised the inclusion of some of those accounts on the corporation records. He subsequently attempted to "wash" them out gradually by improperly juggling the accounts. He finally charged them off altogther while withholding the resultant deficit statements from his investors. He used the bloated balance sheets to encourage new investment. "So interrelated and harmonious were the operations of defendants as disclosed by the documents and the testimony * * * that * * * honest deduction could not but reasonably have inferred their conscious collaboration with a definite purpose." People v. Gordon, 71 Cal.App.2d 606, 627, 163 P.2d 110, 124.

[6, 7] It must be conceded that the above factual statement reveals a "prima facie" showing of a conspiracy between appellant and Clark and therefore justifies admission into evidence of an extrajudicial utterance of one conspirator to the prejudice of the other. People v. Steccone, 36 Cal.2d 234, 238, 223 P.2d 17; People v. Brown, 131 Cal.App.2d 643, 655, 281 P.2d 319; People v. Sica, 112 Cal.App.2d 574, 583, 247 P.2d 72. Two witnesses, Swinford and Ferrera, stated that Miss Clark admitted to them her preparation of the bogus accounts, and further that her activities had taken place under the knowing direction of appellant.

Grand Theft

Appellant was convicted also of cozening several investors out of substantial sums of money by means of false pretenses. Their investments were not returned.

Louis Q. Sims invested $9,000 in Finance Clearing after having been shown by appellant the fraudulently bloated April balance sheet. Appellant had not informed him that the Corporation Commissioner had issued a cease and desist order against the corporation. William Gloege parted with his money in reliance upon appellant's false assertions that the sums would be held in trust by a certified public accountant bonded for $100,000 and upon one or two of the false balance sheets shown to him. Also, he was not apprised of the action of the Commissioner. Otis Swinford was similarly defrauded. When he communicated

with the accountant to discover why he did not receive the July statement, appellant wrote him a letter falsely stating that appellant and the accountant had agreed upon as "continuous work sheet" method of keeping books and had not made a July statement and would not make periodic balances in the future.

E. L. Landgarten responded to a newspaper advertisement inserted by appellant on behalf of Finance Clearing. He was promised by appellant that his funds would be safe and that at all times they would be secured by fifty per cent in cash and seventy five per cent in automobile paper. The true balance sheets, minus the fictitious accounts, indicate that this promise was never kept. Appellant's dealings throughout the existence of Finance Clearing justify an inference that he never intended to live up to his promise.

Norman Jensen relied upon appellant's false representations that an investment in Finance Clearing was safer than in building and loan because the investment would be secured to 125 per cent of the money invested; that it would be backed by fifty per cent cash and 75 per cent paper; and that Mr. Jensen could get his money back upon demand. At no time was the victim informed of the cease and desist order.

Appellant was also convicted of the theft of $1,500 from Finance Clearing (Count VI). Miss Ferrera testified to the following events: By the time this transaction occurred she had discovered appellant's prior falsification of corporate records; she came to be in urgent need of $1,500; she was aware that appellant knew that she had discovered his misdeeds; she asked appellant while driving with him to the airport whether she might have a loan or an advance of the sum she needed; he told her to take a check from a pad of checks which he had pre-signed, make it out for $1,500 in favor of a fictitious payee, countersign it in her own name, indorse and cash it and enter the credit in the petty cash and miscellaneous account; she followed these instructions. The check was introduced into evidence.

[8] It is clear from the above account that Miss Ferrera was at least an accomplice to this misdeed. Her testimony was essential to the conviction of appellant on this charge. Therefore, corroboration must be found for her recital of such events. Pen.Code, § 1111. "The statutory requirement of corroboration is based primarily upon the fact that experience has shown that the evidence of an accomplice should be viewed with care, caution and suspicion because it comes from a tainted source and is often given in the hope or expectation of leniency or immunity." People v. Wallin, 32 Cal.2d 803, 808, 197 P.2d 734, 737; People v. Robinson, 43 Cal.2d 132, 141, 271 P.2d 865; and see generally re the distrust to be afforded the testimony of an accomplice, People v. Dail, 22 Cal.2d 642, 653 et seq., 140 P.2d 828. The instant situation is perfect for the application of this salutary policy. Although every physical act necessary to this crime was admittedly accomplished by Miss Ferrera, she was not prosecuted.

[9] The quantum of evidence required to corroborate the testimony of an accomplice has been detailed repeatedly by the courts, e.g. People v. Morris, 115 Cal.App. 2d 312, 316, 252 P.2d 36, usually for the purpose of pointing out how minimal it may be and yet suffice. However, as recently and workably stated, the corroboration is sufficient if it tends to connect the defendant with the commission of the crime in such a way as may reasonably satisfy the jury that the witness who must be corroborated is telling the truth. People v. MacEwing, 45 Cal.2d 218, 224, 288 P.2d 257. The attorney general offers the following independent items of evidence to connect appellant with the theft:

(1) Appellant's signature on the check as a drawer along with Ferrera is a signature upon an incriminating document, a fact which has been held sufficient corroboration. People v. Morris, supra. However,

the witness' own testimony established that appellant was not even present when the check was prepared and that Ferrera used a check from a pad of checks pre-signed by him. In this light, how can it be said that his signature in any way "connected defendant with the commission of the crime" as required by the MacEwing case? We must rely wholly upon Miss Ferrera's unsupported word that appellant *told* her to use that pre-signed check.

(2) Evidence was introduced to prove that appellant had diverted corporate funds to other than corporate uses upon other occasions. For example, appellant "loaned" funds belonging to the corporation to Miss Clark for her use in acquiring a collection agency, evidently never intending to seek repayment. Also, he used Finance Clearing funds to purchase an expensive yacht after chartering it for a private junket to Mexico. The yacht was subsequently transferred without payment of consideration to a Nevada corporation acquired during the mushrooming expansion of the activities of Finance Clearing. The reason given for the transfer was to avoid (a) attachments of the corporation's properties and (b) the effect of the cease and desist order which had been levied against Finance Clearing.

[10, 11] Proof that a defendant committed other recent and similar offenses tending to show a consistent plan or method of misconduct is admissible to prove the particular crime charged. People v. Thorne, 10 Cal.2d 705, 708, 76 P.2d 491. Such evidence may corroborate the testimony of an accomplice. People v. Gallardo, 41 Cal.2d 57, 64, 257 P.2d 29; People v. Solano, 48 Cal.App.2d 126, 130, 119 P.2d 381. However, it might well be said that when a situation exists as in this case where one out of several guilty parties is caught in one or two transgressions, caution should be exercised in allowing those transgressions to justify the unloading by his confederates of their wrongdoing upon his head in exchange for leniency. Certainly the past misdeeds must unfold some characteristic technique or *modus operandi* before they "connect the defendant with the commission of the crime." See People v. Gallardo, supra [41 Cal.2d 57, 257 P.2d 32]. The other acts proved here establish merely that appellant was loose with corporate funds; none of the other transactions show any marked similarity to one another or to the Ferrera transaction. The transfer of the funds to Miss Clark was recorded as a loan. The yacht was purchased without any deception in books of Finance Clearing. Other than the fact that these instances disclose appellant's general misconduct, nothing connects appellant with this crime save the testimony of Miss Ferrera that he directed her actions. Thus, the judgment of conviction under Count VI must be reversed.

Falsification of Corporate Records

"Every * * * agent * * * of any corporation * * * who, with intent to defraud * * * falsifies any of the books, papers, writings, or securities belonging to the corporation, or makes or concurs in making any false entries, or omits or concurs in omitting to make any material entry in any book of accounts or other record or document kept by the corporation is guilty of a public offense." Corp.C.A. § 3020(b).

Counts VIII and IX of the information deal with the falsification of corporate records by transmittal to the accountant of the purchase of the fictitious E. J. Grau & Son and Utter-McKinley accounts, respectively. The evidence recited under the conspiracy count, supra, suffices to render appellant an accomplice of Miss Clark in the falsification of the accounts receivable with intent to inflate the financial statements of the corporation and thereby defraud future investors.

Count VII involves the entry by Ferrera of the $1,500 check prepared as a gift or "bonus" to her in the "petty cash, furniture, fixtures, and miscellaneous" account at the direction of appellant. This matter has likewise been discussed above under the heading "Grand Theft" (Count VI).

For the same reasons there presented, this count must be reversed.

Denial of the Right to Counsel?

[12] Appellant's former counsel chose, with the consent of his client, to submit the case on the preliminary transcript with very little additional evidence presented by the defense to the trial court. Appellant now claims that the submission of a case as complex as this upon the preliminary transcript constituted such gross neglect on the part of his attorney as effectively to deprive him of the right to counsel. Three answers to this contention are: (1) An abundance of case law holds that, under ordinary circumstances, an accused may not complain for the first time on appeal of the inept conduct of trial counsel of his own choosing. People v. Daniels, 145 Cal. App.2d 615, 302 P.2d 831; People v. Hood, 141 Cal.App.2d 585, 587–590, 297 P. 2d 52. (2) Submission on the preliminary transcript may have been the wisest course under the circumstances. If appellant had no true defense to present, he was entitled to avail himself of his right to have the People prove him guilty beyond a reasonable doubt. The prosecution's case may appear much less convincing in a "cold" transcript than when unfolded before a trial judge. (3) The nature of appellant's crimes indicates that he is not an "ignorant" defendant likely to remain still while his counsel fails to present a *bona fide* defense.

[13] Although the wisdom of submitting cases on preliminary transcripts has been seriously questioned, e.g. People v. Stinchcomb, 92 Cal.App.2d 741, 743–744, 208 P.2d 396, it cannot be said that such practice denies the right of the accused to counsel where with full knowledge of the consequences he allows his trial so to be conducted.

The judgment of conviction on Counts VI and VII of the information is reversed.

In all other respects, the judgment is affirmed.

FOX and ASHBURN, JJ., concur.

WRATHER–ALVAREZ BROADCASTING, Inc., a corporation, and Harold Keen, Petitioners,

v.

John A. HEWICKER, Judge of the Superior Court in and for the County of San Diego, State of California, Respondent.

Civ. 5472.

District Court of Appeal, Fourth District, California.

Jan. 10, 1957.

Rehearing Denied Jan. 22, 1957.

Hearing Denied March 5, 1957.

Television news reporter and television broadcasting company brought mandamus proceeding against the judge of the Superior Court in and for the County of San Diego, John A. Hewicker, J., to compel the judge to allow the reporter and his shorthand secretary to take shorthand notes of the testimony of witnesses at trial of kidnapping case. The District Court of Appeal held that reporter and his secretary were authorized at any public hearing in court where they were rightfully in attendance to take such notes as they might desire concerning the proceedings in any form selected by them, so long as they did not interfere with the orderly conduct of the proceedings before the court or its officers.

Writ issued.

1. Mandamus ⇐10

Mandamus is an appropriate remedy for the enforcement of a civil right.

2. Mandamus ⇐61

Mandamus was an appropriate remedy for television news reporter and television broadcasting company to compel judge of the Superior Court to permit reporter to take a shorthand secretary with him to Superior Court during trial of kidnapping case to take down testimony of witnesses for use by reporter on television news program.

3. Constitutional Law ⇐90

Right of freedom of speech and press is not subject to restraints previous to

publication or censorship, though the speaker shall be held accountable for what he says or prints.

4. Contempt ⇐9

A newspaper or a reporter thereof may not be punished for contempt for reporting the truth of testimony given in a pending trial.

5. Contempt ⇐8

Publications by the press may not be punished as contempt unless they interfere with and obstruct the orderly administration of justice.

6. Constitutional Law ⇐90

The protection given to freedom of speech and press is extended to the medium of television, since there is no distinction between various methods of communications.

7. Constitutional Law ⇐90

Television news reporter and his shorthand secretary were authorized at any public hearing in court where they were rightfully in attendance to take such notes as they might desire concerning the proceedings in any form selected by them, so long as they did not interfere with the orderly conduct of the proceedings before the court or its officers. West's Ann.Code Civ.Proc., §§ 128, 1209.

Luce, Forward, Kunzel & Scripps, by Fred Kunzel, San Diego, for petitioners.

James Don Keller, Dist. Atty., and Claude B. Brown, Deputy Dist. Atty., San Diego, for respondent.

PER CURIAM.

Petitioner Wrather-Alvarez Broadcasting, Inc. operates a television broadcasting station in San Diego, and through its agent, petitioner Harold Keen, broadcasts daily news programs. Respondent judge is engaged in the trial of a certain kidnaping case attracting considerable public attention. Petitioner Keen alleges that in attending the court proceedings and reporting the news he is unable to take longhand notes rapidly enough to accurately set forth the witnesses' testimony; that on December 21, 1956, in order to assist him, he took his assistant, a shorthand secretary, with him to said court for the purpose of taking shorthand notes of certain of the proceedings so he could make an accurate broadcast of the testimony; that said judge stated to him in open court that he would not allow Harold Keen or his assistant to take shorthand notes in the courtroom; that the trial judge announced there was only one official reporter for that court and that there would be no other reporter sitting around taking shorthand notes; that if the assistant was an authorized representative of the press in her own right, designated by some newspaper in San Diego, he would let her report but that she could not do it for some other reporter; that if Harold Keen wanted a transcript of any testimony he would have to obtain it from his reporter, at the reporter's convenience, and at his own expense; and that if Mr. Keen disagreed with him he suggested that Keen obtain a writ of mandamus. Petitioner then alleges he was unable to obtain a reporter's transcript in time for his broadcast because of press of business of the reporter.

This writ is sought to compel the trial judge to allow said Harold Keen and his assistant to take shorthand notes of the testimony of such witnesses as he may desire for use in his broadcasting program. An order to show cause was issued. A demurrer to the petition was interposed and an answer was filed admitting some of these allegations, denying others, and alleging that Harold Keen was interviewing, on his program, certain of the witnesses who had testified at the trial and who had been excused, and the judge thought this might well influence the jurors if they heard it and that this might interfere with the judicial process of his court; that he had the inherent power to preclude any one in his courtroom from taking shorthand notes of the proceedings where there was an official reporter present.

[1, 2] Argument is made that the form of writ sought should have been a writ of prohibition rather than mandamus. Mandamus is the form of writ invited by the respondent court and it is an appropriate remedy for the enforcement of a civil right. Stone v. Board of Directors of City of Pasadena, 47 Cal.App.2d 749, 118 P.2d 866; Pacific Engine & Machine Works v. Superior Court, 132 Cal.App.2d 739, 745, 282 P.2d 937; Hays v. Superior Court, 16 Cal.2d 260, 264, 105 P.2d 975.

[3, 4] It is a well-known rule of law that the right of freedom of speech and press is not subject to restraints previous to publication or censorship, although the speaker shall be held accountable for what he says or prints. Dailey v. Superior Court, 112 Cal. 94, 97, 44 P. 458, 32 L.R.A. 273; Near v. State of Minnesota ex rel. Olson, 283 U.S. 697, 51 S.Ct. 625, 75 L.Ed. 1357; 11 Am.Jur. pp. 1110–1111, sec. 320. A newspaper or a reporter thereof may not be punished for contempt for reporting the truth of testimony given in a pending trial. McClatchy v. Superior Court, 119 Cal. 413, 51 P. 696, 39 L.R.A. 691.

[5, 6] In Craig v. Harney, 331 U.S. 367, 67 S.Ct. 1249, 1254, 91 L.Ed. 1546, it was said:

> "A trial is a public event. What transpires in the court room is public property. * * * Those who see and hear what transpired can report it with impunity. There is no special perquisite of the judiciary which enables it, as distinguished from other institutions of democratic government, to suppress, edit, or censor events which transpire [in] proceedings before it."

Publications by the press may not be punished as contempt until they interfere with and obstruct the orderly administration of justice. In re Shuler, 210 Cal. 377, 292 P. 481; Turkington v. Municipal Court, 85 Cal.App.2d 631, 193 P.2d 795. The protection given to the freedom of speech and press is extended to the medium of television, there being no distinction between the various methods of communication. Public Utilities Commission v. Pollak, 343 U.S. 451, 72 S.Ct. 813, 96 L.Ed. 1068; Superior Films, Inc., v. Department of Education, 346 U.S. 587, 74 S.Ct. 286, 98 L.Ed. 329; Joseph Burstyn, Inc., v. Wilson, 343 U.S. 495, 72 S.Ct. 777, 96 L.Ed. 1098.

Under section 128 of the Code of Civil Procedure every court shall have power to preserve and enforce order in its immediate presence and to control, in furtherance of justice, the conduct of its ministerial officers and of all other persons in any manner connected with the judicial proceedings before it, in every matter pertaining thereto. Section 1209 thereof describes the acts or omissions constituting contempt such as "1. Disorderly, contemptuous, or insolent behavior toward the judge while holding the court, tending to interrupt the due course of a trial or other judicial proceeding; 2. A breach of the peace, boisterous conduct, or violent disturbance, tending to interrupt the due course of a trial or other judicial proceedings"; and "No speech or publication reflecting upon or concerning any court or any officer thereof shall be treated or punished as a contempt of such court unless made in the immediate presence of such court while in session and in such a manner as to actually interfere with its proceedings." Section 1211 thereof provides for summary punishment for contempt in the court's presence and also for a contempt not committed in the court's presence.

Kirstowsky v. Superior Court, 143 Cal. App.2d 745, 300 P.2d 163, involved the exclusion of the members of the press and public from the courtroom during a criminal trial. A writ of mandate was employed to test the question. It was there said that under sections 124–125 of the Code of Civil Procedure the sittings of every court of justice shall be public, with certain exceptions noted; that it applied not only to defendant but that it is a matter of public interest and concern; that the people are interested in knowing, and have

the right to know how their servants, the judge, county attorney, sheriff and clerk conduct the public business; that the right of the public to attend sessions of the court is too well established by the common law and by our statutory law to permit the exclusion of the public except in cases provided for by statutes, or under circumstances which make it a proper exercise of the court's discretion in order to accord the defendant a fair trial. There, the exclusion of the public was requested by the defendant because of his personal emotional disturbance while testifying, and this request was granted by the court. The appellate court, in mandamus proceeding, under the circumstances, held that the public and press could be rightfully excluded during the hearing of defendant's testimony only, but could not be excluded during the entire trial. It was also held that members of the press are in the same position as other members of the public, and have no greater right to be present at court hearings than any other member of the public.

In so far as the facts before us are concerned, we will only consider the question of the right of petitioner or his assistant while in the courtroom, to make shorthand notes of the proceedings of the court for whatever purpose they may desire, so long as it does not then and there interfere with the orderly conduct of the proceedings before the court or its officers. What petitioners may do with said notes or the manner in which they may use them afterwards is not before us for consideration. That would be a separate proceeding and would not amount to a contempt in the presence of the court.

The court may, within reason, regulate the conduct of members of the press or the public while they are in the courtroom. Code Civ.Proc. § 128. It does not appear that the trial judge predicated his order in the instant case upon the ground that the action of the petitioner in taking shorthand notes in the courtroom was disturbing the jury, the court or the orderly conduct of the proceedings. The undisputed showing indicates otherwise.

[7] We conclude that petitioner or his assistant is authorized at any public hearing in the court where he is rightfully in attendance to take such notes as he may desire concerning the proceedings in any form selected by him so long as it does not interfere with the orderly conduct of the proceedings before the court or its officers. People v. Hartman, 103 Cal. 242, 37 P. 153; People v. Byrnes, 84 Cal.App. 2d 72, 190 P.2d 290; People v. Kerrigan, 73 Cal. 222, 14 P. 849; People v. Letoile, 31 Cal.App. 166, 159 P. 1057.

Let a writ issue as prayed for, subject to the limitation herein expressed.

On Petition for Rehearing

PER CURIAM.

On petition for rehearing it is pointed out by the respondent Judge that Harold Keen, personally, was not denied the privilege of taking notes in the courtroom, but that his order was directed solely to Keen's assistant who was there for that purpose. With this clarification, the petition for a rehearing is denied.



147 Cal.App.2d 500

Clarence CLARK and Margaret L. Clark, husband and wife, Plaintiffs, Cross-Defendants, Appellants and Respondents,

v.

Carl F. REDLICH and Lura Metta Redlich, husband and wife, Defendants, Cross-Complainants and Appellants,

R. L. Seal and Dorsie V. Seal, husband and wife, Defendants, Cross-Defendants and Respondents.

Civ. 5299.

District Court of Appeal, Fourth District, California.

Jan. 10, 1957.

Action for declaratory relief that plaintiff had an easement by grant over the property of defendants and an easement by prescription over other property wherein the plaintiff obtained a temporary injunction enjoining interference with the use of the roadway. The defendants cross-complained, seeking to acquire title to their property. From a judgment in the Supe-

rior Court of Orange County, Raymond Thompson, J., both plaintiffs and defendants appealed. The District Court of Appeal, Coughlin, J. pro tem., held that the evidence supported the implied finding that plaintiff's use of a roadway was not adverse or under claim or right; that award of damages because of the preliminary injunction was unauthorized; that whether fencing or cultivation of the whole of a servient tract was adverse to the rights of the plaintiff under easement or whether implied permission was given was a question of fact; and that evidence sustained implied findings that defendants' use of servient tenement was not adverse to exercise of plaintiffs' easement.

Affirmed in part and reversed in part.

1. Easements ⇐36(3)

In action to enjoin defendants from preventing the plaintiffs' use of a roadway over the defendants' property, evidence supported implied findings that plaintiffs' use of the roadway was not adverse or under claim of right but was permissive and with consent of the owner.

2. Appeal and Error ⇐1010(1)

Whether plaintiffs' use of a roadway over the defendants' property was permissive or adverse were questions of fact, and if there was any substantial evidence to support the judgment it must be affirmed.

3. Appeal and Error ⇐931(1), 989

On appeal, an appellate court will view the evidence in light most favorable to the respondent and not weigh evidence and will indulge all intendments which favor sustaining the finding of the trier of fact.

4. Easements ⇐36(3)

Where plaintiff tried to buy a right of way for the road over the defendants' property, such an offer was a recognition of the prior owners' title and disproved any claim that the use of the roadway was under a claim of right.

5. Easements ⇐8(2)

Where use of a way by a neighbor is by the express or implied permission of the owner, the continued use is not adverse and cannot ripen into a prescriptive right.

6. Easements ⇐37

In action to enjoin the obstruction of a way over defendants' land, whether the use of the way was adverse under claim of right or a mere matter of neighborly accommodation was a question of fact.

7. Appeal and Error ⇐172(1)

Where plaintiff sought declaratory relief that plaintiff had an easement for the roadway by prescription over the defendants' land and no mention was made of an irrevocable license either in the pleadings or in the findings, such an issue could not be raised for the first time on appeal.

8. Pleading ⇐387

A plaintiff must recover if at all upon the cause of action set out in the complaint and not upon some other which may be developed by the proofs.

9. Injunction ⇐260

Damages arising out of the issuance of a temporary injunction may be recovered only in an independent action brought for that purpose and not by prayer in answer.

10. Injunction ⇐260

A judgment awarding damages because of preliminary injunction issued in a roadway dispute was unauthorized on the ground that the finding of damages was not based upon any pleadings where only claim therefor was in answer of defendant.

11. Appeal and Error ⇐931(1), 989

On appeal, when the evidence is contradictory, conflicting interpretations are presented thereby or conflicting inferences may be drawn therefrom, that favoring the judgment must be accepted as true and that which is unfavorable must be discarded as not having had sufficient clarity for acceptance by the trial court.

12. Easements ⇐36(3)

In suit to enjoin the obstruction of an easement of way over adjoining land owned by defendant which had been created by a written agreement between prior owners of property but never used, evidence did not

establish that right to use way had been lost by nonuser in view that another roadway over other property was available for use by plaintiffs and where considerable grading would have been necessary to put the instant way in condition for travel.

13. Adverse Possession ⇐31, 68

The essential elements of adverse possession are a claim of right or putting the real owners on notice of the adverse claim.

14. Easements ⇐32

To terminate an easement, the use of the servient tenement must be such as is adverse to the exercise of the easement and under circumstances imparting reasonable notice of the adverse nature thereof.

15. Easements ⇐5, 32

An easement cannot be acquired or extinguished by adverse use unless a party whose rights are affected thereby has knowledge of the adverse nature of such use, and such knowledge may be either actual or constructive resulting from notice, either express or implied.

16. Easements ⇐32

Although certain uses of a servient tenement by their nature may constitute notice of an adverse claim, other uses thereof may appear to be only the reasonable exercise of proprietary rights and would not be the basis for an implication of such notice.

17. Easements ⇐32

In action to enjoin obstruction of an easement of way over adjoining land which was created by a written agreement between prior owners of the properties but never used, fencing of the servient property was not a use necessarily adverse to the exercise of the easement nor conclusive notice of such hostile claim, where servient owner gave as an excuse for not opening up the fence that the land was under water.

18. Easements ⇐37

In action to enjoin obstruction of a way over adjoining land, which easement was created by written agreement between prior owners, whether fencing or cultivation of the whole of the servient property was adverse to the rights of the dominant owner under the easement or with his implied permission was a question of fact.

19. Easements ⇐36(3)

In action to enjoin obstruction of an easement of way over lands of defendant created by written agreement between prior owners of the properties, evidence sustained finding that plaintiffs did not have notice or knowledge of the adverse nature of the use by the servient owners.

Preston Turner, Anaheim, for plaintiffs-appellants Clark.

Wm. P. Webb and Webb & Lae, Anaheim, for defendants-appellants Redlich.

Head, Jacobs, Corfman & Jacobs, Santa Ana, for respondents Seal.

COUGHLIN, Justice pro tem.

In 1945, the plaintiffs Clark purchased a parcel of land, near the intersection of Lincoln Avenue and Hanson Street in Orange County, together with an easement of ingress and egress over adjoining land owned by the defendants Redlich. This easement had been created in 1929 by a written agreement between the prior owners of these properties, but never has been used. Instead, the Clarks have used a lane or road, originally described as a "two-wheel wagon track", along the southerly boundary of the land now owned by the defendants Seal.

The Clarks built two houses upon their property; the first in 1946 and the second in 1953. They lived in the first house; the second house was occupied by tenants. All of the people living in these houses used the road over the Seal property as their means of ingress and egress.

In 1948 or 1949, preliminary to straightening out this road, Clark endeavored to purchase a right of way for this purpose from the prior owner. In discussing this matter with a Mr. McDowell, the agent for this owner, Clark said that he had a right of way to Lincoln Avenue but wanted one to Hanson Street. Although unsuccessful in his attempt to buy a right of way Clark

was given permission to use the road temporarily, until the property was sold, but was advised that the owner anticipated selling the property and would not give him a perpetual right of way.

In 1952, Clark endeavored to get a Mr. Mackay, who then owned the property, to sell him a right of way for the road, or permit the county to put through a street. Clark told Mackay that "he didn't claim any way over the road, that he wasn't making any claim on it as being his." Mackay was unwilling to sell a right of way; permit the roadway to be paved; or deed a "full width street off of one side of the property" to the county. However, he told Clark that he would not work a hardship on him, but advised him "if he had any other way he could get out of there, to try to make some arrangement because he did figure on selling." Thereafter, Clark continued to use the road, grading it about twice a year, until the property was purchased by the Seals who built a house thereon, and constructed a fence enclosing it which prevented further use of the roadway.

In the meantime, little had been done to put through a road along the easement over the Redlich property. From 1946 to 1948, Redlich had row-cropped his land, including the easement; in 1948 sowed it to permanent pasture; and thereafter fencing of the entire property was completed. In 1947, and again in 1949, Mr. Clark asked Mr. Redlich to "open up" but could get no answer.

After the construction of the Seal fence the Clarks filed an action for declaratory relief; alleged that they had an easement by grant over the Redlich property and an easement by prescription over the Seal property; and obtained a temporary injunction restraining Mr. and Mrs. Seal from preventing the Clarks' use of the roadway in question. The Redlichs answered and cross-complained seeking to quiet title to their property. The Seals answered and prayed that they be awarded damages incurred as a result of the temporary injunction and the use of their land thereunder by the plaintiffs.

The trial court found that the Clarks had an easement over the Redlich property; did not have an easement over the Seal property; and that Mr. and Mrs. Seal sustained damages in the sum of $200 resulting from the issuance of the preliminary injunction. Judgment was entered accordingly, from which both the plaintiffs Clark and the defendants Redlich have appealed.

The Clarks contend that the judgment in favor of the defendants Seal was in error, as the facts establish that they acquired an easement by prescription over the Seal property, arising out of the use of the roadway in question; that, if they did not acquire such an easement, at least, they obtained an irrevocable license; and that the award of damages was improper.

[1–3] Contrary to plaintiffs' contention, the evidence fully supports the implied finding of the trial court that their use of the roadway was not adverse or under claim of right, but was permissive and with consent of the owner. These are questions of fact and "if there is any substantial evidence to support the judgment, it must be affirmed." O'Banion v. Borba, 32 Cal.2d 145, 147, 195 P.2d 10, 12. Plaintiffs' argument is based on a statement of facts which ignores the general rule that, on appeal an appellate court will "(a) view the evidence in the light most favorable to the respondent (b) not weigh the evidence", and "(c) indulge all intendments which favor sustaining the finding of the trier of fact, * * *". In re Estate of Isenberg, 63 Cal.App.2d 214, 216, 146 P.2d 424, 425.

[4, 5] In 1948 or 1949, and again in 1952, Clark tried to buy a right of way for the road in question. Such an offer was a recognition of the prior owners' title and disproves any contention that the use of the roadway was under a claim of right. Central Pac. R. Co. v. Mead, 63 Cal. 112. Although refusing to sell a right of way, the former owners gave plaintiffs permission to use the road. "[W]here the use of a way by a neighbor is by the express or implied permission of the owner, the continued use is not adverse and cannot ripen

into a prescriptive right." Jones v. Tierney-Sinclair, 71 Cal.App.2d 366, 370, 162 P.2d 669, 671. Whether the use of a roadway is adverse and under a claim of right or a "mere matter of neighborly accommodation" is a question of fact to be determined in the light of all of the circumstances disclosed by the evidence. O'Banion v. Borba, 32 Cal.2d 145, 150, 195 P.2d 10.

The plaintiffs rely on the cases of Yuba Consolidated Goldfields v. Hilton, 16 Cal. App. 228, 116 P. 712, 715; Crawford v. Lambert, 136 Cal.App. 617, 29 P.2d 428, and Crossett v. Souza, 3 Cal.2d 721, 45 P.2d 970, in which reference is made to a presumption, arising from long continuous use, that such a use was adverse, under claim of right, and with knowledge of such claim by the owners of the property involved. Each of these cases sustain a finding of adverse possession made by the trial court. In O'Banion v. Borba, 32 Cal.2d 145, 150, 195 P.2d 10, 13, the court said: "While many of the cases mention presumptions, the problem actually discussed therein is the sufficiency of the evidence in the light of all the circumstances disclosed." In the instant case, there is ample evidence to support the finding of the trial court. The cited cases are not authority for plaintiffs' position.

[6, 7] The Clarks also contend that, even though they may not have acquired a right of way over the Seal property by prescription, they did obtain an irrevocable license to use the roadway. The complaint, which is for declaratory relief, sets forth only a controversy between the plaintiffs Clark and the defendants Seal over an alleged "easement by prescription". The prayer of this complaint asks for judgment declaring whether the plaintiffs have such an "easement by prescription". No mention is made of an irrevocable license either in the pleadings, or in the findings of the trial court. Such an issue may not be raised for the first time on appeal. Eger v. May Department Stores, 120 Cal.App.2d 554, 561, 261 P.2d 281; Stinson v. Blodget, 123 Cal. App.2d 390, 391, 266 P.2d 947. "A plaintiff must recover, if at all, upon the cause of action set out in the complaint, and not upon some other which may be developed by the proofs." Mondran v. Goux, 51 Cal. 151, 153; Reed v. Norton, 99 Cal. 617, 619, 34 P. 333; Schirmer v. Drexler, 134 Cal. 134, 139, 66 P. 180.

[8, 9] The trial court found that the defendants Seal "have been damaged in the sum of $200 by virtue of the preliminary injunction heretofore ordered at the request of the plaintiffs", and awarded judgment accordingly. This finding was not based upon any pleading. The only mention of such a matter is in the prayer to the answer of the defendants Seal which asks for damages in an undisclosed amount, incurred as a result of the issuance of the preliminary injunction. The issue of such damages was not properly before the trial court; was not a proper subject for consideration by that court; and the judgment awarding such was erroneous. Damages arising out of the issuance of a temporary injunction may be recovered, if at all, only in an independent action brought for that purpose. People v. Hawley, 207 Cal. 395, 407, 279 P. 136.

The defendants Redlich appeal from that part of the judgment declaring the right of plaintiffs to use the easement described in the written agreement executed in 1929. These defendants contend that this easement was lost by adverse possession; was extinguished by their use of the servient tenement, for the statutory period governing adverse possession, in a manner adverse to the exercise of the easement, citing the case of Glatts v. Henson, 31 Cal.2d 368, 370, 188 P.2d 745. In the cited case the court held that the partial occupancy of an easement by permanent buildings constituted an adverse possession which extinguished that part of the easement so occupied.

[10] In the case at bar, it is argued that the enclosure of the whole of the servient tenement, including that part subject to the easement, by a fence, for over six years prior to the filing of the complaint, its use

as a pasture during that time and its prior use for farming purposes, constituted a use adverse to the exercise of the easement. This conclusion, it is claimed, is supported by Clark's nonuser of the easement. Reliance also is placed on the testimony of the Redlichs that, in conversations between themselves and Clark in 1947 and 1949, they refused to permit him to open up the easement. This testimony is contradicted by the testimony of Clark. Conflicting interpretations thereof and conflicting inferences which might be drawn therefrom, also are presented. On appeal, when the evidence is contradictory, conflicting interpretations are presented thereby, or conflicting inferences may be drawn therefrom, that which favors the judgment must be accepted as true, and that which is unfavorable must be discarded as not having had sufficient verity for acceptance by the trial court. In re Estate of Teel, 25 Cal.2d 520, 524, 154 P.2d 384; Crawford v. Southern Pacific Co., 3 Cal.2d 427, 429, 45 P.2d 183; Tobola v. Wholey, 75 Cal.App.2d 351, 355, 170 P.2d 952.

Clark testified that, in 1947 he asked Redlich to open up and "I couldn't get no answer". "He just didn't open up, that's all"; "I don't say he did refuse but he didn't open up"; and that in 1949 "I asked him to open up again." Clark was asked, "What happened then?" and replied: "No results." When asked "And did he refuse?" he answered: "I didn't get no results." To the inquiry, "What do you mean by that?" Clark said "he did not open up."

[11] Redlich testified that, at the 1947 conversation with Clark, "I just told him he couldn't go through, its all fenced" and "* * * I just said * * * I have got cattle in it and it's impossible to go through", and that at the 1949 conversation, "I said 'it is all under water in the first place, you couldn't drive through, you would have to have a boat to get through.'" It appears that a part of the property is in a flood area and, at times, under water. This testimony does not establish the assertion of an adverse use under claim of right.

Clark said he used the right of way to Hanson Street over the Seal property because there was a trail there, whereas there was no road or trail across the Redlich place and it would take a "lot" of grading to get over that property.

[12] The testimony concerning the conversations in question is not conclusive evidence that the Redlichs' use of the property subject to the easement was adverse, under claim of right or put the Clarks on notice of such a claim. These are essential elements of adverse possession. Furtado v. Taylor, 86 Cal.App.2d 346, 352, 194 P.2d 770.

The trial court was justified in rejecting the evidence of nonuser of the easement as proof of an adverse use. There was good reason for not using this easement in view of the fact that the roadway over the Seal property was available, whereas considerable grading would have been necessary to put the Redlich property in condition for travel. An easement by grant may not be lost by mere nonuser. Glatts v. Henson, 31 Cal.2d 368, 371, 188 P.2d 745; Furtado v. Taylor, 86 Cal.App.2d 346, 352, 194 P.2d 770. The effect, if any, of such nonuser, as a factor in accomplishing the extinguishment of an easement by adverse possession, involves the determination of a question of fact committed to the legal discretion of the trial court.

[13–16] Likewise, under the circumstances of this case, whether the fencing and cultivation of the servient estate constituted acts of adverse possession was a question of fact. To terminate an easement, the use of the servient tenement must be such as is adverse to the exercise of the easement, Glatts v. Henson, 31 Cal.2d 368, 371, 188 P.2d 745, and under circumstances which impart reasonable notice of the adverse nature thereof. Furtado v. Taylor, 86 Cal.App.2d 346, 352, 194 P.2d 770. An easement cannot be acquired or extinguished by adverse use unless the party whose rights are affected thereby has knowledge of the adverse nature of such use. This knowledge may be either actual

or constructive, resulting from notice either express or implied. O'Banion v. Borba, 32 Cal.2d 145, 195 P.2d 10; Clarke v. Clarke, 133 Cal. 667, 66 P. 10; Hibberd v. McCosker, 55 Cal.App. 568, 569, 203 P. 810. Although certain uses of a servient tenement by their very nature may constitute notice of an adverse claim, Glatts v. Henson, 31 Cal.2d 368, 371, 188 P.2d 745, other uses thereof may appear to be only the reasonable exercise of proprietary rights, and would not be the basis for an implication of such notice. Pabst v. Finmand, 190 Cal. 124, 129, 211 P. 11.

[17] Fencing the Redlich property was not a use necessarily adverse to the exercise of the Clark easement, nor conclusive notice of a hostile claim. Mattes v. Hall, 21 Cal.App. 552, 560, 132 P. 295; Mattes v. Hall, 28 Cal.App. 361, 365, 152 P. 436; Hibberd v. McCosker, 55 Cal.App. 568, 203 P. 810. Moreover, the effect of the fencing of the servient tenement as an act of hostility toward the continued existence of the easement, or the assertion of a claim of right was negatived by Redlich's giving an excuse for not opening up the fence, when he said that the land was under water and it would be necessary to get a boat to go through.

The acts of cultivation present a similar situation. The fact that the right of way was in pasturage did not prevent its use as a means of ingress and egress, nor was it conclusive evidence of a hostile act.

[18] Whether the fencing or cultivation of the whole of the Redlich property was adverse to the rights of Clark under the easement, or with his implied permission and indulgence, was a question of fact. O'Banion v. Borba, 32 Cal.2d 145, 147, 195 P.2d 10; Van Amersfoort v. Young, 105 Cal.App.2d 22, 232 P.2d 569; Storrow v. Green, 39 Cal.App. 123, 127, 178 P. 339.

[19] There is substantial evidence to sustain the implied findings of the trial court that the Redlichs' use of the servient tenement was not adverse to the exercise of the Clark easement; that such use was with the implied permission of the Clarks, and not under claim of right; and that the Clarks did not have notice or knowledge of the adverse nature of that use.

The judgment in favor of the plaintiffs and respondents Clark and against the defendants and appellants Redlich is affirmed: said respondents to recover from said appellants their costs incurred in the appeal taken by said appellants. That part of the judgment in favor of the defendants and respondents Seal and against the plaintiffs and appellants Clark awarding $200 damages is reversed, but in all other particulars is affirmed: said respondents to recover their costs on appeal from appellants Clark.

BARNARD, P. J., and MUSSELL, J., concur.



147 Cal.App.2d 491

The PEOPLE of the State of California, Plaintiff and Respondent,

v.

Joe VACA et al., Defendants,

Gilbert Lechuga, Defendant and Appellant.

Cr. 5547.

District Court of Appeal, Second District, Division 3, California.

Jan. 10, 1957.

Prosecution on three counts of forcible rape. The Superior Court of Los Angeles County, Joe Raycraft, J., entered a judgment of conviction, and the defendant appealed. The District Court of Appeal, Parker Wood, J., held that evidence supported conviction as against defendant's contention that prosecutrix' testimony was inherently improbable.

Affirmed.

1. Rape ⇐59(24)

In forcible rape prosecution, where accused admitted that he and another who

allegedly had sexual intercourse with prosecutrix were at automobile at same time, instruction relative to aiding and abetting was proper.

2. Rape ⇐51(4)

Evidence was sufficient to support conviction of forcible rape, as against defendant's contention that prosecutrix' testimony was inherently improbable.

Angelo L. Baldwin, Los Angeles, for appellant.

Edmund G. Brown, Atty. Gen., and Norman H. Sokolow, Deputy Atty. Gen., for respondent.

PARKER WOOD, Justice.

Defendants Lechuga, Joe Vaca and Jesse Barrera were convicted, in a jury trial, of three counts of forcible rape. Lechuga, 18 years of age, was committed to the Youth Authority. Lechuga appeals from the judgment and the order denying his motion for a new trial.

Appellant contends that the court erred in instructing the jury; and that the testimony of the prosecutrix was inherently improbable.

On March 4, 1955, about 8 p. m. Patricia, an unmarried girl 14 years of age, and her girl friend LaVeta went to a dance at a schoolhouse. While they and Eddie Alfaro, LaVeta's friend, were standing outside the schoolhouse, Donald Matheny, who was Patricia's friend, drove up in an automobile. Several Mexican boys were in the automobile with him. He asked Patricia to go with him. She declined, stating there were too many boys in the automobile. Then Donald drove away. Patricia asked Eddie where Donald had gone. About 9 p. m. Patricia, LaVeta and Eddie went away from the schoolhouse, in Eddie's automobile, and after driving about 15 minutes they arrived at a place in a field where a bonfire was to be started. Several boys were at that place. Eddie stopped his automobile near Donald's automobile. Eddie told Donald that Patricia wanted to talk to him. After Donald and Patricia had talked about 5 minutes, she entered Donald's automobile, which was a 2-door Buick, and he drove around the corner and parked. They sat in the automobile and talked about 10 minutes. Then "a bunch of Mexican boys got around the car." Patricia locked the door of the automobile, on the side where she was sitting. Donald got out of the automobile and talked, in Spanish, to the boys. Then Patricia got out, on the driver's side of the automobile. A boy asked her where she was going. She said she was going where LaVeta and Eddie were. Then the boys pushed her into the back seat of Donald's automobile. When she was pushed into the automobile there were three boys in the back seat and four boys in the front seat. Donald got into the driver's seat. She screamed, and they threw a coat over her head and tore and pulled her underclothing off. The automobile was driven a short distance, and then the coat was removed from her head. After the automobile was stopped, about 17 boys had sexual intercourse with her without her consent. She struggled, screamed and cried. Part of the time the coat was over her head. They struck her several times. Every time she screamed one of the boys would hit her. When she was screaming, Joe Vaca had hold of her leg. He had a needle and a bottle, and he told her that if she did not keep quiet he would shoot the needle in her leg.

Patricia testified that defendants Lechuga, Vaca and Barrera, and other boys by the names of Mugica, S. Alfaro and Villareal, were some of those who had sexual intercourse with her on said occasion. (Barrera and the three boys last referred to were charged, in another information, with forcible rape and the crime against nature. The two causes were consolidated for trial and were tried together.) She also testified that Lechuga (appellant) "is the one that kept hitting me. He hit me in the temple once with his fist and kept slapping me around." After being at that place approximately two hours, Donald took her, in his automobile, to Eddie's auto-

mobile. Eddie and LaVeta took her to her home, arriving there about midnight. On the way home she told LaVeta and Eddie what had happened. When she arrived home she did not tell her mother what had happened, because the boys had threatened her. The next morning she told her mother, and they went to a physician who examined Patricia. Patricia testified that, prior to said March 4, she had not had sexual intercourse.

Dr. Julien, the physician who examined Patricia, testified that he examined her on March 5, 1955; he found contusions on her temple, the back of her head, her chest, arms, thigh, and knee; he found a laceration on her lip; he found multiple scratches on her buttocks, thighs and hands; there were traumatic injuries to her private parts; in his opinion the hymen lacerations were not more than 12 to 24 hours old, and she was a virgin prior to those lacerations.

A deputy sheriff testified that, in a conversation with Lechuga on March 8, 1955, Lechuga said that he had not been present at the scene of the alleged occurrences and he did not know anything about the affair; the deputy (witness) told Lechuga that other persons involved in the offense had stated that Lechuga was there, and that Joe Vaca had said that he and Lechuga had walked together to Donald Matheny's car; that Lechuga then said that he had been on one side of the car looking through the windows at the time Patricia had an act of intercourse with Mugica and Villareal; that Lechuga denied that he had intercourse with her.

Defendant Lechuga testified that about 10:30 o'clock on the evening involved here he and Joe Vaca arrived, by automobile, at Hawaiian Gardens (the area where there was to be a bonfire); they parked the automobile, walked into a field where there was another automobile, and looked in the automobile and saw who was there; he (Lechuga) was on the driver's side of the automobile when he was looking to see what was going on; he saw Donald Matheny and Gaxiola in the front seat, and a girl and Mugica in the back seat; Lechuga thought Mugica was having sexual intercourse with the girl; Lechuga and Vaca stayed there about half a minute and then went home.

Joe Vaca testified in substance the same as Lechuga testified.

Jesse Vaca (brother of defendant Joe Vaca) testified that he was in Matheny's car about 45 minutes; he did not see Lechuga at Matheny's car.

Gaxiola and Johnny Barrera (brother of defendant Jesse Barrera) testified that they did not see Lechuga there.

[1] Appellant contends that the court erred in giving the following instruction: "In this connection you are instructed that, if an act of forcible rape or the infamous crime against nature is in progress and if one man is the actual perpetrator of either of those crimes against a female person, any other confederate of the perpetrator who, knowingly and with criminal intent, and in concert with the perpetrator, stands by, without any show of resentment against the perpetrator of the acts and without any show of concern for the female person, and who stands by in sympathy with, or in encouragement of such act of rape or crime against nature, or who keeps watch against intrusion, each such confederate has aided and abetted the actual perpetrator and is therefore a principal in such crime. Thus, if you find that, in this manner, any defendant in this case aided and abetted any other defendant in the commission of one or more of the acts alleged, you may find him guilty as a principal." Appellant argues to the effect that the instruction was not applicable to the facts involving appellant; there was evidence that appellant was not present; and there was no evidence that he aided or abetted in the commission of a crime. In the present case a group of boys surrounded the automobile in which Patricia was sitting with Matheny, and then the boys began to commit acts of intercourse upon her. She testified that appellant, Vaca, Barrera, Mugica, S. Alfaro, Villareal, and several other boys had intercourse with her; all the boys hit her, and every time she screamed one of the boys

would hit her; appellant hit her in the temple with his fist and he is the one who kept hitting her and slapping her around; all the boys threatened her if she told what happened. Appellant admitted that he and Vaca were at the automobile at the same time. It was not error to give the instruction. See People v. Mummert, 57 Cal.App.2d 849, 855, 135 P.2d 665; and People v. Griffin, 106 Cal.App.2d 531, 536, 235 P.2d 424.

[2] Appellant also contends that the testimony of Patricia was inherently improbable. After stating this contention appellant quotes various portions of the testimony of Patricia, and he refers to portions of the testimony of Jesse Barrera, Jesse Vaca, Eddie Alfaro, and the physician. Appellant does not present any argument with respect to those quotations or references. One of such quotations from the testimony of Patricia is: "The only one I see, the only one I can really identify is the one in the purple shirt." The person in the purple shirt, so referred to, was defendant S. Alfaro. Although appellant has not presented any argument with respect to that quotation, he apparently intended that the quotation should be understood to mean that Patricia testified that the only one she could identify, among those who had intercourse with her, was S. Alfaro. The quotation should not be so understood. That testimony, so quoted, related to whether or not she observed a defendant at the bonfire (before the acts of intercourse). The reporter's transcript shows that counsel for Jesse Barrera, in cross-examining Patricia, asked her if she had seen Barrera "around the bonfire before that [referring to intercourse with him]?" She replied, "No." While she was answering a question as to when she first saw Barrera, she was interrupted by counsel. Then the following occurred:

"The Court: It sounded like you started to answer one and were interrupted. Had you finished your answer?

"The Witness: He asked me if I seen him around the bonfire.

"The Court: Had you finished your answer to his questions?

"The Witness: No.

"The Court: You may finish your answer. * * *

"The Witness: The only one I see, the only one I can really identify is the one in the purple shirt."

It is clear that she was testifying that S. Alfaro was the only one she could identify as having been at the bonfire. She identified appellant as one of those who had intercourse with her. She said he kept hitting her and slapping her around. She identified several of the other boys who had intercourse with her, including defendants Vaca and Barrera. Her testimony was not inherently improbable.

The judgment and the order denying the motion for a new trial are affirmed.

SHINN, P. J., and VALLÉE, J., concur.



Helen KNIGHT, Plaintiff and Appellant,

v.

KAISER COMPANY, a corporation, E. F. Mitchler, Western Pacific Railway, a corporation, John William Bass, et al., Defendants,

Kaiser Company, a corporation, Respondent.*

No. 17041.

District Court of Appeal, First District, Division 1, California.

Dec. 21, 1956.

Hearing Granted Feb. 13, 1957.

The Superior Court, County of Alameda, James R. Agee, sustained demurrer without leave to amend to plaintiff's third amended complaint as amended, and plaintiff appealed from judgment. The District Court of Appeal, Bray, J., held that if defendant, who owned and con-

* Opinion vacated 312 P.2d 1089.

trolled premises on which it maintained large sand piles, knew or should have known that children were actually playing on piles, jury, under circumstances, in view of propensities of children to play on sand piles, could find that piles were source of danger to children, which danger defendant could easily and inexpensively have guarded against, and that defendant was liable for death of ten year old who was asphyxiated when pile collapsed.

Judgment reversed.

1. Negligence ⇐111(1)

Allegations, in case involving asphyxiation of child while playing on defendants' sand pile, that children of tender age were in habit of playing upon premises and piles and belt, and were by their ordinary predelictions and impulses attracted to them, and that defendant knew or should have known of that fact and of danger to children, satisfied certain of requirements of rule relating to liability of landowner to trespassing children.

2. Negligence ⇐111(1)

Allegations, in case involving liability for asphyxiation of child while playing on defendants' sand pile, that children because of their youth were unable to and did not discover condition or realize risk involved in coming into area and in intermeddling in piles, satisfied requirement of rule relating to liability of landowner to trespassing children, to effect that children because of their youth do not discover condition or realize risk involved in intermeddling in it or in coming within area made dangerous by it.

3. Negligence ⇐111(1)

Allegation, in case involving liability for asphyxiation of child on defendants' sand pile, that fence, guard or railing would have prevented children from coming on premises and intermeddling, satisfied requirement of rule relating to liability of landowner for injuries to trespassing children, to effect that utility to possessor of maintaining condition is slight as compared to risk to young children involved therein.

4. Negligence ⇐39

The doctrine of attractive nuisance does not allow recovery for injuries caused by a danger which a child would be expected to recognize, nor from dangers which could not be remedied without unreasonable trouble or expense, or without destroying utility of the property.

5. Negligence ⇐136(19, 24)

Whether defendant, who owned and controlled premises on which were located sand piles on which child was asphyxiated when it collapsed, knew or should have known that children were in habit of playing on piles, and whether to fence or guard piles would not cause unreasonable trouble or expense, or in any wise destroy utility of property, within rule relating to liability of landowner for injuries to trespassing children, would be questions for jury.

6. Negligence ⇐33(3)

In cases of injury to trespassing children, the customary rules of ordinary negligence cases apply, and the true basis of liability in the particular instance is the foreseeability of harm to the child.

7. Negligence ⇐136(19, 24)

If defendant, who owned and controlled premises on which it maintained large sand and gravel piles, knew or should have known that children were actually playing on piles, jury, under circumstances, in view of propensities of children to play on sand piles, could find that piles were source of danger to children, which danger defendant could easily and inexpensively have guarded against, and that defendant was liable for death of ten year old child who was asphyxiated when pile collapsed.

Charles O. Morgan, Jr., San Francisco, for appellant.

Frederick M. Van Sicklen, James C. Calkins, Alameda, for respondent.

BRAY, Justice.

Defendant's demurrer to plaintiff's third amended complaint as amended was sustained without leave to amend. Plaintiff appeals from the judgment thereon and presents as the sole question: Does the attractive nuisance doctrine in California apply to sand and gravel piles?

Complaint.

Plaintiff was the mother of Johnny William Bass, Jr., who, at the time of his death, was 10 years old. Defendant owned, maintained, operated and controlled certain premises in Stockton on which it maintained large sand and gravel piles and a large conveyor belt. Alongside the piles and the belt was a road or pathway. "* * * children of tender age were in the habit of being upon and playing upon the said premises and the said sand and gravel piles and conveyor belt, and by the ordinary predelictions and impulses of normal children were attracted to and induced to come and to be upon and to play upon the said premises, said sand and gravel piles and conveyor belt; all of which was well known to the defendants, its servants, agents and employees, or by the exercise of reasonable care on their part would have been known to them. * * * the defendants knew and realized, or should have known and realized, that the said sand piles, gravel piles and conveyor involved an unreasonable risk of death or serious bodily harm to children playing on the same as aforesaid in that the children could be injured or killed from falling from the same, from the same falling upon them and in other manners and ways. * * * said children because of their youth were unable to and did not discover the condition or realize the risk involved in intermeddling in said condition or coming within the area made dangerous by the same. * * * a fence, guard or railing would have prevented said children from coming upon and being upon said premises and condition and from intermeddling in same."

On August 20, 1953, Johnny had been attracted to come upon and to play upon the said piles and belt. Being of tender years he was unable to perceive or appreciate the danger confronting him. Defendant negligently maintained said premises in that it failed to place any fences, guards or railing or other means of excluding small children therefrom. As a result of said negligence Johnny while playing and digging on and in the said piles was asphyxiated, resulting in his death, when one of the sand piles on or in which he was playing collapsed upon him.

Defendant demurred generally and specially. The demurrer was sustained apparently on the theory that in this state the attractive nuisance theory does not apply to sand and gravel piles. Admittedly this question has not heretofore been presented in this state. As we pointed out in Marino v. Valenti, 118 Cal.App.2d 830, 841, 259 P.2d 84, there are a number of exceptions to the general rule that the owner or occupier of land owes no duty to trespassers thereon, except to put or keep it in a reasonably safe condition for them, or to conduct his activities in a manner not to endanger them. One of these in favor of trespassing children is "if their trespass is foreseeable, if the condition of the premises involves an unreasonable risk of harm to them in view of their immaturity, and if the burden of rectifying the condition is slight in comparison with its usefulness and the magnitude of the risk." 118 Cal.App.2d at page 842, 259 P.2d at page 90. As we stated in the Marino case, the so-called "turn-table" cases started this doctrine, to which the confusing name "attractive nuisance" has been applied, and we suggested that a more appropriate term would be "injuries to trespassing children." See Prosser on Torts, 1941, pp. 617–620.

In the Marino case we pointed out that there was considerable confusion in the

authorities as to whether the rule as to trespassing children set forth in the Restatement of Torts, section 339, applied in this state. We endeavored to reconcile the cases upon the subject, including the majority opinion in Puchta v. Rothman, 99 Cal.App.2d 285, 221 P.2d 744 (child injured in an uncompleted building), relied upon by defendant here, which seemed to cast some doubt upon California having adopted the Restatement rule, and we finally concluded, 118 Cal.App.2d at page 842, 259 P.2d at page 80: "Our review of the decisions in this state convinces us that the rule today in California is substantially as expressed in § 339 of the Restatement of the Law of Torts: * * *"[1]

[1] Applying that rule here we find that all its elements appear in plaintiff's complaint. 1. It is alleged that children of tender age were in the habit of playing upon the premises and the piles and belt, and were by their ordinary predelictions and impulses attracted to them and that defendant knew or should have known of that fact and of the danger to the children. This could meet the first and second requirements of the Restatement:[2] "A possessor of land is subject to liability for bodily harm to young children trespassing thereon caused by a structure or other artificial condition which he maintains upon the land, if (a) the place where the condition is maintained is one upon which the possessor knows or should know that such children are likely to trespass, and (b) the condition is one of which the possessor knows or should know and which he realizes or should realize as involving an unreasonable risk of death or serious bodily harm to such children * * *."

[2] 2. It is alleged that the children, including Johnny, because of their youth, were unable to and did not discover the condition or realize the risk involved in coming into the area and in intermeddling in the piles. This could meet requirement (c) of the Restatement: "(c) the children because of their youth do not discover the condition or realize the risk involved in intermedding in it or in coming within the area made dangerous by it * * *."

[3] 3. It is alleged that a fence, guard or railing would have prevented the children from coming on the premises and intermeddling. This could meet requirement (d) of the Restatement: "(d) the utility to the possessor of maintaining the condition is slight as compared to the risk to young children involved therein."

Apparently there are only two cases[3] applying the attractive nuisance doctrine to a sand pile. One is Holmberg v. City of Chicago, 1927, 244 Ill.App. 505, where an 11-year-old boy was suffocated by collapsing sand in which he was digging. The pile of sand was about 50 feet in length and about 8 feet in height. The court, in holding that the attractive nuisance doctrine was applicable and that the judgment for plaintiff should be affirmed, said that "It may be assumed, as a matter of common knowledge, that a pile of sand, especially

1. It appears, however, that California, although accepting the Restatement rule, has jointed those states (see 65 C.J.S., Negligence, § 29(14), p. 479) which have refused to apply it to ponds, reservoirs and swimming pools. See California Annotations to the Restatement of the Law of Torts, 141–142; Wilford v. Little, 144 Cal.App.2d 477, 301 P.2d 282; Lake v. Ferrer, 139 Cal.App.2d 114, 293 P.2d 104 (hearing in both of these cases denied by Supreme Court). The reason given in the Wilford case, 144 Cal.App.2d at page 481, 301 P.2d at page 285, is: "Courts in California have held repeatedly that a body of water, natural or artificial, is not such a thing as may be held to constitute an attractive nuisance. It may be attractive to children but it is also of a common and ordinary nature of that which is to be found anywhere."

2. By the expression "could meet" in this and other sentences, we mean that a jury could so find, in effect.

3. Baxter v. Park, 1925, 48 S.D. 506, 205 N.W. 75 and Hawley v. City of Atlantic, 1894, 92 Iowa 172, 60 N.W. 519, cited by plaintiff as dealing with sand piles, do not. They involved collapse of sand from the side of a pit or excavation.

when located on a public street, would prove attractive to the children of the neighborhood," at pages 509–510 and "at first blush, knowing the instincts and the natural urge of children to play and make certain childish adventures, and particularly their natural liking, one might almost say passion, for a sand pile as a source of pleasure, one is inclined to conclude that just such a calamity as happened might have been expected, or anticipated, or thought of as not unreasonably probable." At pages 511–512. In that case the sand pile was located in a public street, differing thereby from the facts in our case. The other case is Foster v. Lusk, 1917, 129 Ark. 1, 194 S.W. 855. There the complaint charged the defendant with maintaining an insecure stack of ties near a pile of sand, both on the defendant railway's right of way, which pile of sand was attractive to children, which fact was known or should have been known to the defendant; that the 4-year-old plaintiff was attracted to the sand pile and was injured by the stack of ties falling on her. In reversing the trial court's holding that the complaint did not state a cause of action, the reviewing court said, 194 S.W. at page 857: "* * * it is alleged that the attractive sand pile and the insecure stack of ties in juxtaposition created a dangerous situation, the maintenance of which constituted negligence for which defendants are liable. * * *

"The defendants are not responsible for the negligent act of the tie company in piling the ties insecurely, but their responsibility is for allowing the dangerous stack of ties to remain there, if it was reasonably to be anticipated that children attracted by the pile of sand might be injured. Of that the jury should have been permitted to decide, for the facts stated in the complaint were, if established by evidence, sufficient to make out a case of culpable negligence on the part of the defendants. It cannot be said as a matter of law that a pile of sand placed in a position described in the complaint would not be such an attraction to children that the owner of the premises should not take [it] into consideration in allowing a dangerous agency to be placed contiguous thereto."

There the injury was not due to danger in the sand pile itself as it is in our case; nevertheless, we see no reason why the doctrine enunciated there should not apply here, 194 S.W. at page 856: "The plaintiff's right to recover is predicated on the doctrine, so often annouced by the courts, that where an owner permits anything dangerous which is attractive to children, and from which injury may be anticipated, to remain unguarded on his premises, he will be liable if a child attracted to the place is injured thereby."

In California the courts have refused to apply the doctrine to a pool of water or an open ditch. The leading case to which most of the cases on the subject refer is Peters v. Bowman, 115 Cal. 345, 47 P. 113, 598, where the defendant had allowed his lot to accumulate waters and a pool by reason of an embankment thrown up by the city, which seemed to decide the matter on the theory that "as to common dangers, existing in the order of nature, it is the duty of parents to guard and warn their children * * *." 115 Cal. at page 356, 47 P. at page 599.[4] However, the refusal to apply the doctrine was extended to artificially created pools and in the following situations: King v. Simons Brick Co., 52 Cal.App.2d 586, 126 P.2d 627 (clay pit dug by the defendant in which waters accumulated); Beeson v. City of Los Angeles, 115 Cal.App. 122, 300 P. 993 (a pool of water in an open storm ditch); Melendez v. City of Los Angeles, 8 Cal.2d 741, 68 P.2d 971 (open pool in a storm drain); Polk v. Laurel Hill Cemetery Ass'n, 37 Cal. App. 624, 174 P. 414, and Betts v. City &

4. But in the Peters case the court said, 115 Cal. at page 356, 47 P. at page 599: "But, with respect to dangers specially created by the act of the owner, novel in character, attractive and dangerous to children, easily guarded and rendered safe, the rule is, as it ought to be, different; and such is the rule of the turntable cases, of the lumberpile cases, and others of a similar character."

County of San Francisco, 108 Cal.App.2d 701, 239 P.2d 456 (reservoirs); Lake v. Ferrer, supra, 139 Cal.App.2d 114, 293 P.2d 104, and Wilford v. Little, supra, 144 Cal. App.2d 477, 301 P.2d 282 (swimming pools); Ward v. Oakley Co., 125 Cal.App.2d 840, 271 P.2d 536 (mud deposited in waters by a mining company).

In certain cases our courts have worked out a theory to modify the doctrine by rather ingeniously finding a trap connected with the pool or ditch. Thus, in Sanchez v. East Contra Costa Irr. Co., 205 Cal. 515, 271 P. 1060, the doctrine was held to apply to an irrigation ditch, because the ditch had in it a concealed syphon, which constituted a trap. The bait for the trap, said the court, was the shallow body of water in the ditch. "The children assumed the risk of the open, obvious, notorious danger incident to the canal, containing about 3 feet of water; but they did not assume the risk of an unknown, concealed and unguarded danger." 205 Cal. at page 518, 271 P. at page 1061.

In Faylor v. Great Eastern Q. Min. Co., 45 Cal.App. 194, 187 P. 101, the bait was a push car in a mining tunnel, the trap was a concealed slope therein filled with water.

As pointed out in Puchta v. Rothman, supra, 99 Cal.App.2d 285, 287, 288, 221 P.2d 744, originally the attractive nuisance doctrine was applied only to machinery under certain circumstances, but it has been extended to various appliances and contrivances such as a loose guy wire which came in contact with a live wire, a wagon attached to the rear of a house being moved through city streets, unlocked ore cars left in an abandoned mining tunnel, a slowly backing railroad train, an unguarded trailer and vat of boiling tar in a city street, an abandoned box of dynamite caps left on a railroad right of way under construction. The court there also stated that its application has been denied in addition to pools, reservoirs and storm drains, to a stable, a dance hall, an icing platform, and an unfinished building. In Lopez v. Capitol Co., 141 Cal.App.2d 60, 296 P.2d 63, it was denied to a building scaffold on a public sidewalk. See 41 Cal.L.Rev. 138 et seq., for a compilation of the cases in California in which the doctrine has been and has not been applied.

[4, 5] Running through all the cases seems to be the proposition that the doctrine does not allow recovery for injuries caused by a danger which a child would be expected to recognize, nor from dangers which could not be remedied without unreasonable trouble or expense, or without destroying the utility of property. We have heretofore shown that the allegations of the complaint meet the requirements of the rule of the Restatement, which rule is recognized in California. Let us now see if they meet the above proposition. Certainly a child of tender years cannot be expected to recognize any danger from a sand pile. It is doubtful if there is anything that will attract a child and upon which he will fearlessly climb and play, more than will a sand pile.[5] Thus that requirement is met. In view of the allegations of the complaint, which, of course, we must assume are true, it is apparent that the second requirement of the proposition is likewise met. It is alleged that defendant knew or should have known that children were in the habit of playing on the piles. Certainly to fence or guard the piles would not, on the face of it, at least, cause unreasonable trouble or expense, or in anywise destroy the utility of the property. It would be for the jury to determine these questions.

Prosser on Torts, 1941 ed. pp. 619–620, states: "The better authorities now agree that the element of 'attraction' is important only in so far as it may mean that the trespass is to be anticipated, and that the basis of liability is merely the foreseeability of

5. In Holmberg v. City of Chicago, supra, 1927, 244 Ill.App. 505, at page 509, the court said that it might be assumed as a matter of common knowledge that a sand pile is attractive to children in the street. We believe that even on private property it would be equally alluring, although, of course, not so available.

harm to the child, and considerations of common humanity and social policy which curtail the defendant's privilege to use the land as he sees fit." That this is the modern tendency and that the questions involved are for the jury, is well illustrated by Kahn v. James Burton Company, 1955, 5 Ill.2d 614, 126 N.E.2d 836. There a child was injured when a pile of lumber left without adequate support on a vacant lot upon which the defendant was constructing a residence, upon which he had been playing, toppled over. The court said, 126 N.E.2d at page 840: "* * * the questions whether the lumber was so piled as to create an unreasonable danger to children playing thereon, and whether it was so attractive to children as to suggest the probability that children would climb onto it, were questions for the jury under the circumstances shown in the record. * * *

"A similar conclusion must follow in the present case. The creator of certain conditions dangerous and hazardous to children because of their immature appreciation of such dangers and hazards must be held to a certain standard of conduct for the protection of such children in accordance with the attendant circumstances and conditions. Account must be taken of the cost and burden of taking precautionary measures and of the right of families and society to rear and develop children with freedom of activity in their communities, without being subject to unreasonable risks which might cause serious injury or death to such children. All men are presumed to know those things which are matters of common knowledge and must be held, in the absence of actual knowledge or notice, to have reasonably anticipated such occurrences as in the ordinary nature of things reasonable men should know will probably occur. * * * The test in the case at bar is whether the lumber company in the exercise of ordinary care could reasonably have anticipated the likelihood that children would climb onto the lumber and would be injured if it were not securely piled."

In our case it is alleged that defendant knew or should have known that children were actually playing on the piles. In the Kahn case, the court points out, as does Prosser (p. 618), that the labeling of a certain set of facts as being an "attractive" nuisance case or a "turntable" case is a misnomer and has led to undesirable conclusions. "The inclination is then to find a *stare decisis* pigeonhole or category." 126 N.E.2d at page 841. As a result irreconcilable conclusions have been reached. One is that because of immature judgment the child was attracted and allured to certain premises and therefore is no longer a trespasser. Another conclusion is that this same immature child was attracted to the premises by object A, but was injured by object B, and therefore his injury was not occasioned by the attracting cause. Still another conclusion relates to water courses, ponds and lakes. The water in itself has been held cannot be the attraction for liability to attach, but if the child is attracted by such attractive objects as floating logs, rafts, boardwalks, tree stumps, etc., and is drowned, liability will attach even though the death is not in the least occasioned by the attracting objects. The court then states, and we agree with the statements, 126 N.E.2d at pages 841, 842: "In view of the foregoing conflict and the fact that, as many courts have declared, a child in his youthful fancy, imagination and ingenuity can make a plaything of almost anything and is attracted by almost everything, the only proper basis for decision in such cases dealing with personal injuries to children are the customary rules of ordinary negligence cases. * * * The element of attraction is significant only in so far as it indicates that the trespass should be anticipated, *the true basis of liability being the foreseeability of harm to the child.* Whether the lumber pile was sufficiently attractive to entice children into climbing upon it, whether its condition would involve danger from such activity, and whether the contractor should have anticipated the probability of the accident, were matters for determination by the jury." (Emphasis added.) In Hawk v. City of Newport Beach, 46 Cal.2d 213, 293 P.2d 48, 50, a youth 17 years

of age was injured when he dove into the ocean from a rock on the beach maintained by the city as a recreational area. Although not based on the attractive nuisance doctrine, but on the charge that the situation constituted a "dangerous or defective condition" of the city's property, the ruling is of some significance here, for the city contended it could not be held liable because the rock and its surrounding area were natural conditions unaltered by any act of the city. The court held that a natural condition may constitute, under certain circumstances, a dangerous or defective condition so as to permit the imposition of liability, and whether it did, was a question for the jury.

In Lopez v. Capitol Co., supra, 141 Cal. App.2d 60, at page 69, 296 P.2d 63, at page 67, the court said: "Negligence is relative to time, place and circumstances, and the question here is as to what was the duty of the respondents and as to what they should have foreseen in view of the knowledge which the complaint charges them with possessing."

[6] In view of the trend of the later cases in California, we believe that the time has come in this state to end the confusion caused by devious methods of avoiding the originally strict application of "attractive nuisance" and "turntable" cases, and to frankly apply in cases of injury to trespassing children the customary rules of ordinary negligence cases, making the true basis of liability in the particular instance the foreseeability of harm to the child, and, in the words of the Restatement, section 339, "the utility to the possessor of maintaining the condition is slight as compared to the risk to young children involved therein."

[7] Under the allegations of the complaint in our case, if, as alleged, defendant knew or should have known that children were actually playing on the sand and gravel piles, a jury "knowing the instincts and the natural urge of children to play and make certain childish adventures, and particularly their natural liking, one might almost say passion, for a sand pile as a source of pleasure," Holmberg v. City of Chicago, supra, 244 Ill.App. 505, 511, could have found that the sand and gravel piles were a source of danger to the children, which danger defendant could easily and inexpensively have guarded against, and hence could have found defendant liable for Johnny's death.

The judgment is reversed.

PETERS, P. J., and FRED B. WOOD, J., concur.



147 Cal.App.2d 424

The BOARD OF SUPERVISORS OF COUNTY OF RIVERSIDE, State of California, and William E. Jones, Fred McCall, Roman Warren, Paul J. Anderson and George Berkey, as members of said Board, Petitioners,

v.

The SUPERIOR COURT of the State of California, IN AND FOR COUNTY OF RIVERSIDE, Respondent.

Desert Turf Club, a Corporation, Real Party in Interest.

Civ. 5553.

District Court of Appeal, Fourth District, California.

Jan. 3, 1957.

Rehearing Denied Jan. 28, 1957.

Hearing Denied Feb. 27, 1957.

Prohibition proceedings by county board of supervisors to prohibit further action in mandate proceedings brought by Turf Club to compel grant of application to establish race track. The District Court of Appeal, Mussell, J., held that the board's order for continuance of hearing on the application and for further hearing was in accordance with prior determination of the Court of Appeals in one of the mandate proceedings.

Order in accordance with opinion.

Counties ⇐21½
Mandamus ⇐185
Prohibition ⇐5(3)

Where Turf Club brought two mandate proceedings to compel county board to grant race track application, and in one of such proceedings the Court of Appeal directed grant of peremptory writ requiring board to cancel their order denying the application and to proceed without delay to carry on and complete a hearing in manner indicated in the opinion, board's subsequent order that hearing on the application be continued until conclusion of court proceedings, and that thereafter a new date be fixed for such hearing, was in accordance with the mandate and the applicable zoning ordinance, and board was not so concluded by its previous orders dispensing with further hearing and denying the application as to be required to grant the application forthwith; and hence Superior Court would be prohibited from proceeding in either mandate proceeding to compel grant of the application or interfere with board's completion of hearing. West's Ann.Bus. & Prof. Code, § 19400 et seq.

Ray T. Sullivan, Jr., County Counsel, Riverside, Leo A. Deegan, Deputy County Counsel and James H. Angel, Asst. County Counsel, Riverside, for petitioners.

Martin C. Casey, San Bernardino and John E. Glover, Los Angeles, for real party in interest.

Best, Best & Krieger, Riverside, amicus curiæ.

MUSSELL, Justice.

In these proceedings, petitioners seek a writ, directed to respondent Superior Court in Riverside County and to Desert Turf Club, prohibiting (1) The enforcement of an order made by said Superior Court on October 11, 1956, in action No. 61652; (2) Any further proceedings in the matter of the petition for a writ of mandate in action No. 64722 in said court, filed August 14, 1956; and (3) Any further action upon the peremptory writ of mandate in said action No. 61652 which will in any way interfere with the board of supervisors' right to promptly call and complete a public hearing on notice on the application of the Desert Turf Club.

In July, 1954, the California Horse Racing Board issued a license to Desert Turf Club to conduct quarter horse race meetings at a proposed race track establishment to be constructed near Rancho Mirage, near Palm Springs, in Riverside county, and found that the turf club had shown that the conducting of quarter horse race meetings of the proposed Palm Springs track would be in the public interest and would subserve the purposes of the California Horse Racing Act. West's Ann.Bus. & Prof.Code, § 19400 et seq.

The site for the proposed track was located in M–3 zone of Riverside county, as established by zoning ordinance No. 348 of said county, and it was necessary, therefore, for the turf club to obtain a permit from the county board of supervisors before the track was established. The Desert Turf Club, in January, 1955, filed its application for such a permit with the planning commission of said county. On February 15, 1955, a public hearing on this application was conducted before the planning commission and a further public hearing was conducted thereon before the board of supervisors on March 28, 1955. Both of these hearings were conducted pursuant to the provisions of section 3.2 of article III of the said ordinance and the notices therein provided for were given as to each such public hearing.

On February 23, 1955, the planning commission made its order and decision recommending to the board of supervisors that the application be granted upon certain terms and conditions, all of which were accepted and agreed to by the applicant. The planning commission then filed with the board of supervisors, in addition to its recommendation and decision, a summary of the testimony presented at the hearing and reports and exhibits which had been introduced in evidence.

The board of supervisors, at its hearing on March 28, 1955, received in evidence the report and decision of the planning commission, the entire file and records of the commission on its hearing, the evidence of several witnesses, some for and some against the granting of the permit, and also various petitions and letters in opposition thereto. The board of supervisors then, by unanimous vote, denied the application.

On April 22, 1955, the Desert Turf Club filed its petition for a writ of mandate, praying that the board of supervisors be required to cancel its order denying the permit, and to make an order granting it.

The trial court in this proceeding (action No. 61652) denied the peremptory writ of mandate, discharged the alternative writ and determined in its conclusions of law that the order of the board of supervisors denying the application for a permit was sufficiently supported by substantial evidence and concluded further that the board did not act arbitrarily, capriciously or unlawfully; that petitioner was not denied a fair trial and that "(a)lthough the licensing throughout the State of California of horse racing tracks where pari-mutuel wagering is conducted is a matter of general and statewide concern, the same is, nevertheless, a municipal affair and is subject to local regulation as embodied by the provisions of Ordinance No. 348 of the county of Riverside, Section 3.1, article III thereof." The Desert Turf Club appealed from the judgment in this action, and the decision of this court on appeal was filed May 11, 1956, Desert Turf Club v. Board of Supervisors, 141 Cal.App.2d 446, 296 P.2d 882, 888. This court reversed the judgment of the trial court and held that the State has taken over in its entirety the whole subject of horse racing and that a board of supervisors cannot overrule the act of the People of the State in adopting a constitutional amendment and the legislature of the State in passing a full and comprehensive plan for the licensing and control of horse racing by prohibiting on moral grounds what the State expressly permits; that a board of supervisors, acting in good faith, may, by properly adopting zoning restrictions, exclude on soundly based grounds the installation of a horse racing track or any other type of activity from those portions of the county as to which such exclusion is reasonable; that, eliminating the opinion evidence and evidence in opposition to the permit on moral grounds, there was insufficient evidence to uphold the decision of the board of supervisors or the findings of the trial court; that the board of supervisors has a proper field for the operation of its discretion in the enforcement of its zoning ordinance after eliminating the moral grounds of opposition to racing, and it is not without jurisdiction to pass upon the application of the Desert Turf Club. It was further held that:

> "The writ should be directed to the Board of Supervisors and its members requiring them to cancel and annul the order denying appellant's application, and to reopen the hearing with leave to hold a supplemental hearing upon due notice if they be so advised, and to reconsider the petition of appellants as to land use, wholly excluding any consideration as to the alleged immorality of horse racing and betting as authorized by State law, and wholly excluding from such consideration all testimony not received in open hearing, and all statements of alleged fact and arguments in petitions and letters on file, except the bare fact that the petitioners or letter writers approve or oppose the granting of the petition; also wholly excluding each and every instance of hearsay testimony unless supported by properly admissible testimony, it being further required that the attorneys representing any party in interest be granted a reasonable opportunity to examine or cross-examine every new witness produced. * * *
>
> "The judgment is reversed, with instructions upon the going down of

the remittitur to amend the findings of fact and conclusions of law in accordance with the views expressed in this opinion, and to enter a judgment granting a peremptory writ of mandate directed to the Board of Supervisors of Riverside County and the members thereof requiring them forthwith to cancel and annul their order denying appellant's petition and to proceed without delay to carry on and complete a hearing in the manner indicated and set forth in this opinion."

Following the filing of the remittitur, amended findings of fact and judgment were filed by the trial court and in its judgment, entered July 25, 1956, the court ordered that a writ of mandate be issued commanding the board of supervisors to forthwith cancel and annul the order of the board made on March 28, 1955, and to proceed to determine *whether or not* they should reopen the hearing upon the application of Desert Turf Club, held on March 28, 1955, and if desired by said Board hold a supplemental hearing thereon upon due notice thereof; reconsider the application of Desert Turf Club as to land use; and upon such reconsideration wholly exclude any consideration as to any alleged immorality of horse racing and betting as authorized by the State law; wholly exclude from any consideration all testimony not received in open hearing, and all statements of alleged facts and arguments in petitions and letters filed at the time of the last hearing and now on file or which may be filed, except the bare fact that the petitioners or letter writers approve or oppose the granting of said application; also wholly exclude each and every instance of hearsay testimony adduced at the hearing of March 28, 1955, as well as any such testimony which may be adduced upon a future hearing unless the same is supported by properly admissible testimony; and grant a reasonable opportunity to the attorneys representing any party in interest to examine or cross-examine any new witness which may be produced at a supplemental hearing; and determine the said application of Desert Turf Club and make proper and appropriate orders in connection with such determination.

Service of said peremptory writ of mandamus was made upon the board of supervisors on or about August 1, 1956. On August 6, 1956, said date being its first regular meeting date following such service, said board cancelled and annulled its order of March 28, 1955, by which the application of Desert Turf Club was denied and ordered "(t)hat the matter of further proceedings in connection with said application and the writ of mandate is continued to Monday, August 20, 1956, at 10:00 A.M., to allow Supervisor Berkey necessary time to examine the documents and other physical evidence on file in the proceeding so that he may participate in the decision, and at that time, the Board to determine whether or not a further hearing will be held, and if such hearing is to be held, to fix a date therefor and if such hearing is not to be held, then forthwith to determine the application on its merits."

At its regular meeting of August 20, 1956, the chairman of said board called the matter of the Desert Turf Club application for hearing. Upon motion made, seconded and carried by unanimous vote the board ordered that a decision be reached without the holding of any further hearings; and a motion made and seconded that the application of Desert Turf Club be granted failed to carry by a vote of three Noes to two Ayes.

At the regular meeting of the board of supervisors on September 4, 1956, a motion was regularly made and seconded that the order of the board of August 20, 1956, determining that a decision would be reached on the application of Desert Turf Club without holding any further hearing be set aside and that a further hearing on the application be set for October 1, 1956. The vote on said motion was two Ayes and two Noes, with one supervisor absent and the said motion failed to carry for want of a majority.

At the regular meeting of the board of supervisors on October 1, 1956, a motion was regularly made, seconded and carried by a vote of three Ayes to two Noes that a hearing be called on the application of Desert Turf Club for October 15, 1956.

At the regular meeting of the board of supervisors on October 8, 1956, a motion was regularly made, seconded and carried by unanimous vote authorizing the County Counsel of Riverside county to take such proceedings in the appellate courts, either by appeal or application for other appropriate remedy, as in his judgment will test the validity of the order entered by the superior court on October 2, 1956, in case No. 61652.

At said meeting on October 8, 1956, another motion was duly made, seconded and carried by unanimous vote ordering that the public hearing on the application of Desert Turf Club now set for hearing on October 15, 1956, "be continued until after proceedings in the superior and appellate courts in this case have been concluded and immediately thereafter a new date shall be fixed for said hearing and further notice thereof given."

On August 24, 1956, Desert Turf Club filed in said superior court action No. 61652 its application for an order compelling obedience and performance of the peremptory writ and on the same date Desert Turf Club filed a new action in said superior court (No. 64722) against the board of supervisors and its individual members, petitioning for a writ of mandate and alleging substantially the same matters therein as in its application of August 6, 1956. An order to show cause was issued upon said application for an order compelling obedience and performance of the terms of the peremptory writ in case No. 61652, returnable September 7, 1956, and an alternative writ of mandamus was issued upon said petition for a writ of mandamus in case No. 64722, also returnable September 7, 1956. Subsequently, both of said matters were continued to September 13, 1956, for hearing. The board of supervisors filed their answer to the application for an order and also filed a motion to recall and quash the peremptory writ of mandate.

On September 13, 1956, the issues raised by the application for an order compelling obedience and performance to the terms of the peremptory writ in case No. 61652 and the answer to said application filed by the board of supervisors, and a motion to quash, were argued before the superior court and submitted for decision.

On September 25, 1956, a minute order was entered in action No. 61652, stating that "The court, after reviewing the law and evidence before it, is of the opinion that the application of the petitioner, Desert Turf Club, which was filed August 24, 1956, should be and the same is hereby allowed and granted; it further appearing that the motion of respondent board of supervisors should be and the same is hereby disallowed." On October 2, 1956, the superior court signed an "order upon order to show cause in re performance and obedience to peremptory writ of mandate and order denying respondent's motion to recall and quash peremptory writ of mandate or to strike portions thereof." This order was filed in action No. 61652 on October 11, 1956, and purports to require the board of supervisors and its individual members to forthwith cancel and annul their order of August 20, 1956, denying the application of Desert Turf Club, and it further purports to order said board of supervisors and its individual members to forthwith vote in favor of granting the application of Desert Turf Club.

A petition for leave to intervene in action No. 64722 was filed on or about September 7, 1956, by owners of property in the vicinity of the proposed race track site.

The Desert Turf Club takes the position that the only legal action by the board of supervisors would be to grant its application; that the board cannot set aside either of its orders of August 20, 1956, namely, (1) The order dispensing with a further hearing; and (2) Denial of petitioner's

application. We do not agree with these contentions.

The opinion of this court (Desert Turf Club v. Board of Supervisors, supra), in the last paragraph thereof, directs the entry of a judgment granting a peremptory writ, directed to the board of supervisors of Riverside county and the members thereof, requiring them to forthwith cancel and annul their order denying appellant's petition and to proceed without delay to carry on and complete a hearing in the manner indicated and set forth in the opinion.

The board of supervisors, at its regular meeting on August 6, 1956, canceled its order denying appellant's petition and reopened the hearing by ordering that the matter of further proceedings in connection with said application and the writ of mandate be continued to August 20, 1956. On that date the chairman of the board called the matter for hearing and by unanimous vote, it was ordered that a decision be reached without the holding of any further hearings. However, a motion was then made that the application of the Desert Turf Club be granted and this motion failed to carry. It appears, therefore, that the board failed to reach a decision and that it was then necessary to hold a further hearing to enable the board to finally conclude the matter and complete a hearing thereon in accordance with the judgment and opinion of this court.

Desert Turf Club argues that the order of the board that a decision be rendered without any further hearing was final and that no further hearing was necessary. However, the board has never reached a final decision in the matter and now seeks to proceed to comply with the order of this court and to complete the public hearing of March 28, 1955.

While the ordinance apparently provides that the board has the privilege (at its discretion), under certain circumstances, to grant or deny any application for a land use permit without holding a public hearing, it also provides that:

> "The Board of Supervisors may hear and consider evidence in addition to the report and supporting material from the Commission before granting, denying, revoking, modifying or refusing to revoke any permit, but shall not consider any statement, argument or evidence of any kind or nature whatsoever except such report and summary except at a public hearing, notice of the time and place of which shall be given to all persons by publication in a newspaper of general circulation, not less than five (5) days prior to such hearing, and notice to the applicant, where issuance of a permit is in question, or to the person owning the property the permit affecting which it is sought to remoke or modify, not less than five (5) days prior to such hearing, either by personal service as required for the serving of summons or by first class mail, postage prepaid."

In the instant case, where evidence was received in addition to the report and supporting material from the planning commission, it was necessary that a public hearing be had. In Desert Turf Club v. Board of Supervisors, supra, it was pointed out that the board of supervisors has a proper field for the operation of its discretion in the enforcement of its zoning ordinance after eliminating the moral grounds of opposition to racing, and that it is not without jurisdiction to pass upon the application of the Desert Turf Club. The decision orders the board to carry on and complete the hearing, thus providing the opportunity for the introduction of proper evidence, if any, on the question of granting or denying a permit to the Desert Turf Club. The order of the board of supervisors, made on October 8, 1956, which was the last order made by the board, orders that the hearing on the application of Desert Turf Club "be continued until after proceedings in the superior court and appellate courts in this case have been concluded and immediately thereafter a new date shall be fixed for said hearing and

further notice thereof given." This order is in accordance with the opinion of this court and writ of mandate issued therein and also is in accordance with the provisions of the ordinance involved. At such a hearing, the board is thus entitled to reach a final decision on the application and conclude the hearings thereon.

It is therefore ordered that a writ of prohibition be issued prohibiting:

(1) Enforcement of said order filed on October 11, 1956, in case No. 61652.

(2) Any further proceedings in re the petition for writ of mandate in case No. 64722.

(3) Any further action upon the peremptory writ of mandate in case No. 61652 which will in any way interfere with the board of supervisors' right to promptly call and complete a public hearing on notice on the application of Desert Turf Club.

BARNARD, P. J., and GRIFFIN, J., concur.

Hearing denied; CARTER, J., dissenting.



Charles J. THURMOND, Petitioner,

v.

SUPERIOR COURT and County Clerk, COUNTY OF SOLANO, State of California, Respondents.*

Civ. 9133.

District Court of Appeal, Third District, California.

Jan. 4, 1957.

Rehearing Denied Jan. 29, 1957.

Hearing Granted Feb. 27, 1957.

Mandate to compel preparation of clerk's and reporter's transcripts on appeal from order denying motion for new trial. The District Court of Appeal, Peek, J., held that defendant, who, upon being found guilty of violation of Penal Code, § 288a, was adjudged and committed as sexual psychopath, could appeal from subsequent denial of his motion for new trial in original criminal proceeding despite fact that original criminal proceeding had been suspended until termination of sexual psychopathy proceeding, and though rule provides that appeal from order denying new trial shall not be taken until granting of probation or rendition of judgment.

Writ issued.

* Opinion vacated 314 P.2d 6.

1. Criminal Law ⇐1023(13)

Under applicable code provisions, defendant in criminal case is given substantive right to move for a new trial, and the substantive right of appeal from order made in response to such motion, notwithstanding provisions of rule that appeal from order denying new trial shall not be taken until after granting of probation or rendition of judgment. West's Ann.Pen.Code, §§ 1182, 1237; West's Ann.Rules on Appeal, rule 31; West's Ann.Const. art. 6, § 1a.

2. Criminal Law ⇐1013, 1069(1)

Defendant, who, upon being found guilty of violation of Penal Code, § 288a, was adjudged and committed as sexual psychopath, could appeal from subsequent denial of his motion for new trial in original criminal proceeding despite fact that original criminal proceeding had been suspended until termination of sexual psychopathy proceedings, and though rule provides that appeal from order denying new trial shall not be taken until after granting of probation or rendition of judgment. West's Ann.Pen.Code, §§ 288, 1179 et seq., 1182, 1237; West's Ann.Welfare and Inst. § 5519; West's Ann.Rules on Appeal, rule 31; West's Ann.Const. art. 6, § 1a.

C. K. Curtright, Sacramento, for petitioner.

Edmund G. Brown, Atty. Gen., Doris H. Maier, Deputy Atty. Gen., Philip B. Lynch, Dist. Atty., and E. Glynn Stanley, Chief Deputy, Fairfield, for respondents.

PEEK, Justice.

By mandate petitioner seeks to compel the preparation of the clerk's and reporter's

transcripts on his appeal from the order of the trial court denying his motion for a new trial.

On January 15, 1952, defendant was found guilty of violating Penal Code, section 288a. Prior to the entry of judgment, and pursuant to his request, the criminal proceedings were suspended and sexual phychopathy proceedings instituted. At the conclusion of the hearing on the psychopathy issue, petitioner was adjudged a sexual psychopath and committed to the Department of Mental Hygiene. Several months thereafter, and after like proceedings had been instituted by petitioner, section 5519 of the Welfare and Institutions Code, the respondent court on its own motion initiated a further proceeding under said section. The petitioner was again committed as a sexual psychopath on January 27, 1956. At the time of the institution of the proceedings on the court's own motion, the petitioner had filed a motion for a new trial in the original criminal proceeding. The court continued that motion pending the outcome of the sexual psychopathy proceeding then before it, and upon termination thereof adverse to petitioner, the court denied his motion for a new trial. Petitioner then sought to appeal from that order and requested preparation of the clerk's and reporter's transcripts. The trial court, by its order of April 2, 1956, found that the order denying petitioner's motion for a new trial was not appealable in that the criminal proceeding had been suspended on motion by petitioner and was still suspended; that no judgment had been pronounced nor had probation been granted in the criminal proceeding; and denied the motion for preparation of the record without prejudice until such time as the criminal proceeding had been resumed and either judgment pronounced or probation granted.

In support of the court's order and in opposition to the petition now before us, respondents contend that under Rule 31 of Rules on Appeal, an appeal from an "* * * order denying a new trial shall not be taken until after the granting of probation or the rendition of judgment, * * *"; that therefore petitioner's appeal from the order denying his motion for a new trial is premature; and that the preparation of the requested transcripts at this time would be but an idle act which mandate will not compel.

Respondents' argument wholly ignores the Constitution, art. VI, sec. 1a; the applicable statutory provisions, Penal Code, sec. 1179 et seq. and 1237; the independent collateral nature of a new trial proceeding, In re Estate of Waters, 181 Cal. 584, 185 P. 951; and apparently places complete reliance upon the quoted portion of Rule 31. Under the cited provisions of the Constitution, the rule-making power of the Judicial Council is limited to the adoption or amendment of "* * * rules of practice and procedure for the several courts not inconsistent with laws that are now or that may hereafter be in force; * * *." Since 1872, section 1179 et seq. of the Penal Code have provided the machinery for making and prosecuting a motion for a new trial, and section 1237 of that code has provided that "an appeal may be taken by the defendant * * * from an order denying a motion for a new trial." Furthermore our courts have held in reference to the provisions of the Code of Civil Procedure governing new trials and the granting of the right to move therefor that they "* * * clearly evidenced an intent on the part of the Legislature to make the motion for a new trial wholly independent of and collateral to the main proceeding, in effect a *new action* in the nature of a writ of error brought to reverse the judgment in the lower court." In re Estate of Waters, supra, 181 Cal. at page 586, 185 P. at page 952.

[1] Thus, under the applicable code provisions, a defendant is given the substantive right to move for a new trial, Penal Code, sec. 1182, and the substantive right of appeal from the order made in response to such motion. Penal Code, sec. 1237.

Additionally, our courts have jealously guarded the right of appeal, and in the early case of Ex parte Hoge, 48 Cal. 3, held this right guaranteed by the Constitution to

be as sacred as the right to trial by jury. See also In re Adams, 81 Cal. 163, 22 P. 547; Smith v. McCallum, 36 Cal.App. 143, 172 P. 408.

But, says the prosecution, the petitioner has been deprived of nothing, since the criminal action was merely suspended, and therefore upon termination of the psychopathy proceedings and resumption of the criminal proceedings he may renew his motion. Prior to the 1951 amendment to section 1237 of the Penal Code allowing an appeal from an order granting probation, a somewhat similar contention was made in People v. Young, 35 Cal.2d 819, 221 P.2d 13. There the People contended that the appeal from the order denying the defendant's motion for a new trial should be dismissed as being not timely, their argument being that section 1182 of the Penal Code provided that an application for a new trial must be made before judgment; that this provision should be construed together with provisions dealing with probation, and in the light of the legislative intent to afford speedy determination of criminal actions; and that when so construed, section 1182 must be read as providing that a motion for new trial must be made before the pronouncement of judgment or the granting of probation. The court held that the contention of the prosecution read something into the section not to be found there, and "* * * would deprive a defendant of the right to attack the terms of probation by motion for a new trial or appeal from a denial thereof, and he would be left without adequate remedy since the probation order [was not at that time] appealable. Although it has been held that the right to the pronouncement of judgment is waived where probation is requested and accepted [citing cases] it does not follow that the right to move for a new trial should likewise be deemed waived upon the granting of probation in the absence of express statutory provision to that effect." 35 Cal.2d at pages 821–822, 221 P.2d at page 15.

Rule 31, therefore, insofar as it ties the substantive rights given by the applicable new trial statutes and the substantive right of appeal, also statutorily given, into the suspended criminal proceedings would affect substantial rights and cease to be merely procedural if given the application contended for by the respondents. The rule as stated in Lane v. Superior Court, 104 Cal.App. 340, 344, 285 P. 860, and approved in Stockton Theatres, Inc. v. Palermo, 47 Cal.2d 469, 304 P.2d 7, 11, is that,

> " 'The rule-making power of the Judicial Council would seem to be limited by any existing law, the Constitution reserving to the Legislature and the people the primary and higher right to provide rules of procedure for our courts with the secondary right in the Judicial Council, to adopt rules only, when and where the higher authority of the Legislature and the people has not been exercised.' "

[2] What has heretofore been said may well be illustrated by the situation where a defendant moves for a new trial and in support thereof files affidavits showing the discovery of new evidence, the availability of which would obviously depend upon the lives of the witnesses who could supply the proposed evidence by their testimony. Necessarily, therefore, the possibility of the long suspension which might arise under the literal application of Rule 31 as argued by the respondents, could easily deny the fruits of a successful new trial proceeding based upon newly discovered evidence.

Let the writ issue.

VAN DYKE, P. J., and SCHOTTKY, J., concur.

147 Cal.App.2d 455

The PEOPLE of the State of California, Plaintiff and Respondent,

v.

Napoleon SHALHOOB, Jr., Defendant and Appellant.

Cr. 5681.

District Court of Appeal, Second District, Division 3, California.

Jan. 8, 1957.

Hearing Denied March 5, 1957.

Defendant was prosecuted for violation of the Corporate Securities Law in that he sold and issued for value to prosecuting witness a security without first obtaining the required permit and for grand theft. Judgment of conviction in the Superior Court of Los Angeles County, LeRoy Dawson, J., and the defendant appeals. The District Court of Appeal, Shinn, P. J., held that the record did not establish an undue limitation on cross-examination of the prosecuting witness by defendant; that evidence was not inadmissible as proving an offense not charged in the information; and that instructions on embezzlement were not prejudicial.

Judgment affirmed.

1. Criminal Law ⇐670

Where there was no offer of proof by defendant of what he proposed to prove in his cross-examination of a witness, there was no basis for claim of error in undue restriction of the cross-examination.

2. Stipulations ⇐14(10)

Claim of error of defendant in undue limitation of cross-examination of witness by defendant which could not be deemed prejudicial without a consideration of the entire evidence could not be considered where defendant had not made a statement of the evidence and where defendant made a stipulation containing the facts which defendant sought to prove in his cross-examination of the witness.

3. Criminal Law ⇐369(2)

In prosecution for selling a security constituting a certificate of interest in an oil and gas lease without a permit and for grand theft, where defendant claimed that he and prosecuting witness were joint adventurers in venture, admitting testimony that defendant had sold to another witness oil interest was proper as tending to prove that defendant was engaged in selling percentage interest in leases in order to finance the drilling of the well over the objection that it tended to prove the commission of an offense other than the one charged.

4. False Pretenses ⇐41

In prosecution for grand theft in connection with the sale of an interest in an oil and gas lease, evidence tending to show that the defendant was operating under a common scheme or plan to promote an enterprise by false and fraudulent representations was admissible.

5. Criminal Law ⇐814(5)

Where there was no evidence of embezzlement in prosecution for grand theft, instruction should have been limited to other forms of theft.

6. Criminal Law ⇐1172(6)

In prosecution for grand theft, instruction on embezzlement of which there was no evidence was not prejudicial where the people made no attempt to prove the offense of embezzlement and evidence of false representations made by defendant precluded any reasonable conclusion that the representations were either truthful or made with honest intentions.

Jesse A. Hamilton, Los Angeles, for appellant.

Edmund G. Brown, Atty. Gen., Norman H. Sokolow, Deputy Atty. Gen., for respondent.

SHINN, Presiding Justice.

By information Napoleon Shalhoob, Jr., was charged with the commission of four felonies, namely, in Count I with violation of the Corporate Securities Law, in violation of Section 26104(a) Corporations Code, in that he sold and issued for value to Dr. Donald E. Brannan a security, to wit, a

certificate of interest in an oil and gas mining title and lease without first having applied for and secured from the Commissioner of Corporations a permit so to do, and in succeeding counts with grand theft May 12, 1954, in taking $1,500, the personal property of Dr. Brannan; in Count III with grand theft of $1,250 from the same person on May 19, 1954, and in Count IV with having taken $920 from the same person on May 26, 1954. He was convicted in a jury trial of all the charged offenses and he appeals from the judgment.

It is not contended on the appeal that the evidence was insufficient to justify the verdict with respect to any of the charged offenses. The points on appeal are (1) the trial court erred in excluding evidence of transactions between appellant and the prosecuting witness after May 26, 1954; (2) the trial court erred in allowing over the objection of appellant proof of facts not charged in the information, which, if true, would have constituted another offense; and (3) the court erred in giving instructions inapplicable to the issues.

Appellant's briefs do not recite the evidence and for the purposes of our opinion a brief outline of the same will be sufficient. Appellant represented to Dr. Brannan that he was the president of the Chieftain Oil Company, having a lease on 2,500 acres at Lompoc; that he was going to drill an oil well on it and needed additional financing. He represented that a group of millionaires were backing him; that they had allocated $50,000 for the venture and that he needed an additional $10,000. He showed Dr. Brannan and a Mr. Delaney a checkbook which purportedly showed a bank balance of over a million dollars. He left in the doctor's office mailbox a proposed agreement which he had signed but which Dr. Brannan did not sign when advised by his attorney that it might have the legal effect of making him a partner or joint adventurer with appellant. On May 12, 1954, the doctor met appellant on the land and invested $1,500 in reliance upon appellant's representations. On the several dates stated in the information Dr. Brannan made further investments of $1,250 and $920.

On May 12 appellant gave Dr. Brannan a receipt for $1,500 which indicated that it was paid on "an account" of $5,000, leaving a balance of $3,500. It said in part: "For Joint Enterprise–Lompoc Property Who Is A Member On The Board And Treasurer In New Corp. Well No. 1, Chftn-Larsen Trustee Account for Well #1" and it was signed "Napoleon Shalhoob, Jr." Dr. Brannan testified that appellant agreed that for every $1,000 invested the doctor would own a 1% interest in the first well drilled and in the lease on some 2,000 acres. There was no writing to that effect, although the written agreement which appellant offered, and which the doctor did not sign, purported to grant to the doctor for a $10,000 investment approximately a 10% interest in a lease on some 2,000 acres. Aside from the fact that the Chieftain Oil Company held a lease on large acreage there was evidence that all the material representations of defendant were false. He did not have the financial backing he claimed to have. The figures in his checkbook 1,273,456 followed "Invoice #", which he covered up when he showed the figures. His bank balances were small.

[1, 2] Under his first assignment of error appellant contends that his cross-examination of Dr. Brannan was unduly limited in that he was not permitted to question him as to matters occurring after May 26, 1954. He does not state in his brief what he proposed to develop in further cross-examination although he intimated to the court that his purpose was to show that the entire transaction was a joint venture. There was no offer of proof and there is no basis for the claim of error. But even if error had been committed it could not be deemed prejudicial without a consideration of the entire evidence. Appellant has not made a statement of the evidence and is in no position to claim he was prejudiced by any of the court's rulings which he criticizes. Moreover, he entered into a stipulation that in June 1954 he and Dr. Brannan became equally interested in the same Lom-

poc oil lease operated by the Cousins Oil Company, Inc., of which Dr. Brannan was president, that Dr. Brannan sold stock in the company and was active in its management. It was also stipulated that all the money appellant received from Dr. Brannan was used in drilling the well. These were the facts which appellant sought to prove in the cross-examination of Dr. Brannan and he was satisfied with the stipulation.

[3, 4] The second point is that the court erred in admitting evidence over objection that appellant had sold for $1,000 a 1% interest to one Brughelli in the oil lease and a well being drilled and that in negotiating the sale appellant made the same representations that he had made to Dr. Brannan. It is argued that the evidence was inadmissible inasmuch as it tended to prove the commission of an offense other than the one charged. We perceive no error in the reception of the testimony. Mr. Brughelli testified that appellant told him that he had sold or offered to sell oil interests to one E. A. Stradiotto, to one Charlie Bosio and to a man named Baker. In view of appellant's contention that he and Dr. Brannan were joint adventurers, and that the doctor was not merely an investor, it was proper to receive evidence tending to prove that appellant was engaged in selling percentage interests in the lease in order to finance the drilling of a well. People v. Dutton, 41 Cal.App.2d 866, 107 P.2d 937; People v. Whelpton, 99 Cal.App.2d 828, 222 P.2d 935; People v. Murphy, 17 Cal.App.2d 575, 62 P.2d 592. The evidence was also admissible under the counts which charged grand theft, inasmuch as it tended to show that defendant was operating under a common scheme or plan to promote his enterprise by false and fraudulent representations. People v. Gordon, 71 Cal.App.2d 606, 163 P.2d 110; People v. Silva, 119 Cal.App.2d 863, 260 P.2d 251.

[5, 6] The court in defining the three forms of theft in its instructions gave definitions of embezzlement, obtaining property by false pretense and larceny by trick and device. At the request of the People the court gave an instruction as to embezzlement which appellant contends was error. There was no evidence of embezzlement and the instructions should have been limited to the other forms of theft. This is a form of error that so frequently occurs in the use of instructions taken from so-called "CALJIC." When these form instructions are used both counsel and the court should first assure themselves that they have direct application to the evidence. The People very properly do not undertake to justify the instruction on embezzlement but contend that "the emphasis is on false pretense in the instructions having to do with theft" and that the error was not prejudicial. We agree that the error was not one which would justify a reversal of the judgment. We find upon examination of the reporter's transcript that the People made no attempt to prove the offense of embezzlement. The evidence of false representations made was so convincing as to preclude any reasonable conclusion that appellant's representations were either truthful or made with honest intentions.

The judgment is affirmed.

PARKER WOOD and VALLÉE, JJ., concur.



147 Cal.App.2d 549

Paul FINSTEIN, Plaintiff and Appellant,

v.

COUNTY OF SAN BERNARDINO, a public corporation, Richard E. Elliott, Joseph H. Martin, Lowell E. Lathrop, Defendants and Respondents.

Civ. 5538.

District Court of Appeal, Fourth District, California.

Jan. 11, 1957.

Action to enjoin enforcement of provision of county health ordinance forbidding the keeping of fowl within 40 feet of any dwelling other than that of owner. The

Superior Court of San Bernardino County, Carl B. Hilliard, J., entered judgment denying an injunction, and plaintiff appealed. The District Court of Appeal, Barnard, P. J., held that as respects facilities which had been erected and used for keeping of poultry since prior to effective date of county zoning ordinance permitting the continuance of existing nonconforming uses, provision of zoning ordinance, requiring that structures for fowl be kept at least 100 feet from any dwelling on adjoining property, did not repeal by implication provision of prior health ordinance forbidding the keeping of fowl within 40 feet of any dwelling other than that of owner.

Judgment affirmed.

1. Municipal Corporations ⇐116

A provision of a zoning ordinance should not be interpreted as intending to repeal by implication an existing provision of a health ordinance, in absence of a clear disclosure of such an intent.

2. Municipal Corporations ⇐601(18)

The provisions of a zoning ordinance, including permissive continuance of a nonconforming use, are related to the purpose of such an ordinance and cannot reasonably be held to imply any intention to thereby exempt owner of property subject thereto from the necessity of complying with any regulation or requirement of an existing health ordinance.

3. Counties ⇐21½

That county zoning ordinance expressly repealed other specified ordinances tended to indicate an absence of any intention to repeal by implication any part of another ordinance not thus specifically repealed.

4. Counties ⇐21½

As respects facilities which had been erected and used for the keeping of poultry since prior to effective date of county zoning ordinance permitting the continuance of existing nonconforming uses, provision of zoning ordinance requiring that structures for fowl be kept at least 100 feet from any dwelling on adjoining property did not repeal by implication provision of prior health ordinance forbidding the keeping of fowl within 40 feet of any dwelling other than that of owner.

5. Municipal Corporations ⇐592(1)

An activity which is permitted by law may be constitutionally prohibited, in connection with zoning ordinances, because of the subsequent development of adjacent property.

6. Constitutional Law ⇐278(4)

Though facilities for keeping poultry were constructed in compliance with county health ordinance, then in effect, forbidding the keeping of fowl within 40 feet of any dwelling other than that of owner, subsequently requiring owner to remove his poultry in compliance with such ordinance 40 feet from a dwelling meantime erected on adjoining property would not unconstitutionally deprive owner of the use of his property.

Busch & Maroney, Uplands, for appellant.

Albert E. Weller, Counsel, J. B. Lawrence, Deputy Counsel, San Bernardino, for San Bernardino County.

BARNARD, Presiding Justice.

This is an appeal from a judgment denying an injunction. The facts are undisputed, and the question presented is whether the first sentence of Section 8 of the San Bernardino County Health Code (Ordinance No. 527) is applicable to and enforceable against the plaintiff's property.

Ordinance No. 527 was adopted in 1942 and Section 8 reads as follows:

> "*Domestic animals.* No person shall keep any animal, fowl, or bird, wild or domestic, other than cats, dogs, canaries or birds of psittacinae family, within forty (40) feet of any school, church, hospital, public place or business, or any residence or dwelling house or other building used for the

habitation of human beings, other than his own personal and private dwelling or residence. No such animal or fowl shall be kept or maintained in any yard, coop, or building which is in a foul or unsanitary condition. The provisions of this section shall not apply to accredited laboratories regulated by the State Department of Public Health."

Since July 1, 1951, the plaintiff has been engaged in the business of raising chickens on his real property. His poultry buildings at the time they were constructed were more than 40 feet from any building used as a dwelling, other than his own residence. Subsequent to July 1, 1951, a neighbor constructed a residence on an adjoining property which was within 40 feet of the plaintiff's poultry enclosure.

On July 9, 1951, the board of supervisors adopted Ordinance 678, a zoning ordinance, which became effective on August 8, 1951. Ordinance No. 678 established eleven zone districts and provided regulations therefor in the unincorporated area of San Bernardino County, and specifically repealed eighteen prior ordinances by number. The Health Code (Ordinance 527) was not named as one of the ordinances being repealed. Section 8 of Ordinance No. 678 provided for one zone in which limited agricultural uses were permitted and one of the regulations therein reads:

"h. Buildings and enclosures for fowl or livestock, small or large, placed on any given parcel of land, shall be kept at least forty (40) feet from dwellings on the property and a minimum of one hundred (100) feet from any other place used for human habitation, public park, school or 'R' District."

Plaintiff's property would be subject to that regulation except that Section 15.5 of that ordinance provides that nonconforming buildings and uses existing on the effective date of that ordinance may be continued and maintained provided there are no structural alterations. Section 19.1 of that ordinance also provides as follows:

"Interpretation: In interpreting and applying the provisions of this Ordinance they shall be held to be the minimum requirements for the promotion of the public health, safety, comfort, convenience and general welfare. It is not intended by this Ordinance to interfere with or abrogate or annul any easement, covenant or other agreement between parties. Where this Ordinance imposes a greater restriction upon the use of building or land, or upon the height of buildings, or requires larger open spaces than are imposed or required by other ordinances, rules, regulations or by easements, covenants or agreements, the provisions of this Ordinance shall control."

The plaintiff alleged in his complaint that the defendants have ordered him to remove his poultry 40 feet from the adjoining dwelling, which was erected subsequent to the construction of his facilities and subsequent to the adoption of Ordinance No. 678; that this order was based upon and made pursuant to the provisions of Section 8 of Ordinance No. 527; that the defendants threaten to prosecute the plaintiff for noncompliance with the provisions of Ordinance 527; and that plaintiff has complied with all requirements of Section 8 of Ordinance 527, except the distance requirement contained in the first sentence thereof. The prayer was that the defendants be enjoined from in any manner enforcing or attempting to enforce the provisions of the first sentence of Section 8 of Ordinance 527. At the trial it was stipulated, among other things, that plaintiff constructed a chicken house after the adoption of Ordinance No. 527, but prior to the adoption of Ordinance No. 678; that at the time of said construction there was no dwelling within 40 feet thereof; that a dwelling house was subsequently erected on adjoining property within 40 feet of the poultry house; that the applicable sections of Ordinance No. 527 are not dependent

upon the existence of an actual nuisance; that the maintenance of a poultry house within 40 feet from such a dwelling house is in violation of the terms of Ordinance No. 527; and that the plaintiff contended that no violation by him appears since Ordinance No. 527, insofar as it pertained to him, was impliedly repealed by Ordinance No. 678. The court found that the plaintiff, as a nonconforming user, is not subject to the provisions of Zoning Ordinance No. 678, and that Ordinance No. 678 did not impliedly repeal Section 8 of Health Ordinance No. 527. Judgment was entered in favor of the defendants, and the plaintiff has appealed therefrom.

The appellant's main contention is that the first sentence of Section 8 of Ordinance No. 527 has been impliedly repealed by the adoption of Ordinance No. 678. It is argued that the provisions of Ordinance 678, which require that buildings and enclosures for fowl shall be kept at least 100 feet from any dwelling on adjoining property, are greater and more restrictive regulations with respect to the keeping of poultry than are the provisions of Section 8 of Ordinance No. 527; that since the provisions of these ordinances, with respect to this matter, are conflicting the last ordinance adopted is controlling; and that it follows that there is an implied repeal of the first sentence of Section 8 of Ordinance No. 527, since the two statutes cannot be reconciled under any reasonable hypothesis.

[1, 2] There is some distinction with respect to the matter in question in that Section 8 of the Health Code forbids the keeping of fowl within 40 feet of any dwelling other than that of the owner, while Ordinance No. 678 relates to structures for that purpose and requires that they shall be kept at least 100 feet from any dwelling on adjoining property. It would be unreasonable to interpret a provision of a zoning ordinance as intended to repeal, by implication, an existing provision of a health ordinance, in the absence of a clear disclosure of such an intent. The purpose of a health ordinance is, of course, quite different from that of a zoning ordinance. The provisions of a zoning ordinance, including the permissive continuance of a nonconforming use, are related to the purpose of such an ordinance, and cannot reasonably be held to imply any intention to thereby exempt the owner of such property from the necessity of complying with any regulation or requirement of an existing health ordinance.

[3, 4] The fact that Ordinance No. 678 specifically repealed certain other ordinances not including any part of Ordinance No. 527, would tend to indicate an absence of any intention to impliedly repeal a part of that ordinance. Moreover, Ordinance No. 678, by its provision for the continuance of a nonconforming use, expressly exempted the appellant's facilities from the operation of that ordinance. Since appellant's facilities are not covered by that ordinance there is no conflict between the provisions of that ordinance and Section 8 of Ordinance No. 527, insofar as appellant is concerned. It follows that insofar as it relates to appellant's property the zoning ordinance (No. 678) does not impose a greater restriction in the respect here in question than is imposed or required by the health ordinance (No. 527). Section 19.1 of Ordinance No. 678 discloses a clear intention that where its provisions do not apply, as is the case with respect to a nonconforming use, it is not controlling over existing ordinances. The effect of that section and the nonconforming use section of Ordinance No. 678 clearly indicates that Ordinance No. 678 was not intended to repeal by implication any part of Section 8 of Ordinance No. 527, under the circumstances which here appear. If it be assumed that the 100 foot restriction provided for in Ordinance No. 678 was intended to apply in future cases, it did not apply to appellant's existing nonconforming use, and the two statutes may reasonably be reconciled insofar as they affect appellant or the circumstances in question. It follows that the trial court correctly found and

held, insofar as this action was concerned, that the first sentence of Section 8 of Ordinance No. 527 was not impliedly repealed by the adoption of Section 678.

The appellant further contends that the enforcement of Section 8 of Ordinance No. 527 will unconstitutionally deprive him of the use of property. It is argued that said Section 8 is arbitrary and confiscatory, that he could not constitutionally be penalized because of the subsequent location of a dwelling on adjoining property, and that to hold him subject to the provisions of Section 8 of Ordinance No. 527 would be to give a retroactive effect to an existing ordinance and compel him to immediately cease an existing use in violation of the established principle of zoning ordinances that a reasonable time must be allowed in which to terminate an existing use.

[5, 6] It is well settled that an activity which is permitted by law may be constitutionally prohibited, in connection with zoning ordinances, because of the subsequent development of adjacent property. Ex parte Hadacheck, 165 Cal. 416, 132 P. 584, L.R.A.1916B, 1248; Jones v. City of Los Angeles, 211 Cal. 304, 295 P. 14; People v. Johnson, 129 Cal.App.2d 1, 277 P.2d 45. The Health Code, Ordinance No. 527, was in effect some nine years before the appellant erected his buildings, and he cannot complain because the adoption of a subsequent zoning ordinance, which exempted him from its operation, does not also exempt him from the operation of the provisions of the preexisting health ordinance. This is not a zoning case, but one involving the operation of a provision of the Health Code of that county. No defect in that ordinance is pointed out or relied on, and from its very nature there is nothing in this provision of the Health Code which discloses any intention of excluding any property from its operation because of prior use or former conditions.

The judgment is affirmed.

GRIFFIN and MUSSELL, JJ., concur.

147 Cal.App.2d 269

The PEOPLE of the State of California, Plaintiff and Respondent,

v.

Eddie VICE, Defendant and Appellant.

Cr. 2717.

District Court of Appeal, Third District, California.

Dec. 27, 1956.

Defendant was convicted of having unlawful possession of preparation of heroin in violation of the Health & Safety Code. The Superior Court, Sacramento County, Raymond T. Coughlin, J., entered judgment, and defendant appealed. The District Court of Appeal, Schottky, J., held that evidence was sufficient to establish the offense.

Judgment affirmed.

1. Arrest ⇐63(4)

Where informers gave inspector reason to believe that the defendant was in possession of narcotics, that such narcotics were in his room, and that it was necessary for inspector to proceed immediately to the room for purpose of arresting defendant and seizing the narcotics to prevent disposal of such narcotics, arrest of defendant on such information supplied by two known and reliable informers was reasonable. West's Ann. Health and Safety Code, § 11500; West's Ann.Pen.Code, § 836, subd. 2.

2. Searches and Seizures ⇐7(12)

Where arresting officer has reasonable ground to believe that person arrested has committed a felony, and the arrest is valid, search, which is conducted as an incident to such arrest, is not unreasonable. West's Ann.Pen. Code, § 836, subd. 2.

3. Poisons ⇐4

To establish defendant's possession of narcotics in violation of the Health & Safety Code, it is sufficient if the articles are deposited in a place which is under

defendant's possession and control. West's Ann.Health and Safety Code, § 11500.

4. Poisons ⊂9

In prosecution for unlawful possession of preparation of heroin in violation of the Health & Safety Code, evidence, which revealed that narcotics were found hidden in defendant's room and that defendant admitted the narcotics belonged to him and had been placed where they were found after he had found them elsewhere, was sufficient to establish the offense. West's Ann.Health and Safety Code, § 11500.

Eddie Vice, in pro. per.

Edmund G. Brown, Atty. Gen., G. A. Strader, Deputy Atty. Gen., for respondent.

SCHOTTKY, Justice.

Defendant above named was charged by information with the crime of violation of section 11500 of the Health and Safety Code, it being alleged that he "did willfully and unlawfully and feloniously have in his possession a preparation of Heroin." He pleaded not guilty, waived a trial by jury, and following trial the court found him guilty as charged. Probation was denied and judgment was pronounced. This appeal is from the judgment.

Appellant has filed an opening brief in propria persona and raises only one point in his appeal which is the same point as that which constituted the principal defense at the trial. He contends that the evidence, consisting of the narcotics, was obtained by an unlawful search and seizure, and therefore improperly admitted in evidence. Before discussing this contention we shall give a brief summary of the evidence as shown by the record.

Eddie Vice, alias "Booster", had been known to Mr. House, the supervising narcotic inspector, for approximately two years. During that time he had associated with narcotic users and peddlers. On the night of April 18, 1956, Mr. House received a call from an informant whom Mr. House had known for some time. This informant stated that Eddie Vice "was dealing in narcotics." The following morning, April 19, Mr. House received a telephone call from a different informant who was also known to Mr. House for a long period of time and who was described by Mr. House as a reliable person in giving information. This informant stated that a man by the name of "Booster" in Room 28 in the Arcade Hotel was in possession of a quantity of narcotics which were in the room at that time; that the man was in the room but he would not stay there very long and would probably take the narcotics out. Mr. House contacted two narcotic inspectors and told them to go to the Arcade Hotel and arrest Eddie Vice.

Mr. House did not obtain a warrant because, on the basis of the information he had, he believed that the narcotic was then in the room but likely to be moved momentarily.

Pursuant to the orders given to them by Supervising Inspector House, narcotic inspectors Best and Murphy proceeded to Room 28 of the Arcade Hotel with an employee of the hotel. After knocking on the door, the officers entered when the employee opened the door with a key. After determining that the defendant was not present and after some search, they found the narcotics. The inspectors informed Mr. House that the defendant was not in the room, and Mr. House, in company with a city police officer, proceeded to the west end of Sacramento where they located defendant. Mr. House placed defendant under arrest for possession of narcotics. Upon being returned to the room after the arrest the appellant stated to the arresting officers that he had placed the articles underneath the wash stand and that he had found them in Stockton some time previously.

Penal Code, § 836, subd. 2, provides that a peace officer may make an arrest without a warrant when the person arrested has committed a felony although

not in the officer's presence, but in the case of People v. Brown, 45 Cal.2d 640, 290 P.2d 528, it was stated that an arrest will not be held to have been validly made even though the arrested person was guilty of having committed a felony unless the arresting officer had reasonable grounds as a basis for making the arrest.

In Willson v. Superior Court, 46 Cal. 2d 291, at page 294, 294 P.2d 36, at page 38, the court said:

"* * * Although information provided by an anonymous informer is relevant on the issue of reasonable cause, in the absence of some pressing emergency [citation], an arrest may not be based solely on such information. [Citations], and evidence must be presented to the court that would justify the conclusion that reliance on the information was reasonable. [Citation.] In some cases the identity of, or past experience with, the informer may provide such evidence [citation], * * *."

Also, in the case of Trowbridge v. Superior Court, 144 Cal.App.2d 13, 300 P.2d 222, the court came to the conclusion that an officer is justified in acting solely upon information from an informant where that informant is known to the arresting officer and is believed by the officer to be trustworthy and reliable. People v. Gonzales, 141 Cal.App.2d 604, 297 P.2d 50, is to the same effect.

[1] We believe that under the authority of the above cases, the arrest of appellant on the information supplied by two known and reliable informers was reasonable. The informers gave Inspector House reason to believe that Eddie Vice was in possession of narcotics at that time, that the narcotics were in his room, and that it was necessary for him to proceed immediately to the room for the purpose of arresting Mr. Vice and seizing the narcotics in order to prevent their disposal.

[2] When the arresting officer does have reasonable grounds to believe that the person arrested has committed a felony, the arrest is valid and a search which is conducted as an incident to that arrest is not unreasonable. People v. Dixon, 46 Cal.2d 456, 296 P.2d 557; People v. Boyles, 45 Cal.2d 652, 290 P.2d 535; People v. Martin, 45 Cal.2d 755, 290 P.2d 855.

Here, the two inspectors went to the appellant's hotel room for the specific purpose of arresting him on a charge of possession of narcotics. When they entered the room he was not present and they so informed Supervising Inspector House. Mr. House then proceeded to the west end of Sacramento where he found Mr. Vice and placed him under arrest. In the meantime, the officers in the appellant's room had discovered the narcotics under a sink. Mr. House brought appellant to the room and appellant stated that he had placed the articles underneath the wash stand.

Recent authorities hold that in order for a search and seizure to be valid it is not necessary that the arrest precede the search and seizure. If the search and seizure are part of the same transaction, the search and seizure may occur prior to the arrest.

In the recent case of People v. Simon, 45 Cal.2d 645, at page 648, 290 P.2d 531, at page 533, our Supreme Court said:

"In People v. Brown, 45 Cal.2d 640, 290 P.2d 528, we held that a search incident to an arrest could not be justified in the absence of 'reasonable cause' under Penal Code, § 836, merely because it revealed that defendant was in fact guilty of a felony. Accordingly, the search of defendant's person may be justified only if he was committing or attempting to commit an offense in the officer's presence, Penal Code, § 836, subd. 1, or the officer had reasonable cause to believe he had committed a felony. Penal Code, § 836, subd. 5. In such circumstances, however, it has been held that it is not significant whether the search precedes or follows the arrest. State v.

McDaniel, 115 Or. 187, 231 P. 965, 237 P. 373, 376; State v. Reynolds, 101 Conn. 224, 125 A. 636, 637–638; Ingle v. Commonwealth, 204 Ky. 518, 264 S.W. 1088, 1090; Knight v. State, 171 Ark. 882, 286 S.W. 1013, 1014–1015; see also Clark v. State, 78 Okl. Cr. 423, 149 P.2d 994, 997; State v. Rotolo, 39 Wyo. 181, 270 P. 665, 666–667. Thus, if the officer is entitled to make an arrest on the basis of information available to him before he searches, and as an incident to that arrest is entitled to make a reasonable search of the person arrested and the place where he is arrested, there is nothing unreasonable in his conduct if he makes the search before instead of after the arrest. In fact, if the person searched is innocent and the search convinces the officer that his reasonable belief to the contrary is erroneous, it is to the advantage of the person searched not to be arrested. On the other hand, if he is not innocent or the search does not establish his innocence, the security of his person, house, papers, or effects suffers no more from a search preceding his arrest than it would from the same search following it. In either case the important considerations are whether the officer had reasonable cause before the search to make an arrest and whether the search and any seizures incident thereto were or were not more extensive than would reasonably be justified as incident to an arrest. See, United States v. Rabinowitz, 339 U.S. 56, 60–64, 70 S.Ct. 430, 94 L.Ed. 653. We conclude, therefore, that a search is not unlawful merely because it precedes rather than follows the arrest."

And in People v. Boyles, 45 Cal.2d 652, at page 655, 290 P.2d 535, at page 537, the court said:

"* * * If, however, an arrest under that subdivision was lawful, the search incident thereto would not be unlawful merely because it preceded rather than followed the arrest. People v. Simon, 45 Cal.2d 645, 290 P.2d 531."

In the instant case, although the seizure of the narcotics preceded the arrest of the appellant by a half hour or so, nevertheless the arrest and the seizure were part of one single transaction. Though he was not present in the room at the time the officers arrived they went there for the specific purpose of arresting him. The finding of the narcotics by the officers after entering the room was not needed in order to make a valid arrest. The arrest was made upon the basis of information supplied by two known, reliable informants, and the arresting process began when the officers first went to the appellant's hotel room. The three officers, Inspectors House, Best and Murphy, were acting together.

[3] In regard to the question of possession, the cases hold that the narcotics need not be found on the person of the defendant, it being sufficient if such articles are deposited in a place under the possession and control of the accused. People v. Noland, 61 Cal.App.2d 364, 143 P.2d 86; People v. Sinclair, 129 Cal.App. 320, 19 P.2d 23.

[4] In regard to the question of exclusive control when the hotel also had access to the room, it has been held that where there was testimony that the defendant admitted the narcotics in the room belonged to him, there was no merit in the argument that unlawful possession might not be sustained for the reason that the evidence showed that another person had equal right and facility of access to the premises. People v. Gallagher, 12 Cal.App.2d 434, 55 P.2d 889.

In the instant case, although the narcotics were not found on the person of the appellant, the offense was adequately established when the narcotics were found hidden in his room and appellant stated that he had placed the articles underneath the wash stand and that he found them in Stockton some time previously.

In view of the foregoing the judgment is affirmed.

VAN DYKE, P. J., and PEEK, J., concur.



147 Cal.App.2d 543

The PEOPLE of the State of California, Plaintiff and Respondent,

v.

Aston Felbon THOMPSON, Defendant and Appellant.

Cr. 5720.

District Court of Appeal, Second District, Division 3, California.

Jan. 11, 1957.

Hearing Denied March 5, 1957.

Prosecution on two counts of robbery and one count of kidnapping. The Superior Court of Los Angeles County, Kenneth C. Newell, J., entered a judgment convicting defendant of both robbery counts, and the defendant appealed. The District Court of Appeal, Shinn, P. J., held that evidence was sufficient to support conviction.

Affirmed.

1. Criminal Law ⇐1144(13)

Evidence must be viewed most favorably to prosecution on appeal in criminal prosecution.

2. Robbery ⇐24(1)

Evidence supported conviction of two counts of robbery of the first degree.

3. Robbery ⇐24(3)

An identification of accused by victim of a robbery is sufficient to sustain an implied finding that accused committed the crime.

4. Robbery ⇐24(3)

The identification of an accused by victim of a robbery need not be corroborated by other evidence.

5. Criminal Law ⇐741(2)

In prosecution on two counts of robbery, whether discrepancy between testimony of the two victims as to robber's moustache raised reasonable doubt of accused's identity or rendered testimony of victims unworthy of belief was question for jury.

6. Criminal Law ⇐739(2)

In robbery prosecution, testimony of defendant and his witnesses, though it would have established an alibi for defendant if believed, merely created conflict in evidence and credibility of that testimony was matter for jury.

7. Criminal Law ⇐814(17)

An instruction defining jury's duties in weighing reasonable inferences to be drawn from evidence is proper only when prosecution relies wholly or substantially upon circumstantial evidence. West's Ann.Code Civ.Proc., § 1831.

8. Criminal Law ⇐814(17)

Where evidence offered by People consisted of identification of defendant and that offered by defendant consisted of testimony that he could not have been at scene of robberies at the times in question, such evidence was "direct" not "circumstantial", and, hence, defendant was not entitled to instruction defining jury's duties in weighing reasonable inferences to be drawn from evidence. West's Ann.Code Civ.Proc., § 1831.

See publication Words and Phrases, for other judicial constructions and definitions of "Circumstantial Evidence" and "Direct Evidence".

9. Criminal Law ⇐1171(1)

In prosecution on two counts of robbery, statements of District Attorney in his closing argument to jury did not constitute prejudicial error.

Gladys Towles Root, Eugene V. McPherson, Joseph A. Armstrong, Los Angeles, for appellant.

Edmund G. Brown, Atty. Gen., Clarence A. Linn, Asst. Atty. Gen., Victor Griffith, Deputy Atty. Gen., for respondent.

SHINN, Presiding Justice.

Aston Felbon Thompson was charged with two counts of robbery and one count of kidnapping. It was also alleged that at the time of the commission of the robberies defendant was armed with a .22 automatic. Trial was to a jury. The kidnapping count was dismissed on defendant's motion at the close of the People's case. Defendant was convicted of both robbery counts. The jury found that he was armed at the time of the commission of the crimes and found the offenses to be robbery of the first degree. Defendant's motion for a new trial was denied. Application for probation was also denied and Thompson was sentenced to state prison for the term prescribed by law, the sentences on each count to run concurrently. Defendant appeals from the judgment and the order denying him a new trial.

Defendant contends that the evidence was insufficient to support the verdicts of guilty, that the court erred in refusing to give an instruction requested by him, and that the district attorney was guilty of prejudicial misconduct during his closing argument to the jury.

There was evidence of the following facts. On December 18, 1955, Richard L. Mansfield was working at a gas station located at 2050 North Fair Oaks in Pasadena. At about 9 p. m., he closed the station and entered his car which was parked behind the station. He started the motor and turned on the headlights. Through the beam of the headlights he saw a clean-shaven Negro, wearing a dark dress coat and an unmatching pair of dark dress slacks approaching him. The man also wore a handkerchief around his neck. Mansfield identified him as defendant. When the man learned that Mansfield was in charge of the station he displayed a .22 automatic and ordered him out of the car. Mansfield did not know whether the automatic was loaded but stated that he was afraid of the gun. Defendant asked Mansfield for the bag of money. On being told that there was no bag of money, the man took Mansfield's wallet which contained $10 and his car keys and left the premises. About two weeks after the robbery Mansfield attended a police show-up and identified defendant as the man who had robbed him. At that time defendant was asked to say "Give me the bag" and Mansfield identified defendant's voice as that of the robber.

On December 24, 1955, Joseph Friedman was operating a general merchandise store at 353 North Fair Oaks in Pasadena. He lived with his family in a house at the rear of the store. At about 8 p. m., Friedman closed down the store. As he was turning the corner to go into his house, a Negro wearing a dark dress coat and dark dress slacks ran up to him. The man had a slight moustache which Friedman stated was similar to defendant's. The man poked a dark automatic into Friedman's chest and said: "It is a hold up. Give me the money." Friedman identified the robber as defendant. He took $20 from Friedman's pocket and ordered him inside the house to get more money. As they entered the house the man put a handkerchief or a T-shirt over his face and said: "Tell your wife to give me the money; if not, I will kill you." Friedman was afraid of the gun and told his wife to do as asked. When told that there was no more money, the man threatened to shoot the Friedmans and then left. Friedman testified that he identified defendant as the culprit at a police show-up a week after the robbery. Mrs. Friedman likewise testified for the People but she was unable to identify defendant as the robber.

Defendant, testifying in his own behalf, stated that he lived in Pasadena and that he had gone to the Friedman store about a week before the robbery to find some trousers to match a suit. He stated that he did not own a gun and denied committing either of the robberies. He had worn a moustache since 1947 and was wearing one on the night of both robberies. On December 18th he went to Pomona in the company of a Mrs. Carson and her daughter to visit a friend of his named John Tilton Smith. They arrived at Smith's residence at about 7 p. m., remained there for half an hour,

and the party then went to Smith's studio where they listened to jazz records and talked until 10 p. m. Smith, testifying in defendant's behalf, corroborated Thompson's account of his whereabouts on the evening of December 18th.

Defendant testified that on December 24th, he visited a Mrs. Florence Morrow and her son at her apartment in Los Angeles while her husband was out of town. He arrived at about 6 p. m., and they spent the evening decorating a Christmas tree, watching television and talking. He stayed overnight in the Morrow apartment. On cross-examination, defendant admitted a prior felony conviction. Mrs. Morrow, testifying in defendant's behalf, corroborated his account of his whereabouts on Christmas Eve.

The first assignment of error to be considered is the insufficiency of the evidence to support the verdicts of the jury. In this connection defendant urges that the evidence of his alibi for the evenings of December 18th and 24th was unimpeached and uncontradicted and that the descriptions of the robber given by the two victims were inconsistent, namely, that Mansfield testified that the culprit was clean-shaven, while Friedman testified that he had a moustache. Thus defendant argues that "in this case it is incredible that the same man could have committed both robberies." The argument is without merit.

[1, 2] Viewing the evidence, as we must, in the light most favorable to the prosecution, there was ample evidence to support the jury's determination that both robberies were perpetrated by the same person and that that person was defendant. The robberies occurred within a mile or so of each other. The modus operandi of the criminal was the same, namely, to approach a place of business at closing time in the hope of taking the day's receipts. Both victims testified that the robber was wearing a dark dress coat, dark dress slacks, and had a handkerchief around his neck. Mansfield and Friedman stated positively that defendant was the robber.

[3–6] An identification of an accused by the victim of a robbery is sufficient to sustain an implied finding that he committed the crime. People v. Hernandez, 47 Cal. App.2d 132, 117 P.2d 394; People v. Beltowski, 71 Cal.App.2d 18, 162 P.2d 59; People v. Calloway, 127 Cal.App.2d 504, 274 P.2d 497. The identification need not be corroborated by other evidence. People v. McNeal, 123 Cal.App.2d 222, 266 P.2d 529. Whether the discrepancy between the testimony of Mansfield and Friedman as to the robber's moustache raised a reasonable doubt of his identity or rendered their testimony unworthy of belief was a question for the jury to decide. People v. Miller, 134 Cal.App.2d 792, 286 P.2d 415. Although the testimony of defendant and his witnesses, if believed, would have established an alibi for defendant, it merely created a conflict in the evidence and the credibility of that testimony was a matter for the jury to decide. People v. Spillard, 15 Cal.App. 2d 649, 59 P.2d 887.

[7, 8] The next assignment of error to be considered is that the court erred in refusing to give the following instruction at defendant's request: "If the evidence in this case (as to any particular count) is susceptible of two constructions or interpretations, each of which appears to you to be reasonable, and one of which points to the guilt of the defendant, and the other to his innocence, it is your duty, under the law, to adopt that interpretation which will admit of the defendant's innocence, and reject that which points to his guilt. You will notice that this rule applies only when both of the two possible opposing conclusions appear to you to be reasonable. If, on the other hand, one of the possible conclusions should appear to you to be reasonable and the other to be unreasonable, it would be your duty to adhere to the reasonable deduction and to reject the unreasonable, bearing in mind, however, that even if the reasonable deduction points to defendant's guilt, the entire proof must carry the convincing force required by law to support a verdict of guilt." Defendant argues that since the evidence which tended to establish his

guilt was circumstantial, he was entitled to an instruction defining the jury's duties in weighing the reasonable inferences to be drawn from that evidence, citing People v. Merkouris, 46 Cal.2d 540, 560–562, 297 P.2d 999. But defendant misconceives the nature of the testimony at the trial. The evidence offered by the People consisted of the identification of defendant and that offered by Thompson consisted of testimony that he could not have been at the scene of the robberies at the times in question. Such evidence is direct, not circumstantial. Code Civ.Proc. § 1831. The instruction requested by defendant is proper only when the prosecution relies either wholly or substantially upon circumstantial evidence. People v. Monge, 109 Cal.App.2d 141, 144, 240 P.2d 432, and cases cited. In People v. Merkouris, supra, 46 Cal.2d 540, 297 P.2d 999, two witnesses testified that they saw the accused either leaving or in the vicinity of a ceramics shop in Los Angeles at the approximate time of a murder committed in the shop. Defendant's evidence was that he was out of the city at the date of the murder. The court stated, 46 Cal.2d at page 562, 297 P.2d at page 1013, that the jury could have disbelieved the identification testimony, but that if this testimony were believed, it would be no more than circumstantial evidence of Merkouris' guilt and that it was error to refuse to instruct the jury as to the "two reasonable theories" doctrine. In the instant case the jury had only to determine whether the testimony of the identifying witnesses or that of defendant and his witnesses should be believed. It was not error to refuse the requested instruction.

[9] The final assignment of error is that the district attorney was guilty of prejudicial misconduct during his closing argument to the jury. We have set out the statements complained of in the margin.[1] The remarks were intemperate. Especially ill-advised was the rejoinder of the deputy district attorney after the court had stricken some of his argument and admonished the jury to disregard it. It was also improper to argue that defendant's admission on cross-examination, which went only to the question of his credibility, was a fact to be considered as tending to prove guilt. The court gave the jury a formal instruction to disregard any statements made by counsel concerning the facts of the case and not to regard them as evidence unless they amounted to a stipulation. There was no misconduct that would require a reversal.

Judgment and order affirmed.

PARKER WOOD and VALLÉE, JJ., concur.

1. "He wants us to be fair. Did you ever hear of a robber being fair? This is a criminal trial. We are here to ascertain the truth. The truth is that this man is guilty as the day is long. I don't care what you do with him. It is your community. If you want people like this in it, why, remember that he is going to do big time—

"Mr. Hollopeter: All right, I assign the making of that remark as misconduct, and ask the Court to instruct the jury to disregard the remark about men like that in the community, as being inflammatory and prejudicial.

"The Court: That portion of the remark may go out, and the jury is admonished to disregard it.

"Mr. Howard: If I say anything that is inflammatory, it is because I mean it.

"Mr. Hollopeter: I will assign the making of that remark as being misconduct.

"Mr. Howard: I mean that this defendant is guilty. Mr. Hollopeter says he is not. He didn't make any admissions so therefore he is not guilty. Well, he has very begrudgingly admitted that he was convicted of a felony on this stand. He didn't want to admit it in this Court, when it happened right in this very Court. That is the type of individual you are working with here."

147 Cal.App.2d 100

In the Matter of the ESTATE of Fredericka C. HERZ, Deceased.

Virgil F. McCARRON, Hugh L. Hubbard, Jr., and Elmer H. Swartz, Appellants,

v.

Rosina HERZ and George A. Herz, co-executors, and Vern L. Miller and Iona B. Miller, Respondents.

Civ. 5277.

District Court of Appeal, Fourth District, California.

Dec. 19, 1956.

Hearing Denied Feb. 13, 1957.

Proceeding to confirm executors' private sale of realty. The Superior Court, San Bernardino County, Martin J. Coughlin, J., directed further proceedings, and entered a subsequent order confirming sale of property to original bidders and second bidders at first hearing appealed. The District Court of Appeal, Barnard, P. J., held that where by excusable inadvertence and mistake executors had failed to notify original bidders of time and place of hearing, and second bidders made oral bid at hearing, which bid was noted by court commissioner on the right hand margin of the "Probate and Guardianship Calendar", and thereafter court vacated minute order indicating the intention of court to accept commissioner's recommendation as to bid of second bidders, court did not abuse its discretion in reopening hearing for further proceedings on question of confirming executors' private sale to the original bidders for an enhanced bid.

Affirmed.

1. Executors and Administrators ⇐138(9)

Question whether another bidder at a hearing to confirm executors' private sale of realty acquires a vested right to a conveyance of property depends on the validity of the order made by the court in reference to the sale to the other bidder.

2. Executors and Administrators ⇐138(9)

An order confirming a sale of decedent's property by executors must be definite and complete in itself in order that it can be recorded in the office of the county recorder. West's Ann.Prob.Code, §§ 756, 757, 785, 786, 1220–1222.

3. Executors and Administrators ⇐138(9)

A commissioner at a hearing to confirm executors' private sale of realty was not authorized to confirm sale to oral bidders at hearing, but only to make a recommendation to court in regard to oral bid.

4. Executors and Administrators ⇐149

In proceeding to set aside a subsequent order of the court confirming an enhanced bid of original bidders for purchase of deceased's property, an original order on the "Probate and Guardianship Calendar" signed by the judge after first hearing to confirm executors' private sale of realty operated as a preliminary memorandum approving the court commissioner's recommendation that decedent's property be sold to oral bidders at the hearing and was not a valid order confirming the sale to oral bidders by which oral bidders acquired a vested right to decedent's property. West's Ann.Prob.Code, §§ 1220–1222.

5. Executors and Administrators ⇐138(9)

In view of the purpose and intent of the probate statutes to encourage competitive bidding in the sale of property, and to protect the best interest of the estate and all concerned therein, the court has certain inherent powers in connection with a hearing on a petition for confirmation of executors' private sale of realty. West's Ann. Prob.Code, §§ 756, 757, 785, 786, 1220–1222.

6. Executors and Administrators ⇐138(9)

The probate court has power to continue a hearing held for the purpose of confirming executors' private sale of realty. West's Ann.Prob.Code, §§ 756, 757, 785, 786, 1220–1222.

7. Executors and Administrators ⇐149

In passing on question as to whether trial judge has abused his discretion in granting a motion for relief from an order purporting to confirm sale of decedent's property to oral bidders at a hearing to confirm executors' private sale of realty,

District Court of Appeal may consider fact that no valid order confirming sale to oral bidders was entered by trial court, a considerable time has elapsed, and that the best interest of estate will be promoted by allowing further hearing on question of confirming executors' private sale of realty. West's Ann.Code Civ.Proc., § 473.

8. Executors and Administrators ⇐149

Statute providing for relief from a judgment, order, or other proceedings taken through mistake, inadvertence, surprise or excusable neglect is applicable for the purpose of vacating an order confirming a probate sale. West's Ann.Code Civ.Proc., § 473.

9. Executors and Administrators ⇐138(9)

In proceeding to confirm executors' private sale of realty, question whether original bidders had failed to appear at the hearing because of mistake, inadvertence, surprise or excusable neglect was for trial court. West's Ann.Code Civ.Proc., § 473.

10. Executors and Administrators ⇐138(9)

Where by excusable inadvertence and mistake executors had failed to notify original bidders of time and place of hearing on a petition by executors to confirm executors' private sale of realty, second bidders made an oral bid at hearing, and court commissioner made a notation of the amount oral bidders bid for decedent's property on the "Probate and Guardianship Calendar", and thereafter court vacated a minute order indicating intention to accept oral bidders' bid, court did not abuse its discretion in reopening hearing for further proceedings on question of confirming executors' private sale of the realty and entering a minute order thereafter confirming sale to original bidders at enhanced bid. West's Ann.Code Civ.Proc., § 473.

Frank J. Kanne, Jr., Los Angeles, for appellants.

Lonergan & Jordan, San Bernardino, for respondent executors.

Swing & Gillespie, Everett H. Swing, San Bernardino, for respondents Miller.

BARNARD, Presiding Justice.

This is an appeal from an order directing further proceedings with respect to a confirmation of the sale of real property, and from a subsequent order confirming the sale of said property.

The executors of this estate, pursuant to authority given in the will, sold a parcel of real property at private sale to the respondents Miller for $15,000 on certain terms. They filed a return of sale and petition for confirmation and for an order directing a conveyance, which was noticed for hearing at 9:30 A.M. on May 6, 1955. This matter was the second of nine probate and guardianship matters which were listed on a "Probate and Guardianship Calendar", which was used by the court commissioner who heard these matters at that time. The Millers had not been informed as to the time and place of such hearing and were not present. The commissioner received an oral bid from the appellants which was afterwards stipulated to have been $16,700. The commissioner wrote on the right-hand margin of the calendar sheet opposite the title of this estate the following: "Bond 2000.00 Appr 15 000.00 Bid 16 250 Sale Confirmed to McCarron, Schwartz & Hubbard." At 10:39 A.M. of that day the appellants filed with the clerk a written bid of $16,700 stating that it was on the same terms as those stated in the return of sale, except that the increase in bid was to be the cash payment. At some time on that day Judge Coughlin signed a typed statement at the bottom of the probate and guardianship calendar which reads: "The foregoing recommendations of the court commissioner upon the foregoing matters heard this day are accepted and adopted as the minute orders of the court in said matters * * *". Neither the notes of the commissioner's recommendations nor this order was entered in the minute book of the court, and no order confirming a sale to the appellants or directing a conveyance to them was at any time entered at length in the minutes of the court or included in any other order signed by the judge.

On May 27, 1955, the executors and the Millers filed a verified petition and motion for an order vacating the order thus endorsed on the calendar sheet on May 6, insofar as it applied to this estate matter, and praying that the return of sale and petition for confirmation be reset for hearing before the court with notice as ordered by the court. This petition alleged, among other things, that by inadvertence and mistake the executors had failed and neglected to notify the Millers of the time and place of hearing of the petition for confirmation, and that as a result the Millers were led to and did remain away from said hearing; that the Millers intended and were prepared to attend such hearing and to make a higher bid for the property in order to protect their original offer; that without any opportunity to the Millers to be heard or to raise their offer a minute order was made announcing the intention of the court to approve the commissioner's recommendation that the sale to the appellants be confirmed; that this minute order did not set forth or contain the terms of such sale; that no written order or decree confirming said sale has been made or entered; that the Millers have at all times been ready, willing and able and, if afforded an opportunity so to do, are now ready and able to offer and bid for said property a price substantially greater than the price for which the commissioner recommended confirmation of sale to the appellants; and that it is for the best interest of the estate that said minute order be vacated and the matter of confirmation be reset for further hearing. This petition and motion was noticed for hearing before the court on June 10, at which time the appellants appeared and filed written objections thereto. At the conclusion of that hearing Judge Coughlin announced his decision to grant the petition stating, in effect, that in accordance with the practice of the court the order he had signed indicated his intention to accept the recommendation of the commissioner but did not constitute an order of court confirming the sale until the court actually acted by an order in writing accepting the bid and ordering the sale confirmed; also that a sufficient showing of mistake or excusable neglect had been made which would authorize the court to proceed under Section 473, Code Civ.Proc. On June 10, a minute order was entered stating that the court had ordered the petition granted, and ordered further proceedings in connection with the return of sale and confirmation thereof to be held on June 24, after proper notice as required by law for an original hearing, and had vacated the minute order of May 6 indicating the intention of the court to accept the bid of the appellants. On June 14, a written order signed by the judge was entered and filed vacating "that portion of the minute order dated May 6, 1955, announcing the intention of the court to confirm the sale of said real property to" the appellants; ordering that the hearing of said return of sale and petition for confirmation be reopened and further proceedings had therein at a hearing to be held on June 24, 1955; and further ordering that the clerk give notice of said hearing in accordance with Section 1200 of the Probate Code. At the hearing on June 24, the respondents Miller increased their bid to $17,500, and the appellants, through their counsel, objected to the proceedings but offered no further bid. A minute order was made on that date granting the petition for confirmation and confirming the sale to the Millers for $17,500. On June 29, a formal order in the usual form was signed and filed by the judge, confirming the sale to the Millers and directing a conveyance to them. This appeal was taken from the minute order entered on June 10, 1955, and from the order of confirmation made on June 29, 1955.

The appellants contend that after the court signed the order at the bottom of the probate calendar on May 6, 1955, it had no power to vacate the sale and order further proceedings except on a proper showing under Section 473 of the Code

of Civil Procedure, and that the showing here made did not justify relief under that section. It is argued that the commissioner confirmed the sale to the appellants; that the order signed by the judge adopting the recommendation of the commissioner as the minute order of the court was a compliance with the provisions of Section 1221 of the Probate Code; that the probate and guardianship calendar used by the commissioner was kept with the estate papers in the clerk's office, and was a sufficient entry in the minutes; that this order of confirmation of sale to the appellants was effective as of May 6; and that by this order of confirmation the appellants acquired an absolute right to a conveyance from the executors as held in In re Estate of Leonis, 138 Cal. 194, 71 P. 171; In re Estate of West, 162 Cal. 352, 122 P. 953 and Baldwin v. Stewart, 218 Cal. 364, 23 P. 2d 283. It is also argued that the showing made did not justify relief under Section 473; that the law did not require any notice to the original bidders other than the notice of the hearing on the petition for confirmation which was posted by the clerk; and that this case is distinguishable from In re Estate of Moreland, 49 Cal. App.2d 484, 121 P.2d 867 and In re Estate of McCrae, 133 Cal.App.2d 634, 284 P.2d 914, since in the first of these cases there was an active mistake in that the bidders had been told that the hearing would be held on a different date, and in the other case the original bidder was actually too ill to attend.

[1] Aside from the question of relief under Section 473, whether a bidder acquires a vested right to a conveyance depends upon the validity of the order made. In re Estate of Leonis, supra [138 Cal. 194, 71 P. 174], it is stated that if the order of sale is regularly made and not appealed from "it is binding upon all." In In re Estate of West [162 Cal. 352, 122 P. 955], it is stated that "if [the] order was valid" it gives the purchaser an absolute right to a conveyance. Baldwin v. Stewart, also holds that a valid order confirming a sale, which has become final, "is conclusive".

[2] The sufficiency of the order signed by the judge on May 6, 1955, depends upon the meaning and intent of that order, and its effect under certain provisions of the Probate Code. Section 756 provides that the order of confirmation must show that proof of the notice of the sale was made. While Section 757 does away with the necessity for a notice of sale where a sale of the property is authorized by the will, it also provides that the executor must make a return of sale and obtain confirmation thereof "as in other cases." Section 785 provides that upon a hearing when certain facts appear the court "shall make an order confirming the sale and directing conveyances to be executed." Section 786 provides that a certified copy of the order confirming sale and directing a conveyance must be recorded in the office of the county recorder. Section 1220 provides that orders in probate proceedings need not recite the existence of jurisdictional facts but shall contain "the matters ordered or adjudged." Section 1221 provides that orders of the court or judge must be entered at length in the minute book of the court or else signed by the judge and filed. Section 1222 provides that a certified copy of an order confirming a sale must be recorded in the office of the county recorder. These sections of the Probate Code clearly require that an order confirming such a sale be definite and complete in itself, as otherwise it could not be recorded in the office of the county recorder.

[3, 4] The commisioner was not authorized to confirm the sale, but only to make a recommendation to the court in that regard. The order on the calendar signed by the judge on May 6 was not a valid order confirming sale within the meaning of Sections 1220, 1221 and 1222 of the Probate Code. It clearly appears that it was intended as a preliminary memorandum approving the commissioner's recommendations in nine different matters. It was not intended to

obviate the necessity of a later order of confirmation in this particular matter, to be entered at length in the minute book of the court or signed by the judge and filed, and did not have that effect. If a certified copy of that order had been recorded it would have been meaningless, insofar as the intent and purpose of these statutes are concerned. It contained no description of the property, no terms of the sale, and no order directing that a conveyance be made. On its face it showed a bid of $16,250, which was less than the increased bid required by Section 785. While it is true that it was later stipulated, on June 10, that the oral bid made before the commissioner was $16,700, the commissioner's recommendation was not in that form when it was accepted and adopted by the court. It must be held that the court's order entered on the bottom of the commissioner's calendar on May 6 did not constitute a sufficient order of the court confirming the sale, in the absence of a more definite minute entry or specific order signed by the judge. No valid order of confirmation was entered or filed, and three weeks later the petition and motion to vacate the purported order and to reopen the matter for further bidding was filed. That motion was heard and granted. If it was within the court's power to vacate the order of May 6, no valid objection is raised to the orders subsequently made on June 24 and June 29 confirming the sale of this property to the respondents Miller, those orders being full and complete and in the usual form.

[5–7] In view of the purpose and intent of the probate statutes to encourage competitive bidding in the sale of property, and to protect the best interest of the estate and all concerned therein, the court has certain inherent powers in connection with hearing a petition for confirmation of a sale. Its power to continue the hearing is well recognized, and it should be allowed to reopen the matter for a further hearing, on proper notice, where no valid order of confirmation has been entered, where considerable time has elapsed, and where the best interests of the estate will be promoted thereby. In any event, the existence of such a situation is one of the things which may be considered in passing upon the question as to whether a trial judge has abused his discretion in granting a motion for relief under Section 473.

[8–10] It is now settled that relief under Section 473 may be granted for the purpose of vacating an order confirming a probate sale. In re Estate of Moreland, 49 Cal.App. 2d 484, 121 P.2d 867; In re Estate of McCrae, 133 Cal.App.2d 634, 284 P.2d 914. It would appear in each of those cases that a valid order confirming the sale had previously been entered since no contention to the contrary appears. If a valid order confirming a sale may be thus vacated it would seem reasonable that a less showing should be required for granting such relief where no definite or complete order of confirmation had previously been entered. The appellants argue that no mistake or inadvertence here appears because the statutes do not require that actual notice of the hearing of the petition for confirmation be given to the original bidder. That same legal situation existed in connection with the Moreland and McCrae cases, where such relief was granted. In the Moreland case the bidders had been misled as to the date of the hearing. In the McCrae case, while the bidder had not been misled in any way he had been prevented from attending the hearing by illness. The important thing in both cases seems to be not that the bidder was entitled by law to notice of the hearing, but that he desired and intended to appear and make an increased bid but through inadvertence or excusable neglect, without fault on his part, he had been unable to do so. If such a showing is sufficient to justify the granting of relief where a valid order of confirmation had previously been entered, its sufficiency should be more apparent where no valid order of confirmation had theretofore been entered. An actual inadvertence here appears, as a result of which there was no further competitive bidding at the original hearing, to the disadvantage

of the estate. The question was one of fact for the trial court, and in exercising its discretion it was proper to take all of the facts and circumstances into consideration. Since there is no clear showing that the discretion vested in the trial court was abused, its orders may not be disturbed. In re Estate of Moreland, 49 Cal.App.2d 484, 121 P.2d 867.

The orders appealed from are affirmed.

GRIFFIN and MUSSELL, JJ., concur.



147 Cal.App.2d 439

Buddy Richard BARASCH, Plaintiff and Respondent,

v.

A. S. EPSTEIN, Defendant and Appellant.

Civ. 21783.

District Court of Appeal, Second District, Division 3, California.

Jan. 7, 1957.

Rehearing Denied Feb. 6, 1957.

Action to recover for money allegedly due the plaintiff by defendant. From a judgment for plaintiff entered on the granting of his motion for judgment on the pleadings in the Superior Court of Los Angeles County, Bayard Rhone, J., the defendant appeals. The District Court of Appeal, Vallée, J., held that the answer of defendant set up a good defense and denied material allegations of the complaint and that plaintiff was not entitled to judgment on the pleadings.

Reversed.

1. Pleading ⇐345(1)

A plaintiff may recover judgment on a motion for judgment on the pleadings only if his complaint states facts sufficient to constitute a cause of action and the answer neither raises a material issue nor states a defense.

2. Pleading ⇐345(1.3)

A motion by plaintiff for judgment on the pleadings is in the nature of a general demurrer to the answer and the motion must be denied if the answer raises a material issue or sets up affirmative matter constituting a defense.

3. Pleading ⇐350(1)

A motion by plaintiff for judgment on the pleadings does not operate as a special demurrer.

4. Pleading ⇐367(6)

Uncertainty and ambiguities in pleadings must be specifically raised by proper procedure.

5. Pleading ⇐345(1.3)

Where answer fairly construed suggests that defendant may have a good defense, a motion for judgment on the pleadings should not be granted.

6. Pleading ⇐350(3)

A moving party for judgment on the pleadings admits the untruth of his own allegations insofar as they have been controverted and all such averments must be disregarded whether there is a direct and specific denial or an indirect denial by virtue of affirmative allegations of a contrary state of facts and every allegation affirmatively pleaded in the answer must be deemed true.

7. Pleading ⇐345(1.3)

In action to recover money allegedly due where answer set up a good defense and denied material allegations of the complaint, it was sufficient as against a general demurrer and plaintiff was not entitled to judgment on the pleadings.

Samuel W. Blum, Irwin N. Fulop and Berne Rolston, Beverly Hills, for appellant.

Benjamin P. Riskin, Los Angeles, for respondent.

VALLÉE, Justice.

Appeal by defendant from a judgment for plaintiff entered on the granting of his motion for judgment on the pleadings.

[1] The action is for money alleged to be due plaintiff from defendant. The question is the sufficiency of the answer. A plaintiff may recover judgment on a motion for judgment on the pleadings only if his complaint states facts sufficient to constitute a cause of action and the answer neither raises a material issue nor states a defense. (21 Cal.Jur. 235, § 164.) We have concluded that the answer explicitly traverses various material allegations of the complaint and that it was error to grant the motion.

Material allegations of the complaint and the answers thereto are:

	Complaint	Answer
1.	A. S. Epstein Associates Inc. is a California corporation	Admitted
2.	Defendant is the president of the corporation	Admitted
3.	The corporation is "dominated and controlled by" defendant and "there is such a unity and interest and ownership that there is no separateness in fact between" the corporation and defendant	Denied
4.	Defendant was authorized and empowered to draw checks on the funds of the corporation	Denied
5.	The transactions took place in Los Angeles and all sums became due and payable in Los Angeles	Denied
6.	On August 28, 1950 plaintiff owned $18,000 of promissory notes executed by the corporation in his favor and 9 shares of the stock of the corporation	Admitted
7.	On that date plaintiff and defendant agreed in writing that plaintiff would sell the notes to defendant for $900 cash and 7,200 Israeli pounds, 1,200 pounds to be paid on or before November 1, 1950, and 6,000 pounds on or before January 1, 1951. The moneys, except the $900, were not paid by defendant on the dates mentioned	Denied
8.	On May 7, 1951 an agreement, partly oral and partly written, was entered into between plaintiff and defendant whereby it was agreed that in lieu of the 7,200 Israeli pounds, nine checks of 1,000 Israeli pounds each, payable on demand, would be drawn by the corporation in favor of plaintiff on its funds on deposit in the Palestine Discount Bank in Tel Aviv, Israel, and defendant would guarantee in writing that the checks would equal $12,000 in American dollars according to the prevailing rate of international exchange to be paid plaintiff. It was also agreed defendant would advance to plaintiff $4,500 against the $12,000 and plaintiff would give him credit for an additional $500	Denied
9.	The written part of the agreement of May 7, 1951 was addressed to plaintiff and is as follows: "This agreement shall serve in effect as a letter of guarantee in which payment of 9,000 IL drawn in 9 1,000 IL checks on Palestine Discount Bank hereby personally guaranteed by the undersigned to be paid in America in dollars to the	

equal sum of $12,000 should said checks not be honored In Israel.

"These 9 checks are given for $18,000 in notes of A. S. Epstein Associates Inc. and 9 shares of stock of said Corporation.

"These checks are payable on demand when presented for payment in Israel by you or your assignees. In the event these checks are lost, destroyed or otherwise mutilated so as not to be of value the undersigned guarantees to redraw said checks and honor their payment. A. S. Epstein." Admitted

10. On information and belief, the nine 1,000 IL checks were never issued or presented for payment at the Palestine Discount Bank in Israel Denied

11. Plaintiff has performed all acts required of him to be performed pursuant to the agreement of May 7, 1951. On May 7, 1951 plaintiff delivered and transferred to defendant the $18,000 in promissory notes and the 9 shares of stock, and defendant paid plaintiff the $4,500 Denied

12. There is now due, owing, and unpaid from defendant to plaintiff $7,500, together with interest Denied

As a separate defense, defendant pleaded that the written agreement of May 7, 1951 should be interpreted so that his obligation as guarantor would mature and become operative only after the checks of the corporation, payable to plaintiff and drawn on Palestine Discount Bank, were first presented to and payment refused by the drawee bank; that plaintiff has failed to perform the conditions precedent to defendant's liability under the written instrument.

As a counterclaim defendant pleaded that on May 7, 1951 for a valuable consideration plaintiff executed to the corporation his promissory note for $5,000 payable September 1, 1951 without interest; as security for payment of the note plaintiff delivered to the corporation nine checks for 1,000 Israeli pounds each, payable on Palestine Discount Bank; the corporation assigned all its interest in the note and pledge to defendant; plaintiff has not paid any part of the note.

[2–6] Judgment was for plaintiff for $7,000 and interest.

A motion by a plaintiff for judgment on the pleadings is in the nature of a general demurrer to the answer, and the motion must be denied if the answer raises a material issue or sets up affirmative matter constituting a defense. Such a motion does not operate as a special demurrer. Uncertainty and ambiguities must be specifically raised by proper procedure. MacIsaac v. Pozzo, 26 Cal.2d 809, 812–813, 161 P.2d 449; Fabbro v. Dardi & Co., 93 Cal.App.2d 247, 252, 209 P.2d 91; Bergerow v. Parker, 4 Cal.App. 169, 172, 87 P. 248. Where the answer, fairly construed, suggests that the defendant may have a good defense, a motion for judgment on the pleadings should not be granted. Patterson v. Pacific Indem. Co., 119 Cal.App. 203, 206–207, 6 P.2d 102. The moving party admits the untruth of his own allegations insofar as they have been controverted, and all such averments must be disregarded whether there is a direct and specific denial or an indirect denial by virtue of affirmative allegations of a contrary state of facts. MacIsaac v. Pozzo, 26 Cal.2d 809, 813, 161 P.2d 449; Osborne v. Abels, 30 Cal.App.2d 729, 730, 87 P.2d 404. Every allegation affirmatively pleaded in the answer must be deemed true. Cuneo v. Lawson, 203 Cal. 190, 193, 263 P. 530.

[7] It appears from analysis of the complaint and answer that the only facts admitted by defendant cannot sustain the judgment. The denials of the answer are sufficient to, and do, create issues. Proof of the allegations of the complaint, which

are denied, is necessary before plaintiff may recover judgment. Since the answer sets up a good defense and denies material allegations of the complaint, it is sufficient as against a general demurrer and plaintiff was not entitled to judgment on the pleadings.

Reversed.

SHINN, P. J., and PARKER WOOD, J., concur.



147 Cal.App.2d 496

Frank E. JONES and Mary E. Jones, Plaintiffs and Respondents,

v.

Harold J. YOUNG, Defendant and Appellant.

Civ. 8870.

District Court of Appeal, Third District, California.

Jan. 10, 1957.

Rehearing Denied Feb. 6, 1957.

Hearing Denied March 5, 1957.

Suit by plaintiffs as equitable owners and in possession of a lot to enjoin defendants from interfering with the use of a roadway across defendant's property. Judgment for plaintiffs in the Superior Court, Sacramento County, J. O. Moncur, J., and the defendant appealed. The District Court of Appeal, Van Dyke, P. J., held that the evidence authorized the finding that a prescriptive right to use of the roadway had been acquired appurtenant to the lot of plaintiff as a dominant tenement, and that the plaintiffs had sufficient estate therein to maintain the action.

Judgment affirmed.

1. Easements ⇐36(3)

In suit to enjoin defendant from interfering with plaintiffs' use of a roadway across defendant's property, where evidence sufficiently proved actual, open, notorious, continuous and peaceable user of the roadway, the trial court could infer that the user was adverse and that a prescriptive right had been acquired appurtenant to the lot of plaintiff as the dominant tenement.

2. Adverse Possession ⇐1

Property may be acquired by occupancy as well as by transfer. West's Ann. Civ.Code, § 1000.

3. Adverse Possession ⇐40

Occupancy for a period prescribed by the Code as sufficient to bar any action for the recovery of property confers a title thereto denominated a title by prescription which is sufficient against all. West's Ann.Civ.Code, § 1007.

4. Easements ⇐61(3)

The owner or occupant of an estate in a dominant tenement may maintain an action for the enforcement of an easement attached thereto.

5. Easements ⇐24

In action to enjoin defendants from interfering with plaintiffs' use of a roadway across defendant's property, where evidence proved a perfect title in plaintiffs' predecessors as legal owners to claimed easement acquired by prescription, prescriptive title to use the roadway having become complete during occupancy of dominant tenement by plaintiffs' predecessors in title, plaintiffs were entitled to use the road as constituting an easement appurtenant to the dominant tenement. West's Ann.Civ.Code, §§ 1000, 1007.

6. Easements ⇐5

In suit to enjoin the defendants from interfering with plaintiff's use of a roadway across defendant's property, that plaintiffs were subvendees under a vendee whose contract contained a clause forbidding "assignment" of his contract did not preclude plaintiffs from claiming title by adverse prescription to use of the roadway, since such provision is for the benefit of the owner, and evidence authorized a finding that owner continued to receive payments from vendee with full knowledge of

subcontract and of subvendee's possession under it without objection.

Archibald D. McDougall, Sacramento, for appellant.

Frank E. Jones, Mary E. Jones, in pro. per.

VAN DYKE, Presiding Justice.

Respondents, claiming to be the equitable owners and in possession of the northeast quarter of Lot 11 of Swanston Acres in Sacramento County, brought this action against appellant to obtain a decree enjoining him from interfering with their use of a certain roadway across appellant's property. At the trial respondents introduced evidence to the following effect: William F. and Elva Cox became the owners of the northeast quarter of Lot 11 on March 28, 1946. At that time a roadway, commonly called Memory Lane, led from the Cox property to Fulton Avenue, a public road, along the south 20 feet of Lot 12, which lies between Lot 11 and the avenue. It was a roadway improved with a graveled surface wide enough for two cars to pass and showed evidence of having been used for some time by the predecessors in interest of the Coxes. They continued to use the road and, along with other people, maintained mail boxes at the junction of Memory Lane and the avenue. On October 12, 1948 the Coxes executed a contract of sale with Richard and Virginia Savin covering the northeast quarter of Lot 11. The Savins took possession and continued the use of Memory Lane until July 9, 1949 when they contracted to sell, and delivered possession of, the northeast quarter of Lot 11 to respondents who thereafter continued the use of the roadway until prevented by barricades erected by appellant. It was shown that appellant in 1947 acquired parcels in the south half of Lot 12 which were bounded on the north by Memory Lane; that he then observed the roadway was being used, saw the mail boxes maintained at the point where the lane entered Fulton Avenue and knew that the mail boxes belonged to the Coxes and their tenants. In that year appellant graded Memory Lane and improved it with a renewed gravel surfacing to a point about 150 feet from the west boundary of Lot 12. From 1947 to 1950 appellant observed the frequent passage of automobiles traveling between Fulton Avenue and the northeast quarter of Lot 11 and along Memory Lane. In 1950 appellant acquired the north half of Lot 12 and observed the continued use of Memory Lane as a road. In May or June of 1952 appellant caused Memory Lane to be surfaced with black top from Fulton Avenue to a point about 60 feet from the west boundary of Lot 12. As he put it, he got the neighbors together to do the paving and arranged with each as to the amount to be contributed to the total cost. He told respondents he thought their proper share was one-third of the total, or about $330. It appeared that they argued over this matter of the fair share to be contributed by the respondents. Respondents offered to contribute $150 but appellant rejected that offer and when respondents refused to go higher appellant barricaded the west end of Memory Lane, excluding respondents from its use. This action followed:

> "The establishment of a prescriptive right depends upon showing a continued and uninterrupted, open and visible, use of a definite right in the land of another which is identical to that claimed as an easement and has a relation to the use of, and a direct and apparent connection with, the dominant tenement under an adverse claim of right for a period corresponding generally to the statutory period of limitations in the particular jurisdiction." 17 Am.Jur., Easements, sec. 59, p. 971.

[1] The evidence in this case sufficiently proved actual, open, notorious, continuous and peaceable user of Memory Lane and therefrom the trial court could infer that the user was adverse; that

therefore a prescriptive right had been acquired appurtenant to the northeast quarter of Lot 11 as the dominant tenement. Conaway v. Toogood, 172 Cal. 706, 709, 158 P. 200; Hutton v. Ormando, 3 Cal.2d 305, 306–307, 43 P.2d 1100. This statement, of course, depends upon the right of the owner of the dominant tenement to tack the user of their tenants and vendee and of respondents as sub-vendees so as to make up the necessary five-year period. The court entered judgment, enjoining appellant from obstructing respondents' use of Memory Lane.

Appellant contends that respondents, as the conditional vendees of another conditional vendee, have no standing to claim title by adverse prescription to an appurtenant right of way over the land of appellant; that the evidence is insufficient to support the finding that respondents and their predecessors used the strip five years prior to 1952 in such a way as to create title by prescription.

[2–5] We think appellant misconceives the nature of the action brought by respondents and the nature of the right by which they claim to have the use of Memory Lane as a roadway. The gravamen of respondents' action is as follows: The Coxes are the owners of the northeast quarter of Lot 11. They and their predecessors initiated a use of what came to be known as Memory Lane and by continuous use through themselves, their tenants, their vendee and their vendee's vendee acquired an easement over that portion of the property which now belongs to appellant. Respondents' position then is that this prescriptive title having become complete during their occupancy of the dominant tenement, they are entitled to use the road, the right constituting an easement appurtenant to the northeast quarter of Lot 11. We have already said that the evidence they introduced sufficiently proved a perfect title in the Coxes as legal owners of the northeast quarter of Lot 11, to the claimed easement acquired by prescription. It is, of course, familiar law that property may be acquired by occupancy as well as by transfer, Civ.Code, Sec. 1000, and that occupancy for the period prescribed by the Code of Civil Procedure as sufficient to bar any action for the recovery of property confers a title thereto denominated a title by prescription which is sufficient against all. Civ.Code, Sec. 1007. Respondents' proof, therefore, showed legal title to the prescriptive right in the Coxes as owners of the dominant tenement with the same effect as though their title rested in grant. Having established ownership in the Coxes of legal title to the northeast quarter of Lot 11 and of the prescriptive right to the use of Memory Lane as a road for the benefit of said northeast quarter of Lot 11, respondents had established their right as sub-vendees in possession to a decree enjoining appellant from interfering with their use of Memory Lane. They had the right to sue for the relief the judgment herein accorded them. We quote the following from Lemos v. Farmin, 128 Cal.App. 195, 200, 17 P.2d 148, 150:

> "The law is well settled that the owner or occupant of an estate in a dominant tenement may maintain an action for the enforcement of an easement attached thereto."

[6] It is not material here that respondents are sub-vendees under a vendee whose contract contains a clause forbidding "assignment" of his contract. Such a provision is for the benefit of the owner who may waive a breach. 55 Am.Jur., Vendor & Purchaser, Sec. 436, p. 845. The trial court could, and impliedly did, infer waiver from evidence that the owner continued to receive payments from the vendee with full knowledge of the sub-contract and of the sub-vendee's possession under it, all without objection. Respondents were possessed of a sufficient estate in the dominant tenement to maintain this action.

The judgment appealed from is affirmed.

PEEK and SCHOTTKY, JJ., concur.

147 Cal.App.2d 527

Wilma JENKINS, Plaintiff and Respondent,

v.

Lynn JENKINS, Defendant and Appellant.

Civ. 21716.

District Court of Appeal, Second District, Division 3, California.

Jan. 11, 1957.

Suit by wife for a divorce, wherein husband filed a cross-complaint. The Superior Court of Los Angeles County, Philbrick McCoy, J., rendered judgment in favor of plaintiff, and defendant appealed. The District Court of Appeal, Shinn, P. J., held that wife's testimony as to numerous acts of violence and name-calling by husband was sufficiently corroborated to sustain finding that husband was guilty of extreme cruelty.

Judgment affirmed.

1. Divorce ⇐127(4)

Wife's testimony as to numerous acts of violence and name-calling by husband was sufficiently corroborated to sustain finding that husband was guilty of extreme cruelty as ground for divorce.

2. Husband and Wife ⇐264

In divorce suit, evidence that title to realty purchased with earnings of husband for use as a home was taken by husband and wife in joint tenancy solely as a matter of convenience in order to have the privilege of survivorship without probate proceedings and without any intention to alter the community character of such property was sufficient to support finding that such realty was community property.

3. Divorce ⇐286

Finding that home was the community property of husband and wife, though title thereto was held in joint tenancy, was conclusive on appeal from divorce judgment, where such finding was supported by reasonable inferences from the evidence.

4. Divorce ⇐240(1), 252

Interlocutory decree granting wife a divorce on ground of extreme cruelty properly adjudicated the property rights of the parties and the matter of support of wife by dividing certain personal property between the parties, ordering community real property sold and 75% of the proceeds paid to wife and 25% to husband and ordering husband to pay $125 per month for support of wife, and such provisions of interlocutory decree, though not immediately effective in regard to disposition of community property, should be carried into final decree.

5. Divorce ⇐252

Where wife was granted a divorce on ground of extreme cruelty, division of property so that value of personal property awarded to husband and his share of proceeds of sale of home amounted to approximately $4,000, while value of such property awarded to wife and her share of proceeds of sale of home amounted to almost $10,000 was not inequitable, in view of circumstances of the parties.

6. Divorce ⇐239

In divorce suit, finding that defendant was an able-bodied man capable of earning more than $300 per month was supported by substantial evidence.

7. Divorce ⇐240(5)

Where wife obtained a divorce on ground of extreme cruelty from able-bodied man capable of earning more than $300 per month, to whom she had been married for more than 27 years and who had no other dependent, allowance of $125 per month for wife's support was not excessive, in absence of evidence that wife was capable of supporting herself.

Barry Sullivan, Los Angeles, for appellant.

Edward K. Brody, Los Angeles, for respondent.

SHINN, Presiding Justice.

Plaintiff sued for divorce; defendant filed a cross-complaint. Each charged the

other with cruelty. Findings and judgment were in favor of plaintiff on the complaint and the cross-complaint. Defendant appeals. We will take up the points on appeal in the following order.

[1] It is contended that although plaintiff's testimony would have been sufficient, if corroborated, to establish the charge of cruelty there was legally insufficient corroborative evidence. The contention is not sustainable. Plaintiff testified to numerous acts of violence at the hands of defendant extending over a number of years and the use by defendant of much vile language and name-calling. The opprobrious epithets were those commonly employed by persons addicted to the use of bad language. Plaintiff's testimony was corroborated by that of a friend and neighbor that she frequently heard defendant shout such epithets at plaintiff, following which she had observed plaintiff suffering "heart spasms". Two notes written by defendant to his wife were placed in evidence. They furnished evidence of defendant's vulgarity. Also in evidence were numerous cigarette stubs adorned with lipstick. On three separate occasions after she had been absent from home plaintiff found the cigarette stubs in the house and asked defendant about them. His answers were uninformative and extremely rude. Plaintiff was naturally distressed. The court made no mistake in finding defendant guilty of extreme cruelty.

[2, 3] A further contention is that the home of the parties stood in joint tenancy and that the court was in error in finding that it was community property, as alleged by plaintiff. This contention also is untenable. There was evidence of the following facts: The property had been purchased with the earnings of defendant for use as a home. The parties, at the suggestion of friends and of an escrow clerk, informed the clerk that title should be taken by them in joint tenancy; at that time the parties did not know the difference between joint tenancy and community property; defendant did not know what community property was; the only reason they had for using the form of joint tenancy was that they had been told that in the event of the death of either of them title would go to the survivor without proceedings in probate; there had been no previous understanding that the property would be put in joint tenancy nor any discussion of it. The escrow clerk told them that title should be put in joint tenancy as a matter of convenience. The evidence was clearly sufficient to justify a finding that this was the sole purpose the parties had in following the advice that title should be placed in joint tenancy. It is a common practice for a husband and wife who have acquired funds as community property to use the same in the purchase of real property and to take title thereto as joint tenants, being motivated solely by a desire to have the privileges of survivorship. It frequently happens that they have no intention of abandoning community ownership and do not understand that placing the title in joint tenancy would affect the change of ownership or would serve any purpose other than to avoid the necessity of proceedings in probate. If the evidence is sufficient to convince the court that the parties had no agreement and no intention to alter the community character of the property it may properly be determined that it remains community property notwithstanding the fact that title was knowingly taken in joint tenancy. Rogers v. Rogers, 86 Cal.App.2d 817, 195 P.2d 890; Mademann v. Sexauer, 117 Cal.App.2d 400, 256 P.2d 34; Palazuelos v. Palazuelos, 103 Cal.App.2d 826, 230 P.2d 431. In the present case the finding that the property remained community property is supported by reasonable inferences from the evidence and is therefore conclusive on the appeal.

By its judgment the court divided certain personal property between the parties; it ordered the real property sold and the proceeds, after certain adjustments, to be divided 75 per cent to the plaintiff and 25 per cent to the defendant; it ordered defendant to pay plaintiff for support and maintenance $125 per month until the further order of the court. Other provisions of the decree are not material to our inquiry.

[4] The next point urged by appellant is that the court had no authority to order a sale of the real property, which the parties stipulated to be of the value of $12,000. The point is that the court had no authority to divide the community property or order a sale of it except by final decree. Respondent concedes that the disposition of the property in terms of the interlocutory decree was not immediately effective. The rights of the parties in the property and the matter of support of plaintiff were properly adjudicated and the provisions of the interlocutory decree should be carried into the final decree. Dowd v. Dowd, 111 Cal. App.2d 760, 245 P.2d 339.

[5–7] Appellant computes the value of the personal property and his share of the proceeds of a sale of the home that was awarded to him at $4,278.25 and the value of that awarded to respondent at $9,919.55. He apparently contends, without argument, that it was an unfair division. There is nothing in the circumstances of the parties that indicates to us that it was not an equitable division. Appellant argues that the allowance of $125 per month for plaintiff's support was excessive. He is a house painter. The amount of his earnings was not definitely shown but the court expressed the opinion that they amounted to somewhere between $300 and $500 per month. The court found that he is an able-bodied man capable of earning more than $300 per month. This finding is supported by substantial evidence. The amount allowed to plaintiff for support is not excessive. The parties had been married for over 27 years. There was no evidence that plaintiff is capable of supporting herself. The marriage was childless and defendant has no dependant other than plaintiff. No other points are urged by appellant which require discussion.

The judgment is affirmed.

PARKER WOOD and VALLÉE, JJ., concur.

147 Cal.App.2d 420

Gladys M. WALES, Plaintiff,

v.

Frank DAVIES, Executor of the Estate of George M. Carey, Deceased, et al., Defendants.

Frank DAVIES, Executor of the Estate of George M. Carey, Deceased, Robert E. Ewing, Ward S. McEntyre, Walter Beaton and Violet Beaton, Cross-Complainants and Appellants,

Gladys M. Wales, Oro Lumber Company, Al Fisher, Edward H. Brunning and Robert K. Graham, Cross-Defendants and Respondents.

Ward S. McENTYRE and Mary McEntyre, Plaintiffs and Appellants,

v.

Gladys M. WALES et al., Defendants and Respondents.

Robert EWING, Plaintiff and Appellant,

v.

Gladys M. WALES et al., Defendants and Respondents.

Frank DAVIES, Executor of the Estate of George M. Carey, Deceased, Walter Beaton and Violet Beaton, Plaintiffs and Appellants,

Gladys M. WALES et al., Defendants and Respondents.

Civ. 8808.

District Court of Appeal, Third District, California.

Jan. 3, 1957.

Rehearing Denied Jan. 29, 1957.

Quiet title action wherein defendant cross-complained for damages resulting from trespass. From a judgment of the Superior Court, Nevada County, Arthur Coats, J., in favor of the plaintiff defendants appealed. The District Court of Appeal, Van Dyke, P. J., held, inter alia, that plaintiff in action to quiet title to timber on public land which had been deeded by the United States to railroad, could not rely on chain of title from railroad to plaintiff's predecessor in title where such predecessor during his lifetime had

conveyed most of timber to a third party, and any title that plaintiff might have acquired from such third party's heirs after action began could not help plaintiff in such action.

Reversed.

1. Quieting Title ⇐10(1)

In order for person to prevail in quiet title action it is necessary that he prevail on strength of his own title.

2. Quieting Title ⇐10(2)

Plaintiff in action to quiet title to timber on public land which had been deeded by the United States to railroad, could not rely on chain of title from railroad to plaintiff's predecessor in title where such predecessor during his lifetime had conveyed most of timber to a third party, and any title that plaintiff might have acquired from such third party's heirs after action began could not help plaintiff in such action. Act Cong. July 1, 1862, 12 Stat. 489.

3. Quieting Title ⇐10(2)

Plaintiff in seeking to quiet title to timber on public land which had been granted by the United States to railroad could not rely on agreement with the United States in order to establish title to timber where it was conceded that United States had granted timber which was on the land at time of grant to the railroad so that United States could not later grant the same timber to another, since one cannot grant what one does not own. Act Cong. July 1, 1862, 12 Stat. 489.

4. Mines and Minerals ⇐51(5)

Where the United States in granting public land to railroad granted timber which was growing on the land at time of grant, mining locator's damages resulting from cutting of timber by trespasser would be limited to injury to their interests which would include damages for trespass.

5. Trespass ⇐57

Where person claiming title to timber on public lands was a trespasser, fact that such person complied with state and federal rules for harvesting timber would not limit damages recoverable.

Albert L. Johnson, Nevada City, and Lynne Kelly, Grass Valley, for appellants.

John L. Larue, Nevada City, for respondent Wales.

Frank A. Morrow, Sacramento, for respondents Oro Lbr. Co., Fisher and Brunning.

Frank G. Finnegan, Sacramento, for respondent Graham.

VAN DYKE, Presiding Justice.

This controversy arose when Gladys M. Wales, claiming ownership of timber growing on public land on which defendants-appellants had located mining claims, went upon the land and cut and removed timber. When the timber operations began the defendants accused the logging operators of trespass. Mrs. Wales then brought suit to quiet her title to the timber. The defendants cross-complained for damages and subsequently filed separate suits for damages. All the actions were consolidated for trial.

In 1862 the Government of the United States granted to the Central Pacific Railroad certain public land adjacent to its railroad line. The grant excepted mineral lands, but provided that where the lands were mineral the timber thereon was granted to the railroad company. 12 Stat. at Large, Chap. 120. It is conceded herein that the land from which Mrs. Wales removed timber was mineral land and that the railroad company acquired the title to the timber on the land when the grant was made. To establish her title to the timber Mrs. Wales introduced in evidence a chain of title from the Central Pacific Railroad Company to one Oscar Tamm. Mrs. Tamm claimed to derive her interest in the timber from the trustees of the estate of Oscar Tamm. However, in the chain of title there appears a deed from Oscar Tamm to George C. Sargent conveying to him by far the greater part of the timber involved in this litigation.

Mrs. Wales also relied on a contract she had negotiated with the United States. By the terms of this contract she was permitted to cut and remove from the land here involved all timber over 90 years of age.

After a trial without a jury the court quieted Mrs. Wales' title to the timber and denied damages to the mining locators. The court made findings that Mrs. Wales was the owner of all the timber she cut and removed from the land; that the mining locators had no right, title or interest in that timber; that she entered the land by virtue of her ownership of the timber she took; that the harvesting of the timber was done in compliance with state and federal rules and that no damage or waste was committed while the timber was being removed; that the mining locators suffered no damage.

[1, 2] The mining locators have appealed from the judgment entered. They first contend that the court erred in quieting Mrs. Wales' title to the timber. We agree that it was error for the court to quiet Mrs. Wales' title. In order for a person to prevail in a quiet title action it is necessary that he prevail on the strength of his own title. Reed v. Hayward, 23 Cal.2d 336–339, 144 P.2d 561; 22 Cal.Jur. pp. 167–168. Mrs. Wales could not rely wholly on the contract of sale from the trustees of the estate of Mr. Tamm because Mr. Tamm during his lifetime had conveyed most of the timber to George C. Sargent. At the time this action was begun Mrs. Wales could not show title from Sargent or his heirs. Therefore, she had no title which could be quieted to any timber which had been conveyed to Sargent. Any title she may have acquired from Sargent's heirs after action begun could not help her in this suit. Reed v. Hayward, supra, 23 Cal.2d at page 340, 144 P.2d at page 563. As for the small part of the timber which Mr. Tamm did not conveyed to Sargent and which the trustees of his estate purported to sell to Mrs. Wales her proof of title is vague and unsatisfactory. But it is unnecessary to determine its sufficiency now since we must reverse the judgment and better proof may be made on retrial.

[3] Mrs. Wales could not rely on the agreement with the United States in order to establish her title to the timber. For, as is conceded here, if the United States granted the timber which was on the land in 1862 to the Central Pacific Railroad, it could not later grant the same timber to another. One cannot grant what one does not own. Ames v. Empire Star Mines Co., 17 Cal.2d 213, 221, 110 P.2d 13.

[4, 5] What we have said does not mean that the mining locators are entitled to damages for the value of the timber which was cut and removed from the land. For, if the United States granted the timber which was growing on the land in 1862 and Mrs. Wales only cut such timber, she did not take any timber to which the locators would have any right. Their damages would be limited to injury to their interest which in this case would include damages for trespass since if Mrs. Wales could show no title she was a trespasser; and was liable in damages for any injury to the land caused by the removal of the timber. Since she was a trespasser, the fact she complied with state and federal rules for harvesting timber would not limit the damages recoverable.

The judgment appealed from is reversed.

SCHOTTKY and PEEK, JJ., concur.

147 Cal.App.2d 186

Grandon C. CURTIS, Plaintiff and Respondent,

v.

Q. R. S. NEON CORP., Ltd., a corporation, D. L. Karcher, d/b/a Allied Steel Products Co., Almas House Moving, Inc., a corporation, The May Department Stores Co., a corporation, Glenn Guy Stout, Kenneth Tangen, Does 1 to 30 Inclusive, Defendants,

Almas House Moving, Inc., a corporation, Glenn Guy Stout and Kenneth Tangen, Appellants.

Civ. 21735.

District Court of Appeal, Second District, Division 3, California.

Dec. 26, 1956.

Hearing Denied Feb. 19, 1957.

Action for personal injuries sustained by plaintiff when his automobile collided with a steel girder which extended into his lane of travel from the edge of defendant's tractor-trailer, on which it was being transported. The Superior Court, Los Angeles County, Otto J. Emme, J., entered judgment for plaintiff, and defendants appealed. The District Court of Appeals, Vallée, J., held that errors in instructing jury on certain statutes inapplicable to the facts of the case, in view of negligence of defendants in moving girder overhanging center line of highway 8 feet, and in view of fact that instructions read as a whole fully, fairly, and correctly charged on all basic issues, were not prejudicial.

Affirmed.

1. Appeal and Error ⇐928(1)

In determining whether instructions given are correct district court of appeals must assume jury might have believed evidence on which the defense of the losing party and appellant was predicated, and if correct instructions had been given that the jury might have rendered a verdict in favor of appellant.

2. Automobiles ⇐170(2)

Vehicle Code sections 525, 525.1 and 525.3 dealing with driving in the right-hand lane of the highway apply only to vehicles traveling in the same direction and not to vehicles proceeding in opposite directions. West's Ann.Vehicle Code, §§ 525, 525.1, 525.3.

3. Automobiles ⇐246(8)

Where vehicles involved in a collision on a public highway were traveling in opposite directions, trial court erred in giving instructions on certain statutes pertaining to driving on the right half of the roadway except under certain conditions. West's Ann.Vehicle Code, §§ 525, 525.1, 525.3.

4. Automobiles ⇐170(2)

Statute setting forth conditions when a driver may overtake and pass to the right of another vehicle applies to vehicles traveling in the same direction, and not in opposite directions. West's Ann.Vehicle Code, § 529.

5. Automobiles ⇐246(8)

Where vehicles involved in automobile collision were proceeding in opposite directions, trial court erred in instructing jury on statutes pertaining to conditions when a driver may overtake and pass to the right of another vehicle. West's Ann. Vehicle Code, § 529.

6. Automobiles ⇐11

Object of Statute regulating width of vehicles on public highways is to restrict width of loads to reasonable limits so that such loads shall not protrude over the center line of a highway or over other vehicle lines in such a way as to interfere with other vehicles which are in their proper lanes and are properly using the other parts of the highway. West's Ann.Vehicle Code, § 694(a–c, f).

7. Negligence ⇐6, 12

An act or failure to act in violation of a statute is negligence as a matter of law, although circumstances of emergency or unusual conditions may be used to excuse or justify the violation.

8. Negligence ⇐6, 136(14)

Unless and until excuse or justification appears for violation of a statute, the violation must be treated as negligence per se,

and ordinarily, the excuse or justification presents a question of fact for the jury.

9. Trial ⇐241

In action for personal injuries sustained by plaintiff when his automobile collided with a steel girder which extended into his lane of travel from the edge of defendant's tractor-trailer, on which it was being transported, trial court did not err in instructing jury on statute pertaining to width of vehicles in view of further instruction on right of city to permit the total outside width of a vehicle on road in the city to be in excess of limits set forth in such statute. West's Ann.Vehicle Code, § 694(a, f).

10. Trial ⇐252(8)

In action for personal injuries sustained by plaintiff when his automobile collided with a steel girder which extended into his lane of travel from the edge of defendant's tractor-trailer on which it was being transported, in view of fact there was no evidence to warrant an inference that tractor was driven in excess of any speed restrictions set forth in statutes specifying speed limits based on weight and tire equipment, trial court erred in instructing jury on such statute. West's Ann.Vehicle Code, § 515.

11. Automobiles ⇐246(8)

In action for personal injuries sustained by plaintiff when his automobile collided with a steel girder which extended into his lane of travel from the edge of defendant's tractor-trailer, in which it was being transported, trial court did not err in refusing to instruct jury that no violation of statute providing that vehicles be driven on right half of roadway results from mere fact that a load extends across center line, in view of fact such statute applies only to vehicles traveling in same direction, whereas vehicles involved in collision were traveling in opposite directions. West's Ann. Vehicle Code, § 525.

12. Trial ⇐295(1)

Where instructions, read as a whole correctly charged jury on all basic issues, any minor error that might have occurred would not be held prejudicial.

13. Appeal and Error ⇐1066
Trial ⇐295(6)

In action for personal injuries sustained by plaintiff when his automobile collided with a steel girder which extended into his lane of travel from edge of defendant's tractor-trailer, on which it was being transported, errors in instructing jury on certain statutes inapplicable to the facts of the case, in view of negligence of defendants in moving girder overhanging center line of highway 8 feet, and in view of fact that instructions read as a whole fully, fairly, and correctly charged on all basic issues, were not prejudicial. West's Ann.Vehicle Code, §§ 515, 525, 525.1, 525.3, 529; West's Ann.Const. art. 6, § 4½.

Kenneth J. Murphy and Henry E. Kappler, Los Angeles, for appellants.

Harry B. Ellison and Howard E. Vleerick, Downey, for respondent.

VALLEE, Justice.

Appeal by defendants from a judgment entered on a verdict for plaintiff in an action for damages for personal injuries sustained when his automobile collided with a triangular steel girder being transported on a tractor owned by defendant Almas House Moving Company and operated by defendant Stout and guided by defendant Tangen in a pilot truck. The only question is whether the trial court erred in giving and in refusing to give certain instructions to the jury; and, if so, whether the error was prejudicial.

[1] In determining whether the instructions given are correct, we must assume the jury might have believed the evidence on which the defense—the losing party—was predicated, and if correct instructions had been given the jury might have rendered a verdict in favor of defendants. Clement v. State Reclamation Board, 35 Cal.2d 628, 629, 643, 220 P.2d 897.

Defendant Almas House Moving Company, to be referred to as defendant, is a

corporation engaged in the business of moving houses and oversized loads.

About 5:45 a. m. on September 24, 1953 defendant was transporting two, large, triangular, prefabricated steel girders on a flat-bed tractor and semitrailer. The tractor was about 8 feet wide. Two I-beams about 23 feet in length were crosswise on the bed of the trailer. The two girders, one on top of the other, were on top of the I-beams. The widest portion of the girders was near the cab of the tractor. From point to point of the girders the load was 24 feet and 6 inches in width, making an 8-foot overhang on both sides of the trailer. The equipment weighed in excess of 25,000 pounds.

The tractor, in addition to its usual headlights, had a fixed electric red light on top of the hood. There were a total of 14 lighted red coal oil lanterns hung from various parts of the load. About 120 feet in front of the tractor a pilot or guide truck was operated by defendant Tangen. He had in his left hand a lighted red coal oil lantern with a wire handle which, he testified, he waved. The lights on the tractor and truck were burning.

Defendant was transporting the girders from Los Angeles to Lakewood and had obtained from the city of Lynwood a permit describing the route, subject to "O.K." by the police department, which showed on its face "Okay," and a permit from the city of South Gate street department, to move the load. Neither permit authorized defendant to move the load in the center of the highway.

Defendant Stout drove the tractor easterly on Imperial Highway. When it reached the intersection of Imperial and Alameda the equipment was stopped and Tangen called the police departments of South Gate and Lynwood. Stout and Tangen had the permits with them. Tangen testified that an officer informed him South Gate did not require a police escort as long as the equipment was properly lighted and as long as he had a permit. A police car from Lynwood was dispatched to the intersection. The officers examined the permits and directed Stout and Tangen to drive down the middle of the highway "so that the truck and the load would be contained within one lane of each direction, straddling that double line." The beams protruded almost out to the single white lines on either side of the double white line.

One of the officers testified the equipment was being driven in this fashion so that traffic would be "able to move on either side of this equipment"; he did not see any red lanterns on the guide truck, nor did he see defendant Tangen wave a red lantern. The officers stayed in front of the equipment until they reached a bridge on Imperial close to the city limits of South Gate, at which point they turned off.

When the tractor reached the city limits of South Gate it was still dark. Imperial at that point was about 74 feet wide. Stout was driving to the right of the double white line in the center of the highway. About 8 feet of the load extended into the lane immediately north of the double line. Plaintiff was traveling west on Imperial in the lane near the double white line. About 70 feet in front of him, and going in the same direction, was a car driven by one Preston. Preston saw a red light, swerved to the right and avoided contact with the equipment. Almost immediately thereafter plaintiff collided with the left-hand side of the load, sustaining serious injuries. The accident occurred near the boundary line between Lynwood and South Gate. The evidence is in conflict as to whether the point of impact was in Lynwood or in South Gate. There was evidence from which the jury could have found either way. Plaintiff testified he did not see any red light other than the rear end light of Preston's car in front of him.

The court read sections 515; 525; 525.1; 525.3; 529; 694(a), (b), (c), and (f); and 710 of the Vehicle Code to the jury.[1]

1. Sections 515, 525, 525.1, 525.3, 529, 694 (a), (b) and (c) were read at the request of plaintiff; sections 694(f) and 710 at the request of defendants.

Section 515: "Speed Law Based on Weight and Tire Equipment.

"(a) No person shall operate upon any highway any of the following vehicles when equipped entirely with pneumatic tires at any speed in excess of 40 miles per hour:

"(1) Any motor truck and trailer.

"(2) Any motor truck alone or truck tractor with semi-trailer having a gross weight, of vehicle and load or of such vehicles and load of 25,000 pounds or more.

"(b) No person shall operate upon a highway any vehicle equipped with any solid tire when such vehicle has a gross weight as set forth in the following table at any speed in excess of the speed set forth opposite such gross weight:

When gross weight of vehicle and load is:	Maximum speed in miles per hour:
10,000 lbs. or more but less than 16,000 lbs.	25
16,000 lbs. or more but less than 22,000 lbs.	15
22,000 lbs. or more	12

"(c) * * *"

Section 525: "Drive on Right Side of Roadway—Exceptions.

"(a) Upon all roadways of sufficient width a vehicle shall be driven upon the right half of the roadway, except as follows:

"(1) When overtaking and passing another vehicle proceeding in the same direction under the rules governing such movement.

"(2) When placing a vehicle in a lawful position for, and when such vehicle is lawfully making a left turn.

"(3) When the right half of a roadway is closed to traffic while under construction or repair.

"(4) Upon a roadway designated and signposted for one-way traffic.

"(b) The State Department of Public Works shall by regulation determine a distinctive roadway marking which shall indicate no driving over such marking, and is authorized either by such marking or by signs and markings to designate any portion of a State highway where the volume of traffic or the vertical or other curvature of the roadway renders it hazardous to drive on the left side of such marking or signs and marking. When such markings or signs and markings are in place, the driver of a vehicle shall not drive along the highway to the left thereof, but this shall not prevent turning to the left across any such markings at any intersection or private driveway.

"(c) It is unlawful to drive any vehicle upon any highway which has been divided into two or more roadways by means of a physical barrier or by means of a dividing section of not less than two feet in width delineated by curbs, lines or other markings on the roadway except to the right of such barrier or dividing section, or to drive any vehicle over or across any such dividing section, or to make any left turn or semi-circular or U-turn on any such divided highway, except in a crossover or intersection."

Section 525.1: "Driving in Right Hand Lane. Upon all highways any vehicle proceeding at less than the normal speed of traffic thereon shall be driven in the right hand lane for traffic or as close as practicable to the right hand edge or curb, except as otherwise provided in Section 525 of this code."

Section 525.3: "Certain Vehicles to be Driven in Right Hand Lane.

"When any vehicle included in Section 515 is being driven on any highway, it shall be driven in the right hand lane for traffic or as close as practicable to the right edge or curb, except when overtaking and passing another vehicle proceeding in the same direction or when preparing for a left turn at an intersection or into a private road or driveway. Vehicles included in this section when overtaking and passing another vehicle shall use the lane to the immediate left of the right hand lane for traffic, except when overtaking and passing to the right of another vehicle as permitted under the provisions of this code."

Section 529: "When Overtaking on the Right Is Permitted.

"(a) The driver of a motor vehicle may overtake and pass to the right of another vehicle only under the following conditions:

"(1) When the vehicle overtaken is making or about to make a left turn.

"(2) Upon a city street with unobstructed pavement of sufficient width for two or more lines of vehicles in each direction.

"(3) Upon a one-way street.

"(4) Upon any highway outside of a

The jury was then told that conduct in violation of the sections constitutes negligence per se, subject to being overcome by a showing that the conduct was excusable or justifiable.[2] This was followed by another instruction to the effect that a violation of

city with unobstructed pavement of sufficient width and clearly marked for four or more lines of moving traffic.

"(5) Upon a highway divided into two roadways where traffic is restricted to one direction upon each of such roadways.

"(b) The driver of a motor vehicle may overtake and pass another vehicle upon the right only under conditions permitting such movement in safety. In no event shall such movement be made by driving off the paved or main traveled portion of the roadway.

"(c) The provisions of this section shall not relieve the driver of a slow moving vehicle from the duty to drive as closely as practicable to the right-hand edge of the roadway."

Section 694 (a), (b), (c), and (f):

"[Width of Vehicles]

"(a) The total outside width of any vehicle or the load thereon shall not exceed 96 inches, except as otherwise provided in this section.

"(b) When any vehicle is equipped with pneumatic tires the maximum width from the outside of one wheel and tire to the outside of the opposite outer wheel and tire shall not exceed 100 inches, but in such event the outside width of the body of such vehicle or the load thereon shall not exceed 96 inches.

"(c) When any vehicle carries a load of loosely piled agricultural products such as hay, straw, or leguminous plants in bulk but not crated, baled, boxed or sacked, such load of loosely piled material and any loading racks retaining the same shall not exceed 120 inches in width. * * *

"(f) Any city organized under a freeholders' charter may by ordinance permit a total outside width of vehicle and load in excess of the limits set forth in this section when such vehicle is used exclusively within the boundary limits of such city."

Section 710: "Permits for Increased Size, Weight, Etc.

"(a) The State Department of Public Works with respect to highways under its jurisdiction and local authorities with respect to highways under their jurisdiction may at their discretion upon application in writing and if good cause appears issue a special permit in writing authorizing the applicant to operate or move a vehicle or combination of vehicles or special mobile equipment of a size or weight of vehicle or load exceeding the maximum specified in this code, or to use corrugations on the periphery of the movable tracks on a traction engine or tractor the propulsive power of which is not exerted through wheels resting upon the roadway but by means of a flexible band or chain, or, under emergency conditions, to operate or move a type of vehicle otherwise prohibited hereunder, upon any highway under the jurisdiction of the party granting such permit and for the maintenance of which said party is responsible.

"(b) The application for any such permit shall specifically describe the vehicle or vehicles and load to be operated or moved and the particular highways over which permit to operate is requested, and whether such permit is requested for a single trip or for continuous operation.

"(c) The State Department of Public Works or local authority is authorized to issue or withhold such permit at its discretion; or, if such permit is issued, to limit the number of trips, or to establish seasonal or other time limitations within which the vehicle or vehicles described may be operated on the highways indicated, or otherwise to limit or prescribe conditions of operation of such vehicle or vehicles, when necessary to assure against undue damage to the road foundations, surfaces or structures, and may require such undertaking or other security as may be deemed necessary to protect the highways and bridges from injury, or to provide indemnity for any injury resulting from such operation."

2. "Conduct which is in violation of * * 515, 525, 525.1, 525.3, 529, * * *. 694a, b, c, f; 710 of the Vehicle Code just read to you constitutes negligence per se. This means that if the evidence supports a finding, and you do find, that a person did so conduct himself, it requires a presumption that he was negligent. However, such presumption is not conclusive. It may be overcome by other evidence showing that under all the circumstances surrounding the event, the conduct in question was excusable, justifiable and such as might reasonably have been expected from a person of ordinary prudence. In this connection, you may assume that a person of ordinary prudence will reasonably endeavor to obey the law and will do so unless causes, not of his own intended making, induce him, without moral fault, to do otherwise."

law is of no consequence unless it was a proximate cause of an injury suffered by the plaintiff. Judgment was for plaintiff. Defendants appeal.

First, defendants assert the court erred in reading sections 525, 525.1, and 525.3 [3] to the jury and stating that violation of these sections constituted negligence per se.

The court first read section 515, which provides that vehicles of specified weight and tire equipment shall not be operated in excess of designated speeds. It then read section 525.3, which in essence provides that vehicles included in section 515 shall be driven in the right-hand lane or as close as practicable to the right edge or curb.[4] It then read section 525.1, which provides that vehicles proceeding at less than normal speed of traffic shall be driven in the right-hand lane. This was followed by section 525 which states that a vehicle shall be driven on the right half of the roadway except under certain conditions.

[2, 3] Section 525 is not applicable where vehicles are passing each other going in opposite directions. Mathers v. County of Riverside, 22 Cal.2d 781, 784, 141 P.2d 419; Morrison v. Jose, 57 Cal.App.2d 795, 801, 135 P.2d 586. Sections 525, 525.1, and 525.3 contain the identical language: "when overtaking and passing another vehicle proceeding in the same direction." Each of these sections applies only to vehicles traveling in the same direction and not to those proceeding in opposite directions. See Lewis v. Western Truck Line, 44 Cal. App.2d 455, 468, 112 P.2d 747. It was error to give the instructions based on sections 525, 525.1, and 525.3 as those sections are not applicable to the facts at bar. The vehicles involved were traveling in opposite directions. Neither party requested that section 527, which applies to vehicles proceeding in opposite directions, be read to the jury, nor was it instructed thereon.[5] Bennett v. Chandler, 52 Cal.App.2d 255, 263, 126 P.2d 173; see People v. Kiss, 125 Cal. App.2d 138, 143, 269 P.2d 924; Morrison v. Jose, 57 Cal.App.2d 795, 801, 135 P.2d 586.

[4, 5] Defendants' second assignment of error is that the court erred in reading section 529, which states the conditions when a driver may overtake and pass to the right of another vehicle. Plaintiff argues the instruction was given because paragraph (c) thereof provides that the provisions of the section shall not relieve the driver of a slow-moving vehicle from the duty to drive as closely as practicable to the right-hand edge of the roadway. This section applies to vehicles traveling in the same direction and not in opposite directions. The evidence is uncontradicted that as defendants were driving easterly on Imperial they were not attempting to pass any other vehicle driven in the same direction. The instruction was not applicable to the facts and should not have been given.

Defendants next contend the court erred in reading subsection (a) of section 694. It is argued that although subsection (f) was read at their request there was no reason to read subsection (a) in view of the

3. All references are to sections of the Vehicle Code.

4. The phrase "and as close as practicable to the right-hand curb or edge of," was deleted from section 525 in 1945. Stats. 1945, c. 493, p. 990, § 1. However, when section 525.1 was added to the code in 1947, Stats.1947, c. 788, p. 1879, § 7, the phrase "or as close as practicable to the right hand edge or curb" was included in the section, and when section 525.3 was added in 1953, Stats.1953, c. 421, p. 1671, § 1, the phrase "or as close as practicable to the right edge or curb" was included in that section.

5. Section 527 reads: "Passing Vehicles Proceeding in Opposite Directions.

"(a) Drivers of vehicles proceeding in opposite directions shall pass each other to the right, and, except when a roadway has been divided into traffic lanes, each driver shall give to the other at least one-half of the main traveled portion of the roadway whenever possible.

"(b) Whenever upon any grade the width of the roadway is insufficient to permit the passing of vehicles approaching from opposite directions at the point of meeting, the driver of the vehicle descending the grade shall yield the right of way to the vehicle ascending the grade and shall if necessary back his vehicle to a place in the highway where it is possible for the vehicles to pass."

evidence that the oversized load was being carried pursuant to permits from the authorities.

[6] The object of section 694(a) is to restrict the width of loads to reasonable limits so that such loads shall not protrude over the center line of a highway or over other traffic lines in such a way as to interfere with other vehicles which are in their proper places and are properly using the other parts of the highway. Albania v. Kovacevich, 44 Cal.App.2d 925, 928, 113 P.2d 251.

[7–9] An act or failure to act in violation of a statute is negligence as a matter of law. Circumstances of emergency or unusual conditions may be shown to excuse or justify the violation. Unless and until excuse or justification appears, the general rule applies and the violation must be treated as negligence per se. Each violation must be considered in connection with the surrounding circumstances. Ordinarily the excuse or justification presents a question of fact for the jury. Here, the instruction relative to negligence per se stated that the violation of section 694(a) may be explained by circumstances surrounding the event. The court read subdivision (f), which qualified the effect of subdivision (a). There was no error in reading subsection (a) of section 694.

[10] The fourth claimed error was the reading of section 515 which specifies speed limits based on weight and tire equipment. Plaintiff concedes the only reason this instruction was given was to make section 525.3 applicable, in that the latter section provides that when a vehicle included in section 515 is being driven on the highway it shall be driven in the right-hand lane or as close as practicable to the right edge or curb, with certain exceptions. As noted, section 525.3 applies to vehicles traveling in the same direction and not in opposite directions. There is no evidence to warrant an inference that the tractor was driven in excess of any of the speed restrictions set forth in section 515. Section 515 should not have been read.

[11] Finally, defendants contend the court erred in refusing to instruct the jury that if a vehicle is driven on the right half of the roadway no violation of section 525 results from the mere fact that the load extends across the center line.[6] Since section 525 applies only to vehicles traveling in the same direction, the court was correct in refusing to give the instruction. Furthermore, the instruction was inapplicable to the facts. The evidence was uncontradicted that the vehicle was driven in the center of the highway, not on the right half.

There remains the question whether reading sections 515, 525, 525.1, 525.3, and 529 to the jury, together with the instruction that conduct in violation of any one of the sections constituted negligence per se subject to being overcome by a showing that the conduct was excusable or justifiable, was prejudicial.

A judgment may not be set aside on the ground of misdirection of the jury unless, after an examination of the evidence, the court shall be of the opinion that the error complained of has resulted in a miscarriage of justice. Const., art. VI, § 4½.

[12, 13] The facts were fully developed. It is not contended the evidence does not support the verdict. There is substantial evidence that defendants were negligent. The court instructed the jury with respect to negligence, proximate cause, and contributory negligence. Obviously the jury found defendants were negligent and plaintiff was not contributorily negligent. When the instructions are read as a whole, it is manifest the jury was fully, fairly, and correctly charged on all basic issues.

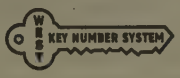
6. The refused instruction reads: "California Vehicle Code Section 525 provides that upon all roadways of sufficient width a vehicle shall be driven upon the right half of the roadway with certain exceptions not applicable in this situation.

"However, if the vehicle itself is driven on the right half of the roadway the fact that the load thereon extends across the center line to the left half of the roadway does not result in a violation of this code section."

Under such circumstances any minor error that may have occurred in the instructions cannot and should not be held to have been prejudicial. Florine v. Market St. Ry. Co., 64 Cal.App.2d 581, 586, 149 P.2d 41. Regardless of the requirements of sections 525, 525.1 and 525.3 defendants were clearly negligent in moving the equipment with 8 feet of overhang north of the center line and we think the jury undoubtedly would have found negligence for that reason. Although some of the instructions complained of were erroneous under the circumstances of this case, it cannot be said the errors resulted in a miscarriage of justice. Lewis v. Western Truck Line, 44 Cal.App.2d 455, 468, 112 P.2d 747; Bennett v. Chandler, 52 Cal.App.2d 255, 263, 126 P.2d 173; Morrison v. Jose, 57 Cal.App.2d 795, 803, 135 P.2d 586.

Affirmed.

SHINN, P. J., and PARKER WOOD, J., concur.



147 Cal.App.2d 471

Jimmie O. WELCH, Petitioner,

v.

INDUSTRIAL ACCIDENT COMMISSION, Ruby Meur, et al., Respondents.

Civ. 22212.

District Court of Appeal, Second District, Division 1, California.

Jan. 9, 1957.

Petition for writ of review challenging correctness of an order of the Industrial Accident Commission denying petitioner compensation. The District Court of Appeal by the court held that it was powerless to weigh the evidence and credibility of witnesses.

Petition denied.

Workmen's Compensation ⇐1939

The District Court of Appeal cannot retry compensation proceeding and weigh the evidence and credibility of the witnesses since such is the function of the duly established arbiter of the facts.

Jimmie O. Welch, in pro. per.

PER CURIAM.

This Petition for a Writ of Review challenges the correctness of respondent commission's order denying petitioner compensation solely upon the ground that notwithstanding conflicting medical testimony, the commission should have ordered an award in favor of petitioner because the findings and award "was unreasonable in that it was based on medical reports which did not reflect a complete and thorough examination of my complaints * * *".

This court is powerless to retry this proceeding and to weigh the evidence and credibility of witnesses. That is the function of the duly established arbiter of the facts.

The petition is denied.

146 Cal.App.2d Supp. 878

The PEOPLE of the State of California, Plaintiff and Appellant,

v.

Arthur BURTON, Clyde Hammond, Azell Guster, Frances Martinez, Alberta Bizzel, Floyd A. Plaster, Otho Puckett, Jack Chapman, Mae Nobles, Bobbie Jean Teague, Defendants.

The National Automobile and Casualty Insurance Company, a Corporation, Walter E. Binger, Harry F. Devenney, Margaret L. Devenney, Carl H. Devenney, Respondents.

Cr. A. A-3 to A-12.

Appellate Department, Superior Court, Kern County, California.

Nov. 14, 1956.

As Amended on Denial of Rehearing Nov. 30, 1956.

Proceeding to set aside summary judgments entered against a number of bail bondsmen after nonappearance of defendants. The Municipal Court, Bakersfield Judicial District, J. Kelly Steele, J., granted motions to set aside such summary judgments and State appealed. The Superior Court, Appellate Department, Main, J., held that statute requiring that actions for recovery upon an undertaking in a criminal action must be commenced within one year, is not applicable to summary judgment proceedings against bail bondsmen under Penal Code, and a court may enter summary judgment against bondsmen more than one year after entry of declaration of forfeiture for failure of defendant to appear.

Reversed with instructions.

1. Bail ⇐86

Statute requiring that actions for recovery upon an undertaking in a criminal action be commenced within one year is not applicable to summary judgment proceedings against bail bondsmen under Penal Code, and court may enter summary judgment against bondsmen more than one year after entry of declaration of forfeiture for failure of defendant to appear. West's Ann.Pen.Code, §§ 1278, 1305, 1306; West's Ann.Code Civ.Proc., §§ 335, 340, subd. 2.

2. Forfeiture ⇐5

"Common-law" or "judicial forfeiture" requires the taking of some action by one of the parties litigant in order to establish the forfeiture or perfect the judgment. West's Ann.Health & Safety Code, § 11610 et seq.; West's Ann.Code Civ.Proc., § 942.

See publication Words and Phrases, for other judicial constructions and definitions of "Common-Law Forfeiture" and "Judicial Forfeiture".

3. Forfeiture ⇐5

"Legislative" or "statutory forfeiture" requires no act to be performed by any litigant to establish forfeiture or to perfect the judgment, but only the ministerial act of the court. West's Ann.Bus & Prof. Code, § 25353.

See publication Words and Phrases, for other judicial constructions and definitions of "Legislative Forfeiture" and "Statutory Forfeiture".

4. Bail ⇐77(2)

Under provisions of Penal Code providing for summary judgment against bail bondsmen upon nonappearance of defendant, upon the unexcused nonappearance of the defendant the surety becomes liable by operation of statute and court's action in making a record of the fact is ministerial and mandatory. West's Ann.Pen.Code, §§ 1305, 1306.

Roy Gargano, County Counsel, Kern County, and M. W. Creagh, Deputy County Counsel, Bakersfield, for appellant.

Donahue & Goldberg, Bakersfield, for respondents Devenney.

Norbert Baumgarten, Bakersfield, for other respondents.

MAIN, Judge.

The appeal in each of the ten captioned cases involves the validity of a summary judgment against bondsmen upon under-

taking of bail in a criminal case, which judgment was entered more than one year after the entry by the lower court of the declaration of forfeiture for failure of the defendant to appear. Penal Code Sections 1278, 1305, 1306.

With exceptions noted, the record in each case discloses the following actions:

1. Defendant was charged with a criminal offense in the Municipal Court, was taken into custody, and was released upon posting an undertaking of bail furnished (exception in case A–12) by a corporate bondsman, the National Automobile and Casualty Insurance Company.

2. Defendant failed to appear when ordered to do so, and thereafter the Municipal Court entered in its minutes a declaration of forfeiture of the bond. In each instance the forfeiture was declared within one year of the failure to appear.

3. More than one year after entry of the forfeiture, the Municipal Court entered a summary judgment upon the bond. In some instances the judgment was entered against the corporate surety only, and in some cases also against one Walter E. Binger, presumably the attorney in fact for the corporate surety.

4. The docket contains an entry: "Summary judgment entered. Bondsman notified." The record does not contain other proof of service, copy of the notice, nor indication of what person or persons were notified. The only appearance of record in opposition to the appeal is by attorney Norbert Baumgarten, appearing "for respondent Walter E. Binger." Neither Mr. Baumgarten nor other counsel appear for the corporate surety.

5. A motion was made in the Municipal Court by Attorney Baumgarten to set aside the summary judgment so entered. The docket does not disclose the identity of the moving party, but only of counsel.

6. On February 27, 1956, the Municipal Court entered its order in each case, setting aside the summary judgment previously rendered.

7. The People (County Counsel of Kern County) appeal from the orders setting aside the summary judgments.

In setting aside the judgments, the Municipal Court in effect decided that entry of such summary judgments was barred by the one-year limitation of Sections 335 and 340(2) of the Code of Civil Procedure, reading:

> "The periods prescribed for the commencement of actions other than for the recovery of real property, are as follows: * * * An action upon a statute, or upon an undertaking in a criminal action, for a forfeiture or penalty to the people of this State."

In other words, the holding is that the court cannot enter the summary judgment on a date more than one year after its declaration of the forfeiture. No such limitation of time is contained in the Penal Code Sections. Only a minimum time is mentioned, in that the defendant and his bail are now allowed ninety days from the declaration of forfeiture within which to appear and offer excuses, before summary judgment can be entered.

Since 1927 the Penal Code Sections 1305, 1306 has required the *court* in which a bail bond has been filed to perform specified acts as a means of fixing liability of bail after the unexcused non-appearance of the defendant. There is no civil action on the bond by the district attorney, as formerly.

Prior to 1927 the method provided for enforcing a forfeiture of bail under Penal Code Sections 1305 and 1306 was by civil action upon the bond, brought by the District Attorney, which action could only be commenced after a declaration of forfeiture by the court in which the principal had failed to appear, and the lapse of twenty days more during which the non-appearance remained unexcused.

In the case of Los Angeles County v. Metropolitan Casualty Insurance Company, 1933, 135 Cal.App. 26, 26 P.2d 699, 700, based on the pre-1927 law, it was held that the court might declare the forfeiture even

after five years time from the date of non-appearance of the defendant; and that his further failure to appear for the twenty-day period then provided by Penal Code Section 1305 entitled the district attorney to proceed with his action on the bond. "It cannot be said * * * that such obligation [became] actionable until established by the procedure" prescribed by Penal Code Sections 1305 and 1306 as they then read. The opinion does not mention Section 340(2) of the Code of Civil Procedure, but does uphold a judgment against the bondsman in a suit filed less than one year after the accrual of the cause of action. The district attorney in filing such suit was following the mandate of Penal Code Section 1306 as it read before 1927, that he might "proceed *by action* against the bail upon their undertaking."

However, by the amendments of 1927 the legislature put into operation an entirely new scheme for fixing liability of sureties on bail bonds. The bail bondsmen were required, P.C. Section 1287, to consent to summary judgment against themselves as an integral part of the undertaking. Section 1306 of the Penal Code was recast to provide that ninety days after the declaration of forfeiture, unless set aside, the court "shall * * * enter a summary judgment" against the bail. All directions to the court as to its duties are mandatory. As to the new system, the court said in People v. New York Indemnity Company, 1931, 113 Cal.App. 487, 298 P. 849, 850:

> "Section 1306 is so radically changed that nothing remains of the former enactment, the section as amended providing for the entry of a summary judgment against each bondsman named, in place of the action against the bail on their undertaking as theretofore provided. It is to be observed that the amendment adds to the form of the bond provided by section 1278 of the Penal Code an express consent to the entry of such summary judgment by the bondsman and also by 'the defendant if he be a party to the bond.' Necessarily the bond would have to be signed by the surety, thereby making such consent effective. Here we have a very important change in the form of the bond, making effective by consent the summary judgment provided for in the amendment to section 1306."

[1] No change was made in 1927 in the language of C.C.P. Section 340(2), perhaps in view of the large number of outstanding bonds enforceable only by the old procedure because they lacked the consent clause. Whether this section ever became applicable to bonds given since the 1927 changes does not seem to have been decided. We believe that on principle and in view of the drastic and specific changes above referred to, the section has no application to bonds given under the new law.

It will first be observed that Sections 1305 and 1306 are specific statutes concerning obligation of bail, and so "are governed by the statutes specially applicable thereto." Section 2781 of the Civil Code. They do not provide for the filing of an *action* as did the old law. They contain no reference to periods of limitation within which the specified acts must be performed by the court, and no limitation can be imported from a general statute.

[2] Next, the law recognizes two types of forfeiture, 22 Cal.Jur. 510, and has done so in this state at least since 1882. See Upham v. Hosking, 62 Cal. 250; People v. Broad, 216 Cal. 1, 12 P.2d 941. The first, called common-law or judicial forfeiture, requires the taking of some action by one of the parties litigant in order to establish the forfeiture or perfect the judgment. Of this character are actions to forfeit vehicles used in the transportation of narcotics. Health and Safety Code Section 11610 et seq., require a series of steps by the state as litigant before forfeiture can be adjudicated. Similarly the liability of sureties upon an undertaking to stay execution of a civil judgment is fixed only by the making and granting of a motion by a litigant. C.C.P. Section 942.

[3, 4] The second type of forfeiture, called legislative or statutory, requires no

act to be performed by any litigant, but only the ministerial act of the court. An example is found in the Alcoholic Beverage Control Act; see Business and Professions Code Section 25353. In the cases now on appeal the liability of the bail derives from a single event: the unexcused non-appearance of the defendant. Upon the happening of this event, the surety becomes liable by operation of the statute. The court's action in making a record of the fact is ministerial and mandatory.

The distinction is spelled out further in People v. Grant, 1942, 52 Cal.App.2d 794, 127 P.2d 19, 22; hearing in the Supreme Court denied. There the state sought to confiscate and forfeit under Penal Code 325 a quantity of coins taken some twenty-two months before from slot machines by the sheriff. Since forfeiture could be accomplished only by the bringing and trial of a civil action, the court held recovery to be barred by the Statute of Limitations, C.C.P. Sec. 340(2). The forfeiture sought was common-law or judicial, not merely confirmation of a legislative forfeiture. But, said the court:

> "Where no *action* for a forfeiture is required to be brought, or where the statute itself prescribes the periods within which the procedural steps must be taken, certainly said section 340 of the Code of Civil Procedure would have no application."

To us it appears quite clear that in 1927 the Legislature purposely changed the character of proceedings for forfeiture of bail. The characteristics of both types of proceedings were known from the decisions of the appellate courts, and the change was recommended by the Commission for the Reform of Criminal Procedure, in its 1927 report to the Legislature. See Vol. 5 of the Appendix to Journals of the Senate and Assembly, 47th session, 1927. Section 1306 of the Penal Code was completely re-cast. The effect was to remove bail forfeiture proceedings from the category of judicial forfeitures and place them within the classification of legislative or statutory forfeitures.

The orders of the Municipal Court granting motion to vacate and set aside summary judgment are therefore reversed as to National Automobile & Casualty Company in all cases in which judgment was rendered against said Company, namely:

A– 3	People v. Burton
A– 4	" v. Hammond
A– 5	" v. Guster
A– 6	" v. Martinez
A– 7	" v. Bizzel
A– 8	" v. Plaster
A– 9	" v. Puckett
A–10	" v. Chapman
A–11	" v. Nobles

Case No. A–12 involves different bondsmen, but all parties in that case have stipulated that the appellate court's ruling on the legal questions involved in the other appeals shall be conclusive in A–12 also. Accordingly, in case numbered A–12, People v. Teague, the order of the Municipal Court granting motion to vacate and set aside summary judgment against Harry F. Devenney, Margaret L. Devenney and Carl H. Devenney, is reversed.

In the cases next tabulated the docket entries reflect judgments against one Walter Binger; but the record fails to show that any person of this name was ever a party defendant or otherwise to the prosecution or the undertaking. He is referred to at times as "respondent Walter Binger". As to Mr. Binger the orders granting motion to set aside purported summary judgment are reversed, with instructions to vacate and set aside any purported judgment appearing of record against him, in the following cases:

A– 6	People v. Martinez
A– 7	" v. Bizzel
A– 8	" v. Plaster
A– 9	" v. Puckett
A–10	" v. Chapman
A–11	" v. Nobles

LAMBERT, P. J., and BRADSHAW, J., concur.

PER CURIAM.

Good cause appearing, it is ordered by the court that

1. The captions of the cases on appeal as shown on the opinion of the court be amended to read as set forth above.

2. The petition for re-hearing in each of said cases be and the same is hereby denied.



147 Cal.App.2d Supp. 827

PEOPLE of the State of California, Plaintiff and Respondent,

v.

John G. OPPENHEIMER, Defendant and Appellant.

Cr. A. 3538, 3539.

Appellate Department, Superior Court, Los Angeles County, California.

Dec. 11, 1956.

Proceeding on motions to vacate judgments in criminal cases. The Municipal Court of the Los Angeles Judicial District, Ben Koenig, J., entered order denying this motion and forfeiting bail, and defendant appealed from both orders. The Appellate Department of the Superior Court held, in part, that defendant, who had, by motion to have judgment set aside, laid foundation for new appeal that stayed execution of judgment until appeal had been heard and determined, could not repeat process by making subsequent motion to vacate judgment, and appeal from order denying subsequent motion to vacate judgment would be dismissed.

Appeals dismissed.

1. Criminal Law ⇐1023(12)

Appeal from order denying motion that was repetition of motion, already made and denied, to set aside judgment on grounds available and considered upon appeal from judgment would be dismissed for lack of compliance with Code of Civil Procedure. West's Ann.Code Civ.Proc., § 1008.

2. Criminal Law ⇐1023(12)

Order made after judgment in criminal case is not appealable where motion merely asks court to repeat or overrule the former ruling on same facts.

3. Criminal Law ⇐1023(12)

Defendant, who had, by motion to have judgment in criminal case set aside, laid foundation for new appeal that stayed execution of judgment until appeal was heard and determined, could not repeat process by bringing subsequent motion to vacate judgment; and appeal from order denying subsequent motion to vacate judgment would be dismissed.

4. Criminal Law ⇐1023(3)

Order forfeiting bail in criminal case is not an appealable order. West's Ann. Pen.Code, § 1305.

5. Bail ⇐79(2)

Appeal will lie from order refusing to set aside forfeiture of bail. West's Ann. Pen.Code, § 1305.

6. Bail ⇐79(2)

Order denying motion to set aside forfeiture of bail is an indispensable prerequisite to an appeal by defendant on question of forfeiture of bail. West's Ann.Pen. Code, § 1305.

7. Criminal Law ⇐1023(3, 12)

That defendant had petitioned for removal of criminal case to federal district court 19 months after trial, despite provision of federal removal statute allowing removal in criminal cases only before trial, would not make appealable otherwise non-appealable orders entered by state court denying second motion to vacate judgment and forfeiting bail. 28 U.S.C.A. § 1446.

John G. Oppenheimer, in pro. per.

Roger Arnebergh, City Atty., Donald M. Redwine, Asst. City Atty., Philip E.

Grey, Deputy City Atty., Los Angeles, for respondent.

Before BISHOP, P. J., and SWAIN and KAUFFMAN, JJ.

BY THE COURT.

These cases have a common history, and all references to one relate to the other as well. We need begin back no further than January of 1955 when, after a trial by the court sitting without a jury, the defendant was convicted and sentenced, in each case, to serve five days (the sentences to run consecutively). He immediately appealed and the judgments were affirmed in May 1955. Making a gesture toward taking the cases to the United States Supreme Court, the defendant secured a stay of execution until August 15, 1955. Later this stay was extended, indefinitely, but was vacated early in April, 1956, when it became known that the defendant had failed to take the steps necessary to get a hearing before the United States Supreme Court. Without noting all the maneuvers that took place (affidavits of prejudice, appeal from "all void orders" etc., etc.) in March, 1956, we have a motion by the defendant to set aside or suspend the judgments, to grant probation and to reduce bail. This motion, as to the judgment, was based on grounds that were in existence, and relied upon, in the appeal from the judgment. It was denied by the trial court, and the order of denial affirmed on appeal in July, 1956. On August 6 the defendant was notified to appear in the trial court on August 13 to answer to the judgment. On August 9 he filed a notice of a new motion to vacate or suspend the judgments, based on the grounds that had become familiar. On August 10, a Petition for Removal to the Federal Court was filed in that court. This petition was denied August 17, but meanwhile, August 13, the defendant failed to appear and his motion was denied in the municipal court, and his bail forfeited.

These cases are now before us on a notice of appeal, divided into two parts: "1. Defendant hereby appeals from the order of August 13, 1956, denying written motion to vacate judgments * * *. 2. Defendant also appeals from the order of August 13, 1956, forfeiting his bail * * *."

[1] We are dismissing the first of these appeals, the one from the order denying a motion that was a repetition of a motion, already made and denied, to set aside a judgment on grounds available and considered upon an appeal from the judgment. Compliance with the requirements of section 1008, Code of Civil Procedure, was lacking in the making of the last motion. The authority given by the section to punish for contempt for a violation of its terms is not the only result of a violation, but the motion should be denied, as it was in this case.

[2, 3] If a defendant may, by a motion to have a judgment set aside, lay the foundation for a new appeal that stays execution of the judgment until the appeal is heard and determined and may then repeat this process, with another stay, no defendant, so long as there is pen and paper at his command would ever have to serve a sentence imposed upon him. The State is not so impotent. The principle is thus stated in People v. Brattingham, 1928, 91 Cal.App. 527, 528, 267 P. 120, 121: "* * * the rule is well established that an order made after judgment is not appealable where the motion merely asks the court to repeat or overrule the former ruling on the same facts." Authorities are cited in support of the rule, and the passage we have quoted appears, in People v. Vivian, 1941, 46 Cal.App.2d 163, 166, 115 P.2d 559, 560. A death penalty was involved in People v. Smith, 1933, 218 Cal. 484, 24 P.2d 166, 168, where procedural steps, closely paralleling those taken in this case, were condemned, the court saying: "This appeal is entirely frivolous. * * * It must have occurred to appellant's attorney that he has long since exhausted all legal remedies which this court is empowered to grant. A repetition of the practice herein attempted will call for the exercise of the disciplinary

powers of this court." In all these cases, and in People v. Howerton, 1953, 40 Cal.2d 217, 220, 253 P.2d 8, 10, the appeals were dismissed, and we deem that the appropriate action in this case.

[4–6] The attempted appeal from the order of August 13, 1956, forfeiting bail must also be dismissed because it is not an appealable order. Penal Code 1305 provides that after a defendant's bail has been declared forfeited the court may direct the forfeiture to be discharged if the defendant within 90 days after the forfeiture appears and satisfactorily excuses his previous failure to appear. An appeal will lie from an order refusing to set aside the forfeiture. People v. Calvert, 1954, 129 Cal.App.2d 693, 277 P.2d 834; People v. Niccoli, 1951, 102 Cal.App.2d 814, 228 P.2d 827; People v. Kersten, 1943, 60 Cal.App.2d 624, 141 P.2d 512. In People v. Hodges, 1928, 205 Cal. 476, 271 P. 897, the court dismissed an appeal from a summary money judgment on a forfeited bond and the court refused to review the order forfeiting the bond saying, 205 Cal. at page 478, 271 P. at page 897: "Appellant should have moved, within the ninety-day period allowed by section 1305, to discharge the order of forfeiture if improperly made." The order denying a motion to set aside the forfeiture of bail is an indispensable prerequisite to an appeal by the defendant. The reason for this is obvious. The defendant does not present to the court his excuses for not appearing until he makes his motion to set aside the forfeiture. Then, for the first time there is a record from which the appellate court can pass upon the validity of the order appealed from.

[7] The defendant is in no position to contend that the trial court had no authority to make the orders at the time that it did, because the federal court had been given jurisdiction by defendant's act in filing a petition there. Authority to file such a petition is given in criminal cases, by section 1446, of 28 U.S.C.A., but only "at any time before trial." Defendant's petition was filed some nineteen months after his trial—unless, of course, we look only to defendant's petition wherein is alleged "that a trial in said cases * * * is set for August 13, 1956," without even a suggestion appearing that the cases had already been tried. But if, as a result of misrepresentation and silence, the federal court technically had jurisdiction, that would not make appealable orders which are not appealable under state law, now that the cases have been remanded.

The appeals are dismissed.

147 Cal.App.2d 603

Sydney M. WILLIAMS, Plaintiff,

v.

Claude S. SPENCE, Defendant.

Sydney M. WILLIAMS, Plaintiff and Cross-Defendant in Certain Pleadings,

and

Quality Films, Inc., a corporation, Cross-Defendant in Certain Pleadings, Respondents,

v.

Claude S. SPENCE, Defendant and Cross-Complainant in Certain Pleadings, Appellant.

Civ. 21738.

District Court of Appeal, Second District, Division 1, California.

Jan. 16, 1957.

Rehearing Denied Feb. 14, 1957.

Proceeding to determine rights of assignor and assignee under written assignment of motion picture in certain funds held by stakeholder. The Superior Court of Los Angeles County, Newcomb Condee, J., entered judgment for assignor, and assignee appealed. The District Court of Appeal, White, P. J., held that where written "release and assignment" of motion picture did not purport to be a compromise or accord and satisfaction, and was signed only by assignor, and assignor claimed that assignment was given as security for debt and was not intended as an outright transfer of property, extrinsic evidence was properly admitted to show true purpose of assignment, the relative rights of parties, and real ownership of property.

Affirmed.

See also 141 Cal.App.2d 213, 296 P.2d 577.

1. Evidence ⇐384

The rule excluding extrinsic or parol evidence is not a rule of evidence, but is a part of substantive law.

2. Evidence ⇐397(2), 458, 461(1)

The parol evidence rule is not applicable where written instrument does not purport to be complete statement of entire agreement of parties, and in such cases extrinsic evidence should be admitted for purpose of showing circumstances under which writing was signed and delivered and intention of parties at that time.

3. Evidence ⇐462

Where written "release and assignment" of motion picture did not purport to be in compromise or accord and satisfaction, and was signed only by assignor, and assignor claimed that assignment was given as security for debt and was not intended as outright transfer of property, extrinsic evidence was properly admitted to show true purpose of assignment, the relative rights of parties, and real ownership of property.

4. Evidence ⇐462

Extrinsic evidence which is admissible to show true purpose of assignment which it is claimed was given as security for debt may consist of acts, conduct, and circumstances, and the question whether the showing is clear and convincing is primarily for the arbiter of facts.

5. Chattel Mortgages ⇐39

Evidence was sufficient to sustain finding that "release and assignment" of motion picture was given as security for debt which assignor owed to assignee and was not an outright transfer.

Robert C. McMahon, James A. Broderick, Jr., Los Angeles, for appellant.

Morton R. Goodman, Beverly Hills, for respondent Sydney M. Williams.

WHITE, Presiding Justice.

Defendant Claude Spence appeals from a judgment declaring the rights of the parties in certain funds then held and later to be collected by cross-defendant Quality Films, Inc., under a contract for the distribution of a certain motion picture.

By appellant's cross-complaint he alleges a controversy existing between respondent and appellant as to the ownership of the

picture and of the distribution contract and seeks a declaration of such rights, and particularly a declaration that appellant is the owner of the film and rights to the proceeds of the distribution contract by virtue of an assignment executed by respondent.

It is conceded by all parties that Quality Films, Inc., is a mere stakeholder awaiting adjudication of the rights of appellant and respondent. The distribution contract is a mimeographed form letter addressed to Quality Films, Inc., dated December 12, 1951, signed by Claude S. Spence and Sydney M. Williams and accepted and approved for Quality Films, Inc., by Charles Weintraub, its president. By the terms of that letter agreement, there appears no difference between appellant and respondent. Each agrees that Quality Films is to distribute the picture, collect the revenue, retain 20% of the gross proceeds, and "remit to the undersigned the total proceeds" less 20%. Each agrees to supply prints, reels and shipping cases. Each "warrants and represents" that he "has the right to enter into this agreement * * * and that such telecasting will not violate the rights of others * * *".

Appellant contends that respondent "was present at the negotiation conferences with Quality Films as his attorney; was acting in that capacity at the time he signed said contract, and failed to inform defendant (appellant) of any claim to the motion picture or proceeds of distribution". The court found upon substantial evidence that "It is true that plaintiff Sydney M. Williams is, and for some years has been, an attorney licensed to practice in the State of California, and pursuant to said license has so practiced. It is not true that plaintiff Sydney M. Williams acted as an attorney for the defendant Claude S. Spence in relation to any matters which are the subject of this litigation."

Respondent was the producer and first owner of the picture. By the terms of a letter agreement between appellant and respondent dated July 12, 1944, and signed by both, appellant loaned $25,000 to respondent to be repaid "solely from the so-called producers' share of the gross receipts of the picture * * * prior to the repayment to myself (respondent) from the receipts of said picture of all sums which I may have invested or advanced * * *. You (appellant) acknowledge that I may repay from the receipts of the picture other production loans prior to the repayment of your loan * * * As compensation to you for the making of said loan, I agree that you shall be paid the following: (a) * * * the sum of $28,750 instead of the sum of $25,000; (b) a sum equal to 15% of the profits to be received by me from the distribution of the picture. The term 'profits' as used herein shall mean the amount by which the moneys paid by Republic Pictures Corporation * * * exceeds the total cost of production of the picture * * *." A check from respondent to appellant, dated March 15, 1946, for $4,450 bears the following endorsement signed by appellant: "Payment en re: The Big Show Off including $3,750.00 interest as per agreement, balance due $22,600.00 to be paid as per agreement only as follows: 50% of proceeds of producers' share until such sum of $22,600 is paid in full. Thereafter, when, as, and if, the said producers' share shall have reached the sum of $150,000 said Claude S. Spence is entitled to receive 15% of any and all further receipts of said producer's share on the Big Show Off."

The facts next summarized were found by the trial court to be true. Payments were made under the terms appearing on the back of said check from March 15, 1946 until August 5, 1949, when respondent executed and delivered to appellant "a full and complete assignment of all of plaintiff's (respondent's) right, title and interest in and to said motion picture and the proceeds from its distribution". At that time, August 5, 1949, there was still owing to appellant from the proceeds of said picture the sum of $6,000 (not yet collected from said picture by Republic, the then distributor); and respondent then owed appellant

an additional $4,000 advanced to him in merchandise for his business in Chile, etc. "Said assignment, although absolute on its face, was given by plaintiff (respondent) to secure to defendant (appellant) payment of $10,000.00 * * *." After said assignment appellant received $10,573.95 and respondent received nothing from the proceeds of said picture. As of January 15, 1956, Quality Films had on hand available for distribution to plaintiff and defendant $3,849.98, and the producer's share referred to in the agreement endorsed upon the check of March 15, 1946 has reached $150,000.

Appellant urges three grounds for reversal: (1) prejudicial "error in admission of extrinsic evidence contradicting the terms of the compromise set forth in 'assignment and release' dated August 5, 1949"; (2) lack of substantial evidence to support the finding that "said assignment, although absolute on its face, was given by plaintiff (respondent) to secure to defendant (appellant) payment of $10,000.00 * * *"; and (3) absence of a finding that "plaintiff and defendant did or did not enter into and execute oral agreement modifying the assignment and release".

Appellant, in his brief, discusses at length the rule excluding extrinsic evidence, 18 Cal.Jur.2d 737 et seq., admits there are some miscellaneous exceptions, and then states that in the instant action there were no facts warranting the admission of parol evidence.

[1, 2] The rule excluding extrinsic or parol evidence is not a rule of evidence, but is a part of the substantive law. Hale v. Bohannon, 38 Cal.2d 458, 465, 241 P.2d 4. Therefore, it is unnecessary to consider what objections, if any, were made by appellant in his effort to exclude such evidence in the instant action. The rule, however, is not applicable where the written instrument does not purport to be a complete statement of the entire agreement of the parties. In such cases, extrinsic evidence should be admitted for the purpose of showing the circumstances under which the writing was signed and delivered and the intention of the parties at that time. Love v. Gulyas, 87 Cal.App.2d 608, 614, 197 P.2d 405.

[3] In the instant action, the written "Release and Assignment" does not purport to be a compromise or accord and satisfaction. It is an assignment signed only by respondent. The testimony of both appellant and respondent was that said assignment was executed by respondent when he was in Chile in order that appellant might present it to Republic, the then distributor of the picture, and procure from Republic a cancellation of its contract with respondent. Appellant, in his briefs, assumes that the term "Release" is conclusive evidence that, in consideration of an absolute assignment to him, he released respondent from all liability for the $4,000 debt due him as well as the $6,000 which he still had coming to him from the picture. Appellant did not sign the instrument, and it contains no compromise of his claims against respondent. According to the testimony, the appellant and respondent had for many years been very close and trusting friends. The assignment was presented by appellant to Republic, whose contract was then cancelled. Later an agreement with Quality Films was made for TV releases.

Appellant has cited many decisions involving controversies growing out of integrated mutual agreements in writing or assignments or conveyances delivered without accompanying act, circumstance, or word to indicate that the purpose of the transfer was to secure payment of a debt. None of the cited decisions considers facts analogous to those of the instant action. It would serve no useful purpose to discuss them here.

[4] When, as in the instant action, it is claimed that an assignment was given as security for a debt and was not intended as an outright transfer of property, extrinsic evidence may be admitted to show its true purpose and object, the relative rights of

the parties and the real ownership of the property. Renton v. Monnier, 77 Cal. 449, 457, 19 P. 820; Sherman v. Panno, 129 Cal. App.2d 375, 388, 277 P.2d 80. Such evidence may consist of acts, conduct and circumstances, and the question whether the showing is clear and convincing is primarily one for the arbiter of the facts. Hansen v. Bear Film Co., Inc., 28 Cal.2d 154, 173–175, 168 P.2d 946.

In our opinion, the admission of parol and other evidence of the intent and purpose for which the assignment was executed was not error in the instant action.

[5] There is in the record evidence sufficient to support the finding that said assignment was given as security. The testimony of respondent, if believed by the court, is sufficient. The testimony of appellant to the contrary, even ignoring the many inconsistencies therein, did not take from the trial judge the duty to find true the testimony believed by him.

In the instant action, however, the trial judge was not required to rely upon the testimony of respondent alone. Charles Weintraub, president of Quality Films, Inc., testified that it was respondent who contacted him in regard to the distribution of the picture; that all parties signed the contract in the presence of each other; that appellant and respondent each referred to the picture as "our picture"; that respondent, in appellant's presence, told him that appellant "had money coming from the picture and to make all payments to appellant until further notice"; that respondent instructed him, in the presence of appellant, to change the production credit on the picture to "Williams-Spence" or "Spence-Williams"; and that the first check was sent to respondent and no complaint was made to him or his employees by appellant. There is also evidence of similar conduct of the parties in negotiations with other distributors before the agreement with Quality was made.

In the instant action, the court having found and concluded that the assignment was intended as security for payment to appellant of his debt only, no finding that "plaintiff and defendant did or did not enter into an executed oral agreement modifying the assignment and release" was required.

The judgment is affirmed.

DORAN and FOURT, JJ., concur.



147 Cal.App.2d 680

Olive MARLOWE, Plaintiff and Appellant,

v.

The CITY OF LOS ANGELES, a municipal corporation, and Department of Water & Power of the City of Los Angeles, Defendants.

The City of Los Angeles, a municipal corporation, Respondent.

Civ. 21758.

District Court of Appeal, Second District, Division 3, California.

Jan. 18, 1957.

Action under Public Liability Law against city and its water and power department for injuries sustained in street fall allegedly due to defendants' negligence in allowing accumulation of water and slippery materials at entrance to sewer. After jury returned a verdict for the plaintiff, the Superior Court of Los Angeles County, A. A. Scott, J., rendered order granting defendants a new trial, and plaintiff appealed. The District Court of Appeal, Shinn, P. J., held that evidence on issue of whether plaintiff had either been contributorily negligent or had assumed risk of condition supported order.

Order affirmed.

1. Appeal and Error ⇐854(6)

If there is substantial evidence on any theory that would support judgment in fa-

vor of party whose motion for new trial is granted, order granting it will not be reversed.

2. New Trial ⇐68

In action under Public Liability Act against city and its water and power department for injuries sustained by plaintiff when she slipped and fell on street allegedly due to defendants' negligence in allowing an accumulation of water and slippery substances at sewer entrance in street, wherein jury returned verdict for plaintiff, evidence on issues of whether plaintiff had either been guilty of contributory negligence or had assumed risk of condition sustained action of trial court in granting defendants a new trial. West's Ann.Gov. Code, §§ 53050, 53051.

3. Negligence ⇐65, 105

There is difference between contributory negligence and assumption of risk, and if a plaintiff fails to exercise degree of care reasonably required of her under circumstances, she is guilty of contributory negligence, though she may not be aware of the extent of danger, but if she has knowledge and appreciation of danger and voluntarily accepts it, she is guilty of assumption of risk.

Walter H. Young, Los Angeles, for appellant.

Roger Arnebergh, City Atty., Bourke Jones, Asst. City Atty., Joseph N. Owen and Weldon L. Weber, Deputy City Attys., Los Angeles, for respondent.

SHINN, Presiding Justice.

Plaintiff appeals from an order granting defendant a new trial in an action for personal injuries brought pursuant to the provisions of the Public Liability Law, sections 53050 and 53051 of the Government Code. The complaint alleged that defendant negligently failed to keep a public highway within the city of Los Angeles free from an accumulation of water, moss, debris, algae and other slippery substances; that defendant had notice of such dangerous and defective condition and both means and opportunity to remedy the same; that while stepping into the street, which had become slippery due to the alleged condition, plaintiff slipped and fell, suffering a broken ankle. The answer denied these allegations and pleaded the defenses of contributory negligence and assumption of risk. Trial was to a jury which returned a verdict for plaintiff in the sum of $3,500. Defendant's motion for a new trial was granted upon the ground of the insufficiency of the evidence to support the verdict. The sole question presented on this appeal is whether the court abused its discretion in granting the motion.

There was evidence of the following facts. Ledgewood Street is a public highway in the city of Los Angeles which winds uphill into the Hollywood Hills. Mr. and Mrs. Rex Bartlett lived on the west side of Ledgewood from 1950 until sometime after plaintiff's accident. Rogerton Street crosses Ledgewood above the Bartlett home. During the time the Bartletts lived at 3035 Ledgewood, water from springs and other sources on Rogerton Street continually flowed down Ledgewood in the gutter along the west side of the street. There were large openings in the curb in front of the Bartlett house leading into an underground conduit. These sometimes became clogged up, impeding the flow of water. The water carried with it moss, algae and other debris which remained in the gutter even when there was no water in the street. Water would gather in front of the house nearly every day and would dry up for a short time only in dry spells. The stream of water was from 6 inches to 3 feet wide. Mr. and Mrs. Bartlett testified in plaintiff's behalf that the gutter was very slippery; Mrs. Bartlett slipped and fell in the gutter on three occasions; Mr. Bartlett slipped and fell four times; a similar misfortune happened to one of their house guests. Mr. Bartlett stated that from 1951 through 1953 he made numerous complaints to various agencies of defendant about the condition of the street, after which crews were sometimes sent to

clean up the street. The last complaint made prior to plaintiff's accident was in the spring or early summer of 1953.

There was no sidewalk in front of the Bartlett residence. A retaining wall was built on the curb. The house could be reached either by climbing a flight of steps that led directly from the curb, or by using a walk leading through a vacant lot above the house.

On September 13, 1953, plaintiff visited the Bartletts late in the afternoon. She had visited them on many previous occasions, on the average of once every month or six weeks. She stated that when she drove to their house she usually turned around at the top of the hill, parked her car above the Bartlett house by the vacant lot and crossed it to a side entrance. There was usually less water there and she could always step across it. She did not park there on September 13th because there were cars parked bumper to bumper beside the lot, which prevented her from reaching the path. She parked her car a little downhill from the house. There was a stream of water flowing in the gutter next to the curb in front of the house. She alighted from her car through the left door, walked around behind it, crossed the water to the curb and in so doing placed both feet in the water and entered the house with wet feet. It was dark by the time plaintiff left. Mr. Bartlett accompanied her out of the house and held her arm as they descended the steps. The lighting was very bad there. When they reached the curb Mr. Bartlett told her to be careful because there was water in the gutter. Plaintiff saw that the stream had widened to three feet. Mr. Bartlett jumped across the stream and told plaintiff to take his hand. She stepped into the flowing water with one foot and as she placed her other foot into the water she slipped and fell, fracturing her ankle. Mr. Bartlett brought a flashlight to see what had happened. He testified that plaintiff had slipped on an accumulation of algae, moss and dirt under the water. There were twigs, leaves, dirt and other debris at the spot where she fell.

[1] In Williams v. Field Transportation Co., 28 Cal.2d 696, 698, 171 P.2d 722, 723, the Supreme Court said: "An order granting a new trial upon the ground of the insufficiency of the evidence to sustain the judgment will not be disturbed upon appeal, unless there be a clear showing of abuse of discretion. 'All presumptions are in favor of the order and it will be affirmed if it is sustainable on any ground. Mazzotta v. Los Angeles Ry. Corp., 25 Cal.2d 165, 169, 153 P.2d 338, and cases cited. The trial court in considering a motion for new trial is not bound by a conflict in the evidence, and has not abused its discretion when there is any evidence which would support a judgment in favor of the moving party.' Ballard v. Pacific Greyhound Lines, 28 Cal.2d 357, 170 P.2d 465, 467. Even if the evidence is uncontradicted, the trial judge may draw inferences from it contrary to those made by the jury, and it is his duty to resolve such conflicts in determining whether the issues should be retried. Only when, as a matter of law, there is no substantial evidence to support a contrary judgment, may an appellate court reverse an order granting a new trial. Brooks v. Metropolitan Life Ins. Co., 27 Cal.2d 305, 163 P.2d 689; Mazzotta v. Los Angeles Ry. Corp., supra." If there is substantial evidence on any theory that would support a judgment in favor of the party whose motion is granted, the order will not be reversed. Gilbert v. Yellow Cab Co., 123 Cal.App.2d 782, 267 P.2d 392; Gainey v. Gainey, 119 Cal.App.2d 564, 259 P.2d 984.

[2] The verdict implied that the city was negligent in maintaining a dangerous condition in the street; that plaintiff was not guilty of contributory negligence and that she did not assume the risk involved in wading through the water. The order granting a new trial implies that the court concluded that each of these implied findings of the jury was contrary to the preponderance of the evidence. In order to

earn a reversal of the order it would be necessary for plaintiff to establish the incorrectness of each of these conclusions of the court. We are of the opinion that the order is sustainable either upon the ground that plaintiff was negligent or that she assumed the risk, and that it is unnecessary to consider the question of the alleged negligence of the city.

[3] There is a difference between contributory negligence and assumption of risk. If plaintiff failed to exercise the degree of care that was reasonably required of her under the circumstances and conditions of the crossing she was guilty of contributory negligence even though she may not have been aware of the extent of the danger. If she had knowledge and appreciation of the danger involved and voluntarily accepted the risk, she alone would have to bear the responsibility for her injury; if she did accept the risk her use of the care that was demanded would not relieve her of that responsibility. Prescott v. Ralphs Grocery Co., 42 Cal.2d 158, 265 P.2d 904.

It was inferable from the evidence that plaintiff knew the surface of the street at the point where she fell presented a more hazardous condition than would have been found further up the street. This was indicated by the fact that plaintiff usually parked her car higher up the hill and had always been able to step across the water at that point. This was the only reason she gave for her practice of parking well above the Bartlett premises. It would not have been unreasonable for the court to conclude that when she observed the excessive flow of water in front of the house she should have looked for a safer place at which to cross. And it could also have been inferred that when she prepared to leave the house she should have anticipated that there would be a heavy flow of water in the street since she had gotten both feet wet when she crossed it the first time. We cannot hold as a matter of law that plaintiff was free from contributory negligence.

A reason for the order that may be even more sound is that plaintiff knew the extent of the danger and voluntarily assumed the risk. She had known from previous experience that the street was littered up in front of the Bartlett house and had avoided crossing the gutter at that point. Just before her accident she was aware of the fact that there was considerably more water to cross than was running at the time she entered the house. Mr. Bartlett told her to be very careful and he held her by the hand. The court necessarily weighed the evidence and the inferences with respect to the extent of plaintiff's knowledge of the conditions and appreciation of the danger. Plaintiff took a chance and lost. All the evidence indicated she knew she was taking a chance. It could be argued that even though she knew she could not cross in complete safety she did not appreciate the extent of the danger, since she had crossed safely a few hours before. And it could be argued, with reason, that she used a considerable degree of care in proceeding deliberately, and accepting the assistance of Mr. Bartlett. But these were arguments properly addressed to the trial court. In order for us to hold that plaintiff did not voluntarily accept the risk we would have to be convinced to the exclusion of every contrary reasonable inference that she believed the risk would be minimal or that there was no danger of injury. Even if opposing reasonable inferences as to the extent of plaintiff's knowledge would be permissible, we would have no authority to reject those drawn by the trial court and substitute those which we might deem equally or even more reasonable. If the jury had found that plaintiff was guilty of contributory negligence or that she assumed the risk of walking through the water the finding would have had substantial support in the evidence and would have warranted a verdict for the defendant.

The order is affirmed.

PARKER WOOD and VALLÉE, JJ., concur.

147 Cal.App.2d 472

The PEOPLE of the State of California, Plaintiff and Respondent,

v.

William D. HUNTER, Defendant and Appellant.

Cr. 1132.

District Court of Appeal, Fourth District, California.

Jan. 9, 1957.

Rehearing Denied Jan. 28, 1957.

Hearing Denied March 5, 1957.

Defendant was convicted in Superior Court, Riverside County, Hilton H. McCabe, J., of grand theft of an automobile and he appealed. The District Court of Appeal, Mussell, J., held that evidence which established that defendant took automobile to try it out but instead of signing written contract as agreed, placed license plates from another automobile on it and departed for another city with all his possessions was sufficient to sustain conviction.

Affirmed.

1. Larceny ⇐65

Evidence which disclosed that defendant took automobile to try it out but instead of signing written contract as agreed, placed license plates from another automobile on it and departed for another city with all his possessions, did not establish debtor-creditor relationship and was sufficient to support conviction for grand theft. West's Ann.Pen.Code, § 484.

2. Embezzlement ⇐1

False Pretenses ⇐1

Larceny ⇐1

The crime of grand theft is complete when a man takes property not his own with the intent to take it, and a defendant may be convicted of grand theft upon proof of facts establishing embezzlement, larceny, or obtaining property under false pretenses. West's Ann.Pen.Code, § 484.

3. Criminal Law ⇐1036(2)

Exclusion of testimony offered for impeachment purposes was not shown to be prejudicial error, where no offer of proof was made and the purpose of the testimony was not disclosed by the record.

4. Criminal Law ⇐369(5)

In prosecution for grand theft of automobile, admission of testimony regarding ownership of another automobile which defendant had in his possession but in no way indicating that defendant had been guilty of any offense in connection therewith, was not improper.

Lionel Richman, San Bernardine, for appellant.

Edmund G. Brown, Atty. Gen., and Elizabeth Miller, Deputy Atty. Gen., for respondent.

MUSSELL, Justice.

Defendant was charged with violation of section 484 of the Penal Code (Grand Theft) in that on or about March 18, 1956, in Riverside county, he did wilfully and unlawfully take a 1949 Lincoln automobile, the property of J. G. Anderson. At his arraignment in the superior court, defendant's counsel, after a discussion with the defendant, made the following statement:

> "Your Honor, in this matter I represented the defendant at the preliminary hearing and I discussed this matter with the District Attorney and at this time the defendant will enter a plea of not guilty, and we will waive a jury trial and stipulate that the evidence produced at the preliminary hearing can be heard by this court as if on a trial, and submit it to the court on that basis."

The deputy district attorney, then present, stated that the statement made by counsel for defendant was agreeable and the matter was then submitted to the court. Defendant was found guilty as charged in the information and, after the report of the probation officer had been read and considered by the court, the defendant was

sentenced to the state prison for the term prescribed by law.

It appears from the record of the preliminary examination that the defendant was employed by the Massey Rock and Sand Company of Indio. Mr. J. G. Anderson, superintendent of the company, owned a 1949 Lincoln automobile, registered in his wife's name, and some time in March, 1956, Anderson endeavored to sell the car to the defendant. Anderson testified:

> "He, I think Mr. Cook, one of the boys that work for us told me Hunter wanted a car, I believe he brought him over to the house or sent him over to the house. I told him I hadn't drove the car for a year, didn't know what shape it was in, I would let him take it and try it out and we would make some kind of deal, I let him take the car from the house to try it."

Anderson further testified that the car had 1955 plates and he expected the defendant to take out insurance on it and get current plates; that three or four days later he had a conversation with the defendant, as follows: "I just asked what he thought of the car, he said he thought if it was fixed up it would be a pretty good car; I asked if he wanted to buy it, said he did. Said he didn't have much money, I said anything agreed to would be all right with me—long as he was working twenty-five dollars ($25.00) a week payments. I told him to come on over and we would draw up the papers and have it transferred to his name and * * *"; that the defendant did not come over to draw up the papers and within a day or two defendant left his employment at the rock and sand company; that he saw the defendant the next day and told him to go to Garnet at 7:00 or 7:30 in the morning; that he (Anderson) would be there; that he was late and did not go to Garnet until about 9:00 or 10:00 o'clock a. m. and the defendant had left; that he met the defendant coming back from Garnet in the Lincoln automobile; that he did not see the defendant after that until he appeared in court and he had not seen his Lincoln; that he heard that the defendant had left town and he reported the matter to the police; that he looked around for his car, went to the defendant's residence, and there found that the defendant had moved all his belongings out of the house; that defendant had stated that he could make a down payment on the car but that he had not paid the sum of $50 or any other sum, on the purchase price of the automobile.

The defendant testified that on March 4, 1956, he went to see Anderson about the car and took it on a try-out basis; that on March 8, 1956, Anderson agreed to take a $50 down payment on the car and that he paid that sum to him the next morning; that he then went to the Garnet plant and, after waiting there until 11:30 a. m., returned to Indio; that he stayed in Indio until March 18, 1956, when he went to Red Bluff, California; that he left in the Lincoln and had transferred the license plates to it from an Oldsmobile which he left in Indio.

[1] Defendant contends that the evidence was insufficient to support the judgment; that the court erroneously prevented the impeachment of the complaining witness; and that the court improperly admitted evidence of other acts. These arguments are without merit.

[2] As is said in People v. Corenevsky, 124 Cal.App.2d 19, 23–24, 267 P.2d 1048, 1050:

> "The crime of grand theft is complete when a man takes property not his own with the intent to take it, and a defendant may be convicted of grand theft upon proof of facts establishing (a) embezzlement, (b) larceny or (c) obtaining property under false pretenses. * * *
>
> "It is likewise established that where criminal acts may constitute one of two or three forms of theft, depending upon how the jury views the evidence, and the facts so warrant, the verdict of conviction can be sustained on ei-

ther theory. (People v. Von Badenthal, 8 Cal.App.2d 404, 408, 48 P.2d 82; People v. Chamberlain, 96 Cal.App.2d 178, 182 et seq., 214 P.2d 600.)"

Embezzlement is the fraudulent appropriation of property by a person to whom it has been entrusted. Pen.Code, Sec. 503. The essential elements of this crime are set forth in People v. Borchers, 199 Cal. 52, 56, 247 P. 1084, 1085, as follows:

"* * * In order to sustain a conviction upon such a charge it must at least be shown, first, that the accused was the agent or bailee of the prosecuting witness in holding the alleged embezzled property; second, the property must actually belong to the alleged principal, the prosecuting witness; third, it must be lawfully in the possession of the accused at the time of the alleged embezzlement; fourth, the accused must have been guilty of the conversion which the statute denounces; and, fifth, there must be shown an intent on the part of the accused to deprive the prosecuting witness of his property unlawfully. * *"

Appellant contends that the facts do not show the elements of embezzlement because they show a debtor-creditor relationship. This contention is not supported by the evidence. In People v. Baker, 64 Cal.App. 336, 341, 221 P. 654, 656, the court said:

"One of the principal tests by which to determine whether any particular contract creates a mere bailment or is a sale on credit is this: Was there a binding promise on the part of the person to whom the possession was given to pay for the article? If there was such promise, then the contract is ordinarily held to be one of sale and not of bailment; and, conversely, if there was no such binding promise to purchase on terms agreed upon, then the transaction is ordinarily held not to be a sale. * * *"

In the instant action the appellant took possession of the automobile involved to try it out and then to buy it or return it to Anderson. He agreed to sign a written contract before obtaining the registration slip and this he failed to do. He placed the plates from another car on the Lincoln, departed for Red Bluff, California, with all his possessions, and failed to return the car to Anderson. Before leaving Indio, the defendant had indicated verbally that he would purchase the vehicle but was to come to Anderson's place to make out the papers. However, he left Indio without meeting Anderson, as agreed.

In People v. Baker, supra, 64 Cal.App. 336, 342, 221 P. 654, where the defendant had been given the right to drive an automobile to a given place within the county to enable him to raise money for a payment thereon if he elected to purchase it, the fact that he took the car to Mexico was held sufficient to warrant the inference that he converted the car to his own use in a manner inconsistent with the nature and purpose of the bailment. Since the amendment in 1927 to section 484 of the Penal Code, a defendant may be convicted of grand theft upon proof showing either larceny, embezzlement or obtaining money by false pretenses. People v. Cannon, 77 Cal.App.2d 678, 688–689, 176 P.2d 409. In the instant case there is substantial evidence to support the inference drawn by the trial court and to support its findings and judgment.

[3] Appellant complains that the court erred in preventing the impeachment of the complaining witness. This claim is based on a ruling of the trial court sustaining an objection to testimony as to a conversation by telephone between Anderson and one Roger Hutchinson. No offer of proof was made and the purpose of the testimony in this connection is not disclosed by the record. No prejudicial error appears in connection therewith. People v. Monson, 102 Cal.App.2d 308, 313, 227 P.2d 521.

[4] Appellant further argues that the court improperly admitted evidence of other acts. This contention likewise is without merit. The testimony admitted in this

connection with as to the ownership of an Oldsmobile which defendant had in his possession and apparently was buying from someone in Missouri. The evidence admitted in no way indicated that the defendant had been guilty of any offense in connection with this car and no error appears in the trial court's ruling.

The judgment is affirmed.

BARNARD, P. J., and GRIFFIN, J., concur.



147 Cal.App.2d 621

Wrena M. ULREY, Plaintiff and Appellant,

v.

Glenn D. GILLETT, Defendant and Respondent.

Ray D. ULREY, Plaintiff and Appellant,

v.

Glenn D. GILLETT, Defendant and Respondent.

Civ. 21764.

District Court of Appeal, Second District, Division 3, California.

Jan. 16, 1957.

Actions by payee on notes given in connection with sale of payee's partnership interest and by partner for money allegedly due from maker for transactions arising out of partnership business. The maker filed answer and cross-complaints. The Superior Court of Los Angeles County, Clarence M. Hanson, J., entered identical minute orders appointing referee to take an accounting and directing payee to mark cancelled and transfer to maker the three promissory notes, and both plaintiffs appealed. The District Court of Appeal, Vallée, J., held that minute orders were merely expression of trial judge as to decision he ultimately intended to make on one phase of the cases and were not appealable.

Appeals dismissed.

1. Appeal and Error ⇐66

An appeal does not lie from an interlocutory or intermediate order unless it be designated by statute as one of those from which an appeal may be taken.

2. Appeal and Error ⇐80(3)

If an order be in its nature such as to be subject, before enforcement or execution, to further action of the court, either by decree or later order, order complained of is not final and review must be sought by appeal from the decree or order subsequently entered.

3. Judgment ⇐217

A judgment is a "final judgment" when it terminates the litigation between the parties on the merits of the case and leaves nothing to be done but to enforce by execution what has been determined.

See publication Words and Phrases, for other judicial constructions and definitions of "Final Judgment".

4. Appeal and Error ⇐533(1)

On appeal to District Court of Appeal, memorandum opinion of trial judge is part of record. West's Ann.Rules on Appeal, rule 5(a).

5. Appeal and Error ⇐123

Where actions were brought by payee on notes given in connection with sale of partnership interest and by partner for money allegedly due from maker for transactions arising out of partnership business and court made a minute entry appointing a referee to take an accounting and directing payee to mark cancelled and transfer to maker the three promissory notes, such minute entry was merely an expression of trial judge as to decision he ultimately intended to make on one phase of case and was not a decision or judgment of the court that was binding on the court or the payee, and hence was not appealable.

Charles Watkins and George R. Maury, Los Angeles, for appellants.

Zimmerman, Kelly & Thody and W. Alan Thody, Los Angeles, for respondent.

VALLÉE, Justice.

Appeals by plaintiffs from identical orders made in two actions appointing a referee to take an accounting, and directing plaintiff Wrena Ulrey to mark "cancelled" and transfer to defendant three promissory notes signed by defendant in her favor. The appeals involve the same questions and will be determined in one opinion. Defendant contends the order is not appealable. We agree.

In November 1953 plaintiffs were partners operating a retail electrical motor sales and service business under the name "Ray Ulrey Electric Motors." At that time plaintiffs and defendant entered into an agreement to be effective January 18, 1954, whereby plaintiff Wrena Ulrey withdrew from the partnership and a new partnership was formed between plaintiff Ray Ulrey and defendant. Defendant paid $5,000 to the Ulreys and executed three promissory notes to plaintiff Wrena Ulrey dated January 18, 1954, each in the amount of $5,000 with interest at 5 per cent, payable January 18, 1955, January 18, 1956, and January 18, 1957.

Plaintiffs operated the business until January 16, 1954, when the new partnership took over. By June of 1954 differences had arisen between plaintiff Ray Ulrey and defendant, and that partnership was terminated. The present litigation ensued.

Plaintiff Wrena Ulrey brought an action against defendant on the three promissory notes. Plaintiff Ray Ulrey brought a separate action against defendant for money allegedly due under a contract of sale of his half interest in the Ulrey-Gillett partnership on the dissolution of the partnership. Defendant's answer to plaintiff Wrena Ulrey's complaint pleaded lack of consideration; fraud; rescission; and mistake, inadvertence, and neglect in omitting a provision from the agreement relative to the manner of paying the promissory notes from his share of the profits from the new partnership. Defendant filed in each action a cross-complaint for money allegedly due from plaintiffs, naming both plaintiffs as cross-defendants; and in his amended cross-complaint filed in plaintiff Ray Ulrey's action he also prayed for an accounting of the business when plaintiffs were partners and when he and plaintiff Ray Ulrey were partners. The two actions were consolidated for trial.

After submission, identical memorandum opinions were filed by the court in each action. These were followed by identical minute entries in each action appointing a referee to take an accounting and stating:

> "That Mrs. Ulrey is *hereby* ordered to transfer over, marked cancelled, unto Mr. Gillett, the three promissory notes, dated January 18, 1954, signed by Glenn D. Gillett, in favor of Wrena M. Ulrey, each in the amount of Five Thousand Dollars, and due, respectively, on January 18, 1955, January 18, 1956, and January 18, 1957."

No findings of fact or conclusions of law were made and no judgment has been rendered in either action.

Although plaintiffs appeal from the entire minute order, they contend only the quoted part thereof is appealable. See Berry v. Berry, 140 Cal.App.2d 50, 61, 294 P.2d 757. They say that part of the order is final.

[1, 2] An appeal does not lie from an interlocutory or intermediate order unless it be designated by statute as one of those from which an appeal may be taken. Title Ins. & Trust Co. v. California Dev. Co., 159 Cal. 484, 486, 114 P. 838. If an order be in its nature such as to be subject, before enforcement or execution, to the further action of the court, either by decree or later order, the order complained of is not final and review must be sought by appeal from the decree or order subsequently entered. Berry v. Berry, 140 Cal.App.2d 50, 61, 294 P.2d 757.

[3] A judgment is final "'when it terminates the litigation between the parties on the merits of the case and leaves nothing to be done but to enforce by execution what has been determined.'" Doudell v. Shoo, 159 Cal. 448, 453, 114 P. 579, 581; David v.

Goodman, 89 Cal.App.2d 162, 165, 200 P.2d 568.

[4] From the tenor of the memorandum opinion and from the order itself it is evident the trial judge intended that the order should be only interlocutory. In the memorandum opinion, which is part of the record on appeal, Rules on Appeal, Rule 5(a); 36 Cal.2d 1, 5, the trial judge stated that the contract entered into between plaintiffs and defendant was for the sale of a half interest in a partnership; plaintiff Ray Ulrey agreed to contribute a sum equivalent to $17,500 by placing in the partnership assets from the Ray Ulrey Electric Motors partnership in that amount; the assets which plaintiff Ray Ulrey turned over after taking out certain property equaled only $21,000, therefore his half share was only $10,500; defendant owned at least $10,500 of these assets by virtue of the $20,000 he had paid for them by cash and notes; defendant was to put in $17,500; the assets to be turned over were to be taken at book value; the value placed on the assets by plaintiff Ray Ulrey in determining the book value probably was not correct—it appeared to be in excess of $4,000; between November 9, 1953 and January 16, 1954 plaintiffs operated the business and sold items out of stock which should have been but were not replaced or accounted for; plaintiff Ray Ulrey should account for sums paid to "informers"; many collections made by defendant on sales should have been received by the partnership and many should have been received by him alone; "hence it is going to be necessary, to get a complete detail, to appoint an accountant-referee to trace the items of Electric Motors from, say, the 1st of November onwards." The judge concluded: "If we take the position that Gillett is stuck with the business and hence owes Ulrey $12,500.00 for his share, there must yet be offset against that amount the four thousand odd dollars excess valuation Ulrey placed on certain assets which he put in the business and which he had no right to put in the business as he was only to put in $17,500.00 in assets, and not some $21,000.00 and then draw down from the business in cash the difference and these offsets which Gillett would, therefore, have as against the $12,500.00 payable by him, will be reduced by that $4,000.00 and by a good many other items, I am sure, and hence it is quite possible that he will wind up owing nothing, or certainly less than $6,000.00. As Gillett paid $5,000.00 in cash to the Ulreys, he is entitled to offset against that anything that he may be owing and to have his notes for $15,000.00 cancelled. *From the foregoing it is apparent that the Court is of the view that before it can enter a judgment it is necessary that there be an accounting.*" (Italics added.)

The accounting period is to begin November 1, 1953, before the date of the contract between plaintiffs and defendant. Defendant's defenses to plaintiff Wrena Ulrey's action are dependent on the accounting.

[5] A minute entry made shortly after trial by a judge is merely evidence of the intention of the court as to its decision—the finding of fact and conclusion of law he intends to ultimately make. Bastajian v. Brown, 19 Cal.2d 209, 215, 120 P.2d 9. So here, the part of the order challenged is merely an expression of the trial judge as to the decision he ultimately intends to make on one phase of the case. It is not the decision or judgment of the court. It is not binding on the court and it is not binding on plaintiff Wrena Ulrey. Reimer v. Firpo, 94 Cal.App.2d 798, 800, 212 P.2d 23.

We reach the conclusion that the minute entry is an interlocutory order from a study of the extensive pleadings and the lengthy memorandum of the trial judge, from which it appears that it was not the intention of the court to render a judgment in either action until it was in a position to finally settle the entire controversy between all the parties. The order is not appealable.

The appeal in each action is dismissed.

SHINN, P. J., and PARKER WOOD, J., concur.

147 Cal.App.2d 530

The PEOPLE of the State of California, Plaintiff and Respondent,

v.

Alton Gordon GARDNER, Defendant and Appellant.

Cr. 5678.

District Court of Appeal, Second District, Division 3, California.

Jan. 11, 1957.

Prosecution for robberies. The Superior Court of Los Angeles County, Joseph M. Maltby, J., entered judgment upon conviction and denied defendant's motion for new trial. Defendant appealed from judgment and order. The District Court of Appeal, Vallée, J., held, in part, that defendant, who was not charged with conspiracy, was not prejudiced by poorly worded instructions on conspiracy, where evidence was sufficient to warrant finding of conspiracy, and, under circumstances, jury could not have been misled by instruction on conspiracy.

Judgment and order affirmed.

1. Criminal Law ⇐1159(4)

A reviewing court in a criminal case cannot reject testimony of a witness that has been believed by the trier of fact unless it is a physical impossibility that it be true, or its falsity is apparent without resorting to inferences or deductions.

2. Criminal Law ⇐1159(4)

In order to say that testimony of witness in criminal case is inherently improbable it must appear that what was related or described could not have occurred; testimony which is subject to justifiable suspicion is not inherently improbable.

3. Criminal Law ⇐1159(2)

A reviewing court in a criminal case will not hold unsupported a jury's finding of guilt merely because it might reasonably draw an inference different from one jury reasonably drew, or might not be convinced beyond a reasonable doubt of guilt of defendant.

4. Criminal Law ⇐1159(2)

Function of District Court of Appeal on review in criminal case is to determine whether evidence, if believed, is of sufficient character to justify a conviction.

5. Robbery ⇐24(3)

In prosecution for robbery of liquor store by defendant who was identified as robber by operator, in view of fact that identification of defendant by operator was not so inherently improbable as to be unbelievable, and in view of sufficiency of other evidence that, disregarding identification of operator, defendant was driver of getaway automobile, evidence supported conviction.

6. Criminal Law ⇐814(1)

Where defendant was not charged with conspiracy, and instructions on conspiracy were poorly worded, they could properly have been omitted.

7. Criminal Law ⇐427(1)

As general rule, evidence of conspiracy is properly admissible even though a conspiracy is not charged in information.

8. Criminal Law ⇐791

When evidence is sufficient to warrant finding of conspiracy, appropriate instructions on subject may be given.

9. Criminal Law ⇐1172(6)

Defendant, who was not charged with conspiracy, was not prejudiced by poorly worded instructions on conspiracy, where evidence was sufficient to warrant finding of conspiracy to commit robberies, and, under circumstances, jury could not have been misled by instructions on conspiracy.

10. Criminal Law ⇐814(16)

Where instructions correctly defined confession and admission, and left question whether a confession had been made, and if so whether it was true, to jury, instruction was not improper, though there was no actual confession in the case.

11. Witnesses ⇐258

A witness who has no present recollection of the facts and who is permitted to refresh his memory from a memorandum, may, in testifying to the facts, read directly from the writing. West's Ann.Code Civ.Proc., § 2047.

12. Witnesses ⇐258

Police officer, who was present during transcription of conversations between officers and defendant and others suspected of robberies, and who could not recall conversations, was properly allowed to refresh his memory by examining transcribed conversations, and to read it aloud in witness box. West's Ann.Code Civ.Proc., § 2047.

13. Criminal Law ⇐784(1)

Where connection of defendant with robbery offenses was based entirely on circumstantial evidence, it was error to refuse to give instruction with respect to circumstantial evidence, to effect that each fact which is essential to complete chain of circumstances that will establish guilt must be proved beyond a reasonable doubt.

14. Criminal Law ⇐829(15)

Error in refusal to give instruction on circumstantial evidence, to effect that each fact essential to complete chain of circumstances must be proved beyond reasonable doubt, in case where connection of defendant with offenses was based entirely on circumstantial evidence, was not prejudicial, where court instructed with respect to presumption of innocence, burden of proof, reasonable doubt, direct and circumstantial evidence.

15. Robbery ⇐24(1)

In prosecution for robberies of bar and liquor store, evidence connecting defendant with robberies in form of his alleged conversations related by police officers, and of his statement that what other alleged robbers said was true, was sufficient to warrant conviction.

16. Criminal Law ⇐1037(1, 2)

Argument of prosecutor in robbery prosecution could not be grounds for reversal of conviction as prejudicial misconduct, where no objection was made to argument at time, and it was not assigned as misconduct, and court was not requested to admonish jury to disregard it, and argument was not such as would not require assignment of misconduct or request for admonition or instruction.

17. Criminal Law ⇐715

That prosecutor in robbery prosecution had held gun, which was in evidence, before jury during part of argument, was not misconduct, in view of nature of evidence.

Simon & McKinsey and Harry J. Simon, Long Beach, for appellant.

Edmund G. Brown, Atty. Gen. of the State of California, Clarence A. Linn, Asst. Atty. Gen., and Victor Griffith, Deputy Atty. Gen., for respondent.

VALLÉE, Justice.

By information defendant was charged in seven counts with robbery. He was convicted by a jury of the offenses charged in Counts I, III, IV, and V, and acquitted of the other three. He appeals from the judgment and the order denying his motion for a new trial.

Count V

Gilbert Meischke was employed as a clerk in Benson's Liquor Store in Long Beach. About 1 a. m. on October 15, 1955 James Polk robbed him of $155. The first time Meischke saw defendant was in a police line-up.

Count IV

Fred Stager managed the Sands Bar & Café in Long Beach. About 12:30 a. m. on October 20, 1955 James Polk and Billy Gardner, brother of defendant, robbed him of $189 and his wallet containing $10 or $12. As they left one of them fired a shot into the ceiling. A Mercury was parked in front of the bar. No one saw defendant in the bar that night. The first time Stager saw defendant was at a police station.

Count III

Claude Heater operated Jack's Liquor Store in Long Beach. About 1 a. m. on October 27, 1955 he was getting ready to close. There was a customer in the store. Heater testified defendant entered the store and asked for a package of cigarettes; as he reached for the cigarettes defendant pulled a gun on him and told the customer, "You stay where you are. Don't you make a move"; defendant ordered Heater to open the cash register; he did, and defendant took $44 from it; defendant slowly backed out of the door and across the front of the store; there was a car parked outside with the motor running; defendant was very agile, he walked with a steady gait, nothing unusal struck him about defendant's walk except that he "moved awfully slowly." Heater identified defendant from others in a police line-up.

Count I

James Browning operated a grocery store in Long Beach. About 11:30 a. m. on November 28, 1955 one Robertson robbed him of $93 in the store. Robertson left the store, followed by Browning. Before leaving, Browning told his wife to call the police. Robertson got into a new, cream-colored Mercury. Browning followed in his car. The Mercury stopped in front of an apartment house. The police arrived on the scene, entered the apartment house, saw Robertson, searched him and found $93 in his pocket. After the officers had taken the $93 from Robertson, one of them climbed to the roof on a ladder. Defendant was lying on his stomach at the edge of the roof. Glass in the skylight leading to the roof had been broken. The officer took defendant from the roof and had a conversation with him. The officer said, "Well, it looks like you got yourself in a pretty good mess this time," to which defendant replied, "It looks that way." Defendant told the officers he would tell the truth and said, "I did not know he was going to hold up that market [Browning's—Count I]. He told me to stop, that he wanted some cigarettes," that when Robertson returned from the market he (Robertson) said, "I just held up that market. Let's go." An officer testified:

"Q. Following that conversation what next occurred? What was said and done within your immediate sight and hearing? A. I recall after that statement he stated that he was trying to get into the apartment, that Robertson had already succeeded in getting into the apartment through the skylight, and that he was entering and that he observed a motor officer approaching and went and hid on the roof.

"Q. Did you ask him why he hid when he saw a motor officer arrive? A. Yes.

"Q. What did he say to that? A. He said, 'I was scared.'

"Q. Did you ask him what he was scared of? A. Yes.

"Q. What did he say to that? A. Being caught.

"Q. Did you ask him why he was, why he was afraid of being caught? A. He stated that the situation probably looked bad and it would be figured that he had been in on the robbery." In the room occupied by Robertson the officers found a .38 Smith & Wesson revolver loaded with six shells. The officers called Browning into the apartment house. Defendant was sitting on the floor. Browning had not seen him in the grocery store. Defendant was then taken to the police station.

Additional Evidence

At the police station defendant told an officer he had bought the new Mercury—he had traded his green '50 for it; that he drove the car but did not know what was taking place; that Robertson came out "in a hurry, so I had to take off in a hurry."

On November 29, 1955 two officers talked to defendant. He told them he would plead guilty if he could get the same deal as the other defendants in the case were getting (plead guilty to one offense), his "priors" were not charged, and he

would get a county jail sentence. One of the officers told him they were not making deals.

Later that day the officers talked to Polk, Billy Gardner, Robertson, and defendant together in the interrogation room of the jail. Defendant refused to answer any questions, saying, "I have nothing to say." Billy Gardner said he and Polk held up the Sands bar (Count IV); Polk fired a shot into the ceiling as they left; defendant was waiting outside in his Mercury; after the robbery they went to Polk's apartment and divided the $190 three ways; defendant received one-third. Polk stated that what Billy Gardner had said was "all true." Polk said defendant had been living with him; he had held up Jack's Liquor Store (Count III); he took $45 from the cash register; defendant was driving the getaway car and knew he was going to hold up the store; immediately after the robbery they split the money "50-50." An officer then said to defendant, "Q. Al Gardner, have you got anything to say about this?" to which defendant replied, "No." Polk said he had held up Benson's Liquor Store (Count V); he took $140 from the cash register; defendant knew he was going to hold up the place and waited outside in his Mercury; after the robbery he split the $140 with defendant. The officers then asked defendant if he had anything to say, to which he replied, "No."

An officer then removed defendant from the interrogation room. In the elevator going up to the jail the officer asked him "if these other boys were lying." Defendant "sort of grinned" and said he would like "to have a deal where he could get a County Jail sentence." The officer told him that was up to the court. After further conversation the officer asked defendant "if what they said about him was true," to which defendant replied, "Yes, it is all true." Defendant was then returned to the interrogation room and in the presence of the officers, Polk, Billy Gardner, and Robertson the following conversation between one of the officers and defendant occurred: "Q. Now, all that they said in your presence a while ago, are those statements true? Alton Gardner: True."

One of the officers had several conversations with defendant about the Mercury. Defendant first told the officer he bought it at a used car lot; the price was $3,200, and he had traded in another Mercury. Later the officer asked him if he had not stolen the Mercury in South Gate near the General Motors plant. Defendant replied that he had and that he had "doctored" the ownership certificate to fit the Mercury and put it in the window of the car.

Defendant's first assignment of error is that the evidence is insufficient to sustain the verdict as to Count III, robbery of Jack's Liquor Store. The contention is that the testimony of Claude Heater identifying defendant as the robber is so inherently improbable as to be unbelievable. The contention is predicated on the following: Uncontradicted evidence of a physician that defendant sustained a compound fracture of his left tibia on July 1, 1955 and that it was placed in a nonweight-bearing cast; on October 7, 1955 the fracture "had not healed very much"; it would not have healed very much by October 27, 1955 (date of robbery of Jack's) and defendant would not then have been able, without a cast, to bear the weight of his body unaided by crutches. Testimony of the customer who was in the store at the time of the robbery that defendant was not the robber. Testimony of Heater that at the time of the robbery he thought defendant was very agile, had a steady gait, and there was nothing unusual about his walk, and that he (Heater) was under medical care at the time of the trial.

[1–5] A reviewing court cannot reject testimony of a witness that has been believed by the trier of fact unless it is a physical impossibility that it be true, or its falsity is apparent without resorting to inferences or deductions. People v. Huston, 21 Cal.2d 690, 693, 134 P.2d 758. In order to say that testimony is inherently im-

probable it must appear that what was related or described could not have occurred. Testimony which is subject to justifiable suspicion is not inherently improbable. People v. Dragoo, 121 Cal.App.2d 322, 324, 263 P.2d 90. A reviewing court will not hold unsupported a jury's finding of guilt merely because it might reasonably draw an inference different from the one the jury reasonably drew or might not be convinced beyond a reasonable doubt of the guilt of defendant. People v. Tollack, 105 Cal.App.2d 169, 172, 233 P.2d 121; People v. Cahan, 141 Cal.App.2d 891, 897, 297 P.2d 715. Our function is to determine whether the evidence, if believed, is of sufficient character to justify a conviction. We cannot say as a matter of law that the identification of defendant by Heater is so inherently improbable as to be unbelievable. Further, the jury may have disregarded the identification of Heater and concluded defendant was the driver of the getaway car.

The court gave seven instructions on the subject of conspiracy at the request of the People. They defined a conspiracy; stated that after a conspiracy has been proved each member is liable for and bound by the acts and declarations of each and all the conspirators; stated the manner in which a conspiracy may be proved; stated that the jury should determine from the facts and circumstances shown by the evidence "whether or not a criminal combination or agreement did in fact exist as charged in the case"; defined an overt act; and stated that no agreement amounts to a conspiracy unless an overt act is done by one or more of the conspirators for the purpose of accomplishing the object of the agreement and that an overt act "must be proved to support a conviction for conspiracy." They referred to an "alleged conspiracy," an "alleged conspirator," to a "conspiracy as alleged." Defendant asserts that since he was not charged with a conspiracy the court erred in giving these instructions.

[6-9] Since defendant was not charged with conspiracy and since these instructions were poorly worded, they could well have been omitted. People v. Talbott, 65 Cal.App.2d 654, 664–665, 151 P.2d 317. However, we do not think defendant was prejudiced. The evidence was sufficient to warrant the jury in concluding that a conspiracy to commit robberies existed between Polk, Robertson, Billy Gardner, and defendant. As a general rule evidence of a conspiracy is properly admissible even though a conspiracy is not charged in the information. People v. Rivas, 92 Cal.App. 2d 663, 667–668, 207 P.2d 1062. When the evidence is sufficient to warrant a finding of a conspiracy, appropriate instructions on the subject may be given. People v. Weaver, 56 Cal.App.2d 732, 740–741, 133 P.2d 818. The jury was well aware that defendant was not charged with conspiracy. On *voir dire* examination the court told the jurors defendant was charged with seven counts of armed robbery. The clerk read the information to the jury. The verdict forms related to robbery, not conspiracy. It is evident the jury was not confused or misled by the instructions on conspiracy.

[10] The court instructed the jury relative to confessions and admissions.[1] Defendant claims "there was no actual con-

1. "Evidence has been received in this case tending to show that on an occasion other than this trial the defendant himself made a statement relating to the issues in this case.

"[A statement thus made by a defendant may be either a confession or an admission.]

"A confession is a statement that was made by one who is a defendant in a criminal trial, at a time when he was not testifying in that trial, by which he acknowledged certain conduct of his own that constituted a crime for which he is on trial, a statement which, if true, discloses his guilt of that crime and excludes the possibility of a reasonable inference to the contrary.

"If under my instructions you find that a voluntary confession was made, you are the exclusive judges as to whether or not the confession was true; and in decid-

fession in the case," hence it was error to instruct on the subject of confessions. We find no error. The instruction correctly defines a confession and an admission. People v. Connelly, 195 Cal. 584, 597, 234 P. 374; People v. Chan Chaun, 41 Cal.App.2d 586, 593, 107 P.2d 455. It left the questions whether a confession had been made, and if so whether it was true, to the jury. There was no error in giving the instruction. It did defendant no harm.

The conversations which took place on November 28, 1955 between the officers, Polk, Billy Gardner, Robertson, and defendant in the interrogation room were taken down in shorthand and transcribed by two court stenographers. Officer Decker, who was present during all the conversations, was called by the People. He testified: he read a typewritten transcript of the conversations the next day; the transcript accurately recorded the conversations; he cannot, without referring to the transcript, narrate accurately the conversations; he is unable to remember them; he would have to refresh his memory; his memory as to what they were is "in the most part" completely gone; he has no independent "memory and recollection of the conversation"; he could relate some of the conversations but "I doubt if it could be wholly correct to my recollection"; his use of the transcript would be merely to refresh his recollection. Over defendant's objection Officer Decker was then permitted to read aloud the transcript of the conversations which took place in the interrogation room in the presence of defendant. The transcript was not admitted in evidence.

Defendant asserts it was error to allow the transcribed conversations to be read verbatim to the jury. He argues its "proper use could only be (1) to refresh the memory of the witness, if he had a memory, or (2) to allow a witness *without memory,* to read it and thus testify from it; *provided,* in both cases, the document meets the requirements of C.C.P. Section 2047.[2] Unless it is made to appear that the memorandum complies with the requirements of the statute, the witness may *not* use it to refresh his memory or testify therefrom"; that the transcript does not meet the requirements of section 2047 in that it appears the witness did not prepare it and it does not appear that it was prepared under his direction.

Carpenter v. Ashley, 16 Cal.App. 302, 116 P. 983, was an action for slander. The defendant, a district attorney, was a witness in his own behalf. He was asked to narrate the colloquy occurring between him and the plaintiff during which the alleged slanderous words were uttered. He testified that he, as district attorney, directed the official reporter to take down the testimony of the witnesses and what occurred during the colloquy and that the reporter did take down all that was said and wrote it out soon thereafter and that he, the witness, examined the transcrip-

ing that question you should consider all the circumstances connected with the making of the statement, as shown by the evidence.

"[An admission is something less than a confession in that it does not concede so much pointing toward defendant's guilt, and does not alone, even if true, support a deduction of guilt. It may consist of any statement or other conduct by a defendant whereby he expressly or impliedly acknowledges a fact that contributes in some degree to the proof of his guilt of an alleged crime for which he is on trial, and which statement was made or conduct occurred outside of that trial.]"

2. Section 2047: "A witness is allowed to refresh his memory respecting a fact, by anything written by himself, or under his direction, at the time when the fact occurred, or immediately thereafter, or at any other time when the fact was fresh in his memory, and he knew that the same was correctly stated in the writing. But in such case the writing must be produced, and may be seen by the adverse party, who may, if he choose, cross-examine the witness upon it, and may read it to the jury. So, also, a witness may testify from such a writing, though he retain no recollection of the particular facts, but such evidence must be received with caution."

tion; that it was a true and correct statement. He was then permitted to refresh his memory from it. The ruling was held not to be error.

[11, 12] In People v. Amaya, 44 Cal.App.2d 656, at page 658, 112 P.2d 942, at page 944, Mr. Justice McComb wrote:

"Deputy Sheriff Morrell, who spoke Spanish as well as English, questioned appellant, after his arrest, partly in English and partly in Spanish. The questions and answers as interpreted by Deputy Sheriff Morrell were reduced to writing by a stenographic reporter. Thereafter at the time of the trial Mr. Morrell used, for the purpose of refreshing his recollection as to his conversation with appellant, the transcribed notes of the reporter. This procedure was proper. Mr. Morrell stated when questioned by the district attorney that it was necessary for him to use the memorandum for the purpose of refreshing his recollection. This was sufficient foundation, together with the showing as to the method of preparation of the notes to permit Mr. Morrell to use the memorandum in testifying as to the statements made by appellant in his presence. The law is established that one who is present at a conversation and has heard the same and knows the facts may use any writing whether made by himself or another to refresh his memory when subsequently testifying. Section 2047, Code Civ. Proc.; Beecham v. Burns, 34 Cal. App. 754, 758, 168 P. 1058; People v. Lee Fat, 54 Cal. 527, 531; see, also, 27 Cal.Jur. (1926) 88, secs. 68 and 69; vol. 7, No. 5, February, 1941, p. 315, Current Legal Thought."

Also see In re Estate of Moore, 180 Cal. 570, 584, 182 P. 285; People v. Vera, 131 Cal.App.2d 669, 674–676, 281 P.2d 65; People v. Eads, 124 Cal.App.2d 393, 400, 268 P.2d 561; People v. Sica, 112 Cal.App.2d 574, 586–587, 247 P.2d 72; People v. Burns, 109 Cal.App.2d 524, 539–540, 241 P.2d 308, 242 P.2d 9; People v. Deckert, 77 Cal.App. 146, 151, 246 P. 157; People v. Brown, 3 Cal.App. 178, 84 P. 670.[3] A witness who has no present recollection of the facts and is permitted to refresh his memory from a memorandum may, in testifying to the facts, read directly from the writing. Anderson v. Souza, 38 Cal.2d 825, 832–833, 243 P.2d 497; People v. Vera, 131 Cal.App.2d 669, 675–676, 281 P.2d 65. The court did not err in permitting Officer Decker to refresh his memory from the transcriptions of the conversations and to read directly therefrom.

[13, 14] The court declined to give an instruction with respect to circumstantial evidence requested by defendant.[4] Error is claimed. The connection of defendant with the offenses charged in Counts IV and V was based entirely on circumstantial evidence. It was therefore error to refuse to give the instruction. People v. Watson, 46 Cal.2d 818, 829–832, 299 P.2d 243. The court instructed with respect to the presumption of innocence; the burden of proof; reasonable doubt; direct and circumstantial evidence, equally entitled to consideration; definitions of direct and circumstantial evidence; where the evidence is susceptible of two constructions it is the jury's duty to adopt that construction which admits of defendant's inno-

3. Theoretically it should make no difference what is used to refresh the recollection of a witness. A witness should be permitted to use anything which has some logical tendency to stimulate his memory. (3 U.C.L.A.Law Rev. 616, 627; 24 Mich. Law Rev. 420; 17 Or.Law Rev. 78; 9 Kan.Bar Asso.Jour. 296.) However, legislation would be necessary to change the rule in California.

4. "When the case which has been made out by the People against a defendant rests entirely or chiefly on circumstantial evidence, and in any case before the jury may find a defendant guilty basing its finding solely on such evidence, each fact which is essential to complete a chain of circumstances that will establish the defendant's guilt must be proved beyond a reasonable doubt."

cence; and that the jury was not permitted on circumstantial evidence "to find the defendant guilty of any crime charged against him unless the proved circumstances not only are consistent with the hypothesis that the defendant is guilty of the crime, but are irreconcilable with any other rational conclusion." Under these circumstances it does not appear in the present case that the court's refusal to give the instruction requested resulted in a miscarriage of justice.

[15] Next defendant contends the evidence is insufficient to sustain the convictions of the charges in Counts IV (robbery of Sands bar) and V (robbery of Benson's Liquor Store). He concedes the corpus delicti as to these counts was clearly proved but argues that his connection with each robbery "hangs by two thin threads"—his alleged conversations related by the officers, and his statement that what the robbers said was "True." The evidentiary effect of the so-called "thin threads" was for the jury. The evidence was sufficient.

[16, 17] Lastly it is contended the prosecutor was guilty of prejudical misconduct in his argument to the jury. The parts of the argument complained of are set out in the margin.[5] No objection was made to the argument at the time. It was not assigned as misconduct, nor was the court requested to admonish the jury to disregard it. This is not a case in which the argument was such as not to require an assignment of misconduct and a request for an admonition or instruction. We find nothing prejudicial in the argument. Defendant also asserts misconduct because

5. "I don't know a fair way to present it. I can't make this explanation to you because I don't know what goes on in that defendant's mind, but we do know this, and you people know it, he decided apparently sometime or other that he was not guilty for one, or he may do like so many people do, come to a jury in spite of this tremendous evidence against him when they don't have the nerve to plead guilty and do a fair thing, wait to see if a jury would be gullible enough, in spite of the physical evidence and the oral evidence which I have just re-read to you here against them, or maybe that they will feel that now, upon a demonstration of a claim of illness, crippleness, and so on, a jury will get sympathetic and decide it could not happen that way and a crippled fellow could not do it."

"Let us get down to merry old England. He says in England the prosecutor is bound to turn over evidence to the counsel if it proves innocence. We have a slightly different system in this country, but it is just as effective and I don't want you to take this by way of personal opinion in this case, and sometime later I will tell you why I don't give jurors opinions. The reason we don't necessarily do that in this country in America the case is a simple one. We don't have to prosecute the cases where the evidence proves innocence. You have the same results by not even starting the prosecution."

"That is difficult, because I have to hedge, keep to 38 or something cases to get to the things that are permitted in this case. In fairness to Mr. Simon, it is the duty of the attorneys who represent the respective clients that you see before you here, to as far as possible prevent mistakes."

"The defendant is there with them. 'Now, you just heard what your pal said, what have you got to say about it?' 'I ain't saying nothing.' That is the gist of it, the vernacular of it, he is given a fair opportunity, as that instruction that Mr. Simon referred to gave you, and he wants, in connection with that talk about this instruction, that has to do with pain and suffering and advice of counsel. The defendant probably knows the law of self-incrimination as well as any Fifth Columnist to hear him talk. You and I know that, too.

"If one of you citizens were interrogated by some officer, you would tell him the truth, because you have nothing to tell. It is all well and good that the law provides for Fifth Columnists or under investigation to take that attitude. We believe in the Constitution. We still have to be realistic to this extent, when a person is accused, is given a fair opportunity to give an explanation and fails to do so, the law, in its wisdom, says any trier of fact—it can be a judge without a jury, it is again a privilege of the defendant."

the prosecutor held a gun, which was in evidence, before the jury during part of his argument. In view of the nature of the evidence there was nothing improper in his doing so.

We find no prejudicial error in the record.

The judgment and the order denying a new trial are affirmed.

SHINN, P. J., and PARKER WOOD, J., concur.



147 Cal.App.2d 574

Martinha ENNES, Plaintiff and Appellant,

v.

Alfred J. ENNES, Defendant and Respondent.

Civ. 16995.

District Court of Appeal, First District, Division 2, California.

Jan. 15, 1957.

Action by wife for an accounting and for partition of realty under a property settlement agreement executed by the parties. Husband filed a cross-complaint in which he set forth the accounting and requested approval of the accounting and specific performance of the agreement. The Superior Court, City and County of San Francisco, Milton D. Sapiro, J., entered judgment adverse to wife, and wife appealed. The District Court of Appeal, Kaufman, J., held that, where, after date of property settlement agreement, husband paid taxes on wife's separate property without authorization, and wife also paid the taxes, husband was a mere volunteer and would not be entitled to recover the amount which wife had also paid, but wife should, in good conscience, make available to husband wife's receipts, if she possessed them, to enable husband to get a refund.

Judgment reversed.

1. Trusts ⇐325

Trustee of property has burden of establishing the account.

2. Trusts ⇐30½(2)

Where, under property settlement agreement, husband had duty of managing parties' joint properties until their sale, husband served in capacity of a trustee.

3. Husband and Wife ⇐279(1)

Where husband, who regularly made to wife the payments required by separate maintenance order from time of order until time of subsequent property settlement agreement but had not withdrawn all that he could have withdrawn for his own support under the order, subsequent charge, in an accounting by husband, of the amount he could have withdrawn was improper, in view of fact that the agreement purported to be complete settlement. West's Ann.Civ.Code, § 1541.

4. Husband and Wife ⇐279(1)

Where husband failed to make, in accordance with separate maintenance order, withdrawals authorized from income from property of husband and wife in full amount authorized up to date of subsequent property settlement agreement and then, in sale of certain income producing property in accordance with the agreement, failed to deduct from wife's share the support payment withdrawals he had not made, husband would not thereafter be heard to contend that, under the agreement, he would be entitled to credit for the withdrawals not made.

5. Husband and Wife ⇐279(1)

Where property settlement agreement stated that cost of accountant and any other bills of any kind in connection with realty of husband and wife, including insurance, should be paid by husband, accountant's fee would have to be paid entirely by husband as well as the insurance expense.

6. Husband and Wife ⇐279(1)

Where property settlement agreement is clear, trial court must apply it according to its plain meaning.

7. Husband and Wife ⇐279(1)

Property settlement agreement provision requiring written permission from wife's attorney for repairs on parties' property did not include the type of repairs which would be considered ordinary maintenance.

8. Husband and Wife ⇐279(1, 6)

Where, under property settlement agreement, husband was to pay $5,000 to wife for certain realty but wife refused to tender the deed to him, husband could not have been placed in default for failure to make such payment, in view of fact that wife had refused to tender the deed to him, and, therefore, no interest would be due to wife on such sum.

9. Husband and Wife ⇐279(1)
Interest ⇐39(1)

Where, under property settlement agreement husband was to pay out of his own funds the sum needed to clear encumbrance on certain property which was allotted to wife, husband's duty constituted an independent covenant which was not to wait for performance until the final accounting after sale of all the properties under the property settlement agreement, and, therefore, wife would be entitled to interest on such sum from time payment was made by her to save the property after husband had refused to pay off the encumbrance.

10. Husband and Wife ⇐279(1)

Where, by terms of property settlement agreement, husband was to deliver secured note free of all claims, trial court's failure to order husband, who delivered the note in court, to produce security for the note was not error, in view of fact that the security was then nonexistent.

11. Taxation ⇐531(1)

Where, after date of property settlement agreement, husband paid taxes on wife's separate property without authorization, and wife also paid the taxes, husband was a mere volunteer and would not be entitled to recover the amount which wife had also paid, but wife should, in good conscience, make available to husband wife's receipts, if she possessed them, to enable husband to get a refund.

12. Husband and Wife ⇐279(1)

Where unpaid support installments owed wife subsequent to property settlement agreement were balanced by unpaid installments due husband, denial of wife's claim as to such installments in action for an accounting and for partition of realty under the property settlement agreement was not error.

Hutchinson & Quattrin, San Francisco, for appellant.

Thomas Pierce Rogers, San Francisco, for respondent.

KAUFMAN, Justice.

This is an appeal from a judgment entered on December 22, 1954, in an action for an accounting and for partition of real estate brought by appellant Martinha Ennes against her husband Alfred J. Ennes, under a property settlement agreement executed by the parties. Respondent filed an answer and a cross-complaint setting forth the accounting. He asked that said accounting be approved and requested specific performance of the property settlement agreement.

The count asking partition of real estate was dismissed before trial, inasmuch as the real property involved therein had been sold.

Appellant had brought an action for separate maintenance against respondent on September 8, 1950. On September 19, 1950, on hearing of an order to show cause $250 per month for support was ordered paid to appellant by respondent, and it was ordered that the attorney of the parties select an accountant to ascertain the financial condition of respondent and the income of the parties from their properties.

On October 26, 1950, the court made an order in which it recited that it had continued the matter until it received the report of a certified public accountant, and then ordered $250 per month to be paid appellant pendente lite, and further ordered that respondent is "authorized to withdraw from the income of the properties involved in this action" the sum of $250 per month for his support and maintenance. Two thousand dollars counsel fees were allowed to each party out of the properties owned by the parties. It was also ordered that if the parties agreed upon the sale of any piece of property, the restraining order which had been previously issued, preventing respondent from disposing of any of the properties is so modified as to permit such sale.

Although respondent states that the court ordered respondent to continue management of the community properties, there is no such specific order in either the order of September 19, or October 26, 1950. There is nothing in the latter order that indicates that the court was to receive any further accounting reports. Moreover, the second report of the accountant, received in evidence, is dated October 31, 1951, which is subsequent to the interlocutory decree of divorce which states that the parties have settled all their property rights in accordance with a written contract which is made a part of the decree.

On June 12, 1951, the parties executed a property settlement agreement, which was thereafter incorporated into the Interlocutory Judgment of Divorce on July 17, 1951. Final Judgment in Divorce was entered on July 22, 1952, shortly after this action had been commenced.

The property settlement agreement states that it is the purpose of the parties to "fully, completely and absolutely settle, fix and terminate any and all of their property rights." Several pieces of real property are therein allotted to one or the other of the parties free of all claims of the other. None of these parcels are involved in this case. It is provided that the real property at 7040 Geary Street, San Francisco, shall be sold and the net proceeds divided equally. Paragraph 20 of said agreement provides that real property at 746 Geary Street and 1054 Sutter Street, San Francisco, shall be sold at the best obtainable price, approved by both parties. Before division of the proceeds of these sales, expenses of the sale such as commissions are to be deducted, as well as income and capital gains taxes. Real estate taxes "now delinquent on said properties and all other properties of the parties hereto shall, upon the following conditions, be payable out of the proceeds of the sale of all of the properties in this instrument provided for to be sold, to wit:

"That first the Second Party shall show that he has well, truly and conscientiously accounted for every dollar of income and every dollar of expense derived from any and all of said properties referred to anywhere in this agreement, and that if it shall appear that he has not well and truly paid out all of the returns received from the sale of said properties, excepting only the sum of $250 drawn by him for living expenses, and a like amount paid to the First Party, then and in that case, Second Party shall bear and pay any difference which may exist as shown by said accounting between the money so received by him and the taxes not paid by him and for which he received the moneys and did not account. It is understood and agreed that all other bills of every kind, including cost of deposition, cost of title report, and cost of C. T. Plummer, Accountant, and any and all other bills of any kind in connection with the said real property, including insurance, shall be paid by the Second Party [respondent]."

Paragraph 23 provided that the parties waived all rights of inheritance against each other, "all rights to family allowance, all rights to alimony, support or maintenance or counsel fees, except as herein referred to and already allowed herein" and agreed that this was a "full, complete, absolute release and settlement of all prop-

erty rights." The only reference in the agreement to support or alimony was that referred to above in paragraph 20, allowing the husband to withdraw $250 for his support and a like amount to appellant from the proceeds of the sales, and the final paragraph of the agreement which provided that it was understood "that the alimony payment of $250 to the First Party shall continue until the sale of the properties, and that the same amount shall also be paid to the Second Party, as heretofore ordered by the Court."

Counsel fees of $2,000 had been previously awarded for each party to be paid by respondent. The agreement provided that $250 of the First Party's attorneys fees had been paid, that respondent should pay $500 additional counsel fees, making a total of $2,250.

Paragraph 27 of the agreement provides that until the properties are sold, respondent "shall incur no debts against the property for repairs or any matter or thing, without having the express written approval therefor of Joseph A. Brown, one of the attorneys for the First Party."

The complaint herein charged failure of respondent to pay $5,000 under paragraph 9 of the agreement, which provided that he was to pay that sum as consideration for receiving fee simple title to the Faxon Avenue property of the parties; that he had failed to deliver the promissory note referred to in paragraph 7 of the agreement; that he had failed to pay the mortgage on property at 109 Gennessee Street in the sum of $2,431.46 as provided in the agreement. Certain other failures to perform were alleged, one being a failure to pay appellant $250 per month since August 1, 1951.

Respondent denied all these charges, alleged that he had diligently managed the property from the date of the filing of the divorce action until March 3, 1953, the date when the last of the properties was sold. He alleged that the accountants reports which had been made from his record showed that he had obligated himself in the sum of $14,130.80 in excess of money received by him in the management of the parties' properties, that this excess accrued after August 10, 1951, following the sale of the only substantial income producing property. The answer admits that respondent promised to pay appellant under the agreement the sum of $5,000 and the balance due in the deed of trust on the Gennessee property, a total of $7,006.21, but alleges that the amount which appellant owes him totals $7,886.12 or more than what he owes her. He alleges that the accounting shows that prior to August 10, 1951, appellant had received her support allowance of $250 per month and respondent was credited with $2,427.35 (which he had not withdrawn as he had been authorized to do by court order of October 26, 1950).

Appellant contends that the testimony of respondent Alfred Ennes and all evidence in support of his alleged expenditures is inaccurate and inherently improbable. But as there is nothing on its face inherently improbable in the testimony of either respondent or the accountant, there is no merit in this charge.

[1, 2] It is urged that the reports of the certified public accountant, Plummer, were not admissible in evidence. Appellant complains that they were not admissible because she or her representative were not present when they were made. This accountant was, however, selected by appellant's attorney, and the parties named him as their accountant in the property settlement agreement. There is no evidence that appellant ever asked to be present when these reports were made. Undoubtedly, respondent had a very informal method of keeping records, considering the substantial nature of the properties here involved, but the record shows that the accountant had access to all the records which appellant kept, check stubs, copies of rent receipts issued, bills, bank deposits records, income tax reports. It is true, however, as appellant states in her reply brief, that

the burden of establishing the account is upon the trustee of the property and respondent undoubtedly served in the capacity of a trustee in view of his management of the joint properties until their sale. McKay v. McKay, 184 Cal. 742, 746, 195 P. 385. In Purdy v. Johnson, 174 Cal. 521, 527, 163 P. 893, which appellant contends is very similar to the present case, the court reversed the judgment when the trustee presented to the court a restatement of the account by an expert accountant. The trustees did not testify on direct examination but were subjected to cross-examination by plaintiff. The court stated that the course pursued was irregular. The court there found that the charges attacked were not supported by vouchers or testimony. The expert had based such charges on memorandum checks or tags found among papers at the bank and not signed by plaintiff, and they were held not to constitute vouchers sufficient to show payment to the beneficiary. In the present case respondent Ennes testified on direct examination as to how he kept his accounts, that they were complete, and that all of them had been available to the accountant in preparing his reports. He also testified that no major repairs had been made to the properties without the consent in writing of appellant's attorney, Mr. Brown. This case is therefore distinguishable from that cited above, in that respondent herein did testify as to the validity of the accounts on direct examination, and offered testimony which, though certainly not very detailed, if believed, would substantiate the charges made for repairs, maintenance, and operating expenses of the properties.

[3] It is appellant's position that the charge of $2,427.35 for support allowance was improper. We agree. Prior to the property settlement, respondent had paid to appellant the $250 per month alimony pendente lite ordered by the court. He had, however, drawn but $322 from the income of the properties for his own support although he had been given authorization to draw $250 per month from said income. He testified that the income was insufficient to provide the payments to himself during this period. As this charge against the joint properties all accumulated prior to the execution of the property settlement agreement appellant maintains that the language therein declaring that "this is a full, complete, absolute release and settlement of all property rights", and that "all rights to alimony, support or maintenance * * * except as herein referred to and already allowed herein" are waived. The previous reference to the $250 support allowance in the agreement states that respondent must account for the returns from the sales of the property, "excepting only the sum of $250.00 drawn by him for living expenses, and a like amount paid to the First Party." This obviously contemplates future payments following the execution of the agreement, for appellant had been paid in full up to that time, and both were to receive a like amount. They would not be receiving like amounts if it were contemplated that $2,427.35 not drawn by respondent previously, was also to be paid to him. The final paragraph of the agreement allowing alimony payments to appellant to continue with a like amount to be paid respondent, clearly contemplates the future.

[4] It is noteworthy that when the largest piece of income producing property was sold shortly after the agreement was executed, the only deductions made from the proceeds were those listed in the property settlement agreement, that is, expenses of sale, commissions, taxes. Additional expenses, such as cost of title report, were deducted from respondent's share as per that agreement. Nothing was deducted from appellant's share for this charge of respondent's unpaid support. If the provision for the drawing of living expenses contemplated the past as well as the future, then it would seem only reasonable that respondent would have deducted that amount from the wife's share. He did not then apparently so construe the agreement and he is not now in a position to change the construction of the agreement.

Respondent contends that appellant did not raise this issue at the trial, nor was it raised in the pleadings. However, appellant's attorney did question this item at the trial, respondent admitted that it all accumulated prior to the agreement, and when asked why it wasn't excepted in the property settlement agreement if he meant to preserve the claim, respondent said simply, "Well, now, don't ask me." The accounting report of October 31, 1951, the first made after the agreement and following the sale of the first piece of property, included this charge, and respondent says there was no evidence that appellant protested it. However, the suit asking for an accounting was filed some months later, prior to any of the other reports which repeat this charge.

It seems clear that the property settlement agreement clearly constitutes a release of all rights to family allowance not therein preserved. Civ.Code, § 1541; Pellett v. Sonotone Corporation, 26 Cal.2d 705, 160 P.2d 783, 160 A.L.R. 863; Faye v. Feldman, 128 Cal.App.2d 319, 328, 275 P.2d 121. The same type of release was given as to counsel fees, and it is to be noted that the agreement very carefully provides in paragraph 19 for the preservation of the debt for those fees that were then due from respondent.

[5, 6] Despite the fact that the agreement states very clearly that "the cost of C. T. Plummer, accountant, and any and all other bills of any kind in connection with said real property, including insurance, shall be paid by the Second Party," appellant has been charged with half of the expense for the accountant, as well as insurance. There can be no question but that the accountant's fees must be paid entirely by respondent, as well as insurance. Where the agreement is clear, the trial court must apply it according to its plain meaning. Messenger v. Messenger, 46 Cal. 2d 619, 297 P.2d 988.

[7] Appellant contends that the trial court misconstrued the property settlement agreement in deciding that the provision requiring written permission for repairs on the property from appellant's attorney, did not include the type of repairs that would be considered ordinary maintenance. This appears to have been an entirely reasonable construction. The agreement prohibited respondent from incurring any debts against the property for repairs without written permission. The trial court interpreted this to mean repairs of such substantial nature that a contractor's lien might be placed against the property. The one large item of repairs which was strenuously objected to by appellant, the replacement of a boiler for the sum of $1,053.04, was shown to have been approved by appellant's attorney. Attorney Joseph Brown stated in a letter to appellant's attorney that Mr. Ennes was to pay the bill for the heater, and was entitled to have it "taken into account in the accounting between the parties, arising out of the management, by Mr. Ennes of the properties of the parties to be made by Mr. Ennes to Mrs. Ennes."

[8] It is true that respondent admits that he did not pay the $5,000 due to appellant for the Faxon Street property. That he was well able to pay it after the sale of the most substantial piece of the property in August, 1951, is apparent. Even if all of the charges made against Mrs. Ennes were correct, they had not then reached the sum of $5,000. However, since there is some evidence in the record that she had refused to tender the deed to him, he would not have been placed in default, hence no interest would be due to her on this sum. The deed was delivered to the court during trial and the judgment decreed that it was to be delivered to respondent.

[9] As to the sum which was to be paid by respondent out of his own funds to clear the encumbrance on the property at 109 Gennessee Street, allotted to appellant, it appears that she would be entitled to interest on that sum from the time the

payment was made by her to save the property after respondent's refusal to pay off the deed of trust. This duty on his part was clearly an independent covenant that was not to wait for performance until the final accounting after the sale of all the properties. The respondent undertook to pay this sum *"out of his own funds."*

[10] By the terms of the agreement respondent was to deliver the Aby note (secured) and free of all claims by respondent. This note was delivered at the trial. Appellant had been receiving the collections on the note since the execution of the agreement, although she did not have the note. There is testimony that respondent had security for this note at first, apparently a second mortgage, that this security was released when a new financing agreement was entered into, and that Mrs. Ennes, and her niece, Mrs. Aby, participated in these negotiations. There was no error on the part of the trial court in not ordering respondent to produce the security for the note which was then nonexistent.

[11] Respondent was given credit for taxes which he paid on appellant's separate property after the date of the property settlement agreement. Mrs. Ennes had also paid these taxes. It appears that respondent was a mere volunteer in paying the taxes on her separate property without authorization, and that he should not recover the amount which she also had paid. There is evidence that he cannot get a refund unless appellant furnishes her receipts. If she has this evidence in her possession, she should in good conscience make it available in order that respondent may recover the double payment.

[12] Since the unpaid installments of $250 per month owed to appellant for every month since August 1951 subsequent to the property settlement agreement were balanced by the unpaid installments due to respondent since that time, there was no error in denying appellant's claim in this regard.

In view of the errors noted, this matter must be retried and, accordingly, the judgment must be reversed.

Judgment reversed.

DOOLING, Acting P. J., and DRAPER, J. pro tem., concur.



Annelen SPELLENS, Plaintiff, Appellant and Respondent,

v.

Sol Carl SPELLENS, Defendant, Respondent and Appellant.*

Civ. 19338, 20236, 20318, 20975, 20986, 20987, 21015.

District Court of Appeal, Second District, Division 2, California.

Dec. 28, 1956.

Rehearing Denied Jan. 21, 1957.

Hearing Granted Feb. 19, 1957.

Action for declaration that plaintiff was lawful wife of defendant and for decree of separate maintenance, or, in the alternative, if court determined marriage to be invalid, for damages for alleged fraudulent misrepresentations leading to marriage ceremony and for award of quasi-community property of parties, and for other relief. Nine appeals were taken by the parties from judgments and orders of the Superior Court of Los Angeles County, Stanley Mosk and Orlando H. Rhodes, JJ. The District Court of Appeal, Fox, J., held, inter alia, that in view of fact that no marriage existed between parties, plaintiff was not entitled to support, counsel fees or costs pendente lite or following judgment, but that trial court did not abuse discretion in allowing her counsel fees and costs on appeal from order denying support, fees and costs pendente lite, that trial court's allocation of community property had been proper but that its action in entering non-

* Opinion vacated 317 P.2d 613.

suit upon plaintiff's fraud count had been improper.

Appeal from one order dismissed; another order reversed with directions; and other orders affirmed. One judgment reversed with directions; and other judgment modified and affirmed.

1. Divorce ⇐209, 221
Husband and Wife ⇐295

The existence of marriage is jurisdictional prerequisite for support, costs, and counsel fees pendente lite in action for divorce or separate maintenance. West's Ann.Civ.Code, §§ 137.2, 137.3.

2. Divorce ⇐39
Husband and Wife ⇐288

The invalidity of a marriage may be shown at any time, in action for divorce or separate maintenance. West's Ann.Civ. Code, § 61, subd. 1.

3. Divorce ⇐214(3)
Husband and Wife ⇐295

The evidence to establish a disputed marriage need not be as complete and satisfactory upon application for temporary support as on trial of issue, in action for divorce or separate maintenance, but the party seeking relief must make a reasonably plain case of existence of a marriage. West's Ann.Civ.Code, § 61, subd. 1; §§ 87, 137.2, 137.3.

4. Divorce ⇐320

A marriage contracted in Mexico four days after one party's receiving interlocutory decree for divorce in California is contrary to express public policy of state, and illegal and void from its inception. West's Ann.Civ.Code, § 61, subd. 1.

5. Husband and Wife ⇐205(6)

Where, in alleged wife's action wherein she sought declaration that marriage was valid, decree for separate maintenance, or, in alternative, if marriage were held invalid, damages because of alleged husband's alleged fraudulent representations and award of quasi-community property, on application for support, counsel fees and costs pendente lite, she virtually established that she was not wife of alleged defendant, she was not entitled to such relief pendente lite. West's Ann.Civ.Code, § 61, subd. 1.

6. Marriage ⇐36

In view of public policy against remarriage within proscribed period following entry of interlocutory divorce decree, in alleged wife's action for declaration of validity of marriage and for other relief, alleged husband was not estopped to deny the validity of marriage on any theory that his misrepresentation that marriage would be valid had led her to putative marriage. West's Ann.Civ.Code, § 61, subd. 1.

7. Husband and Wife ⇐205(6)

The showing of a marriage in existence is a jurisdictional prerequisite to granting of support, counsel fees and costs pendente lite, and where, on application therefor it appears that there is no marriage, such may not be awarded even though putative spouse may be entitled to interest in property accumulated during putative marriage. West's Ann.Civ.Code, § 61, subd. 1; §§ 87, 137.2, 137.3.

8. Appeal and Error ⇐837(1)

Trial court's ruling is required to be viewed as of the time it was made on the then state of the record.

9. Appeal and Error ⇐172(1)

In alleged wife's action for separate maintenance, and damages for alleged husband's alleged fraud in inducing putative marriage, if it were void, even if complaint indicated that alleged wife was entitled to annulment, where it was not drawn upon such theory and, at hearing on order to show cause, there was no suggestion made on her behalf that she was entitled to counsel fees and costs pendente lite on theory that she was seeking an annulment, she was not entitled to have order denying such reversed on appeal upon her belated suggestion that she was seeking an annulment. West's Ann.Civ.Code, § 87.

10. Husband and Wife ⇐205(6), 295

Plaintiff in action for declaration of validity of marriage, separate maintenance, and damages, if marriage be declared void, was not entitled to have order denying her

support, costs, and counsel fees reversed on appeal, on any theory that defendant's answer showed that marriage was void and that she was consequently entitled to such award on ground that she was seeking an annulment, in view of fact that such answer was not filed until after hearing and ruling on her order. West's Ann.Civ.Code, § 87.

11. Husband and Wife ⇐295

Where alleged wife in action for separate maintenance, and, in alternative, if marriage be determined invalid, damages because of alleged husband's alleged fraud in inducing putative marriage failed, on application for support pendente lite, to show existence of marriage, she was not entitled to award of support pending appeal from such order. West's Ann.Civ. Code, §§ 87, 137.2.

12. Husband and Wife ⇐205(6)

In alleged wife's action for declaration of validity of marriage and for other relief, wherein trial court entered order denying her support, counsel fees and costs pendente lite, on ground that no marriage existed, and alleged wife's attorney advised her that she had good cause for appeal, trial court was satisfied that appeal was taken in good faith, alleged wife had no funds to finance appeal but alleged husband was amply provided with funds, trial court's allowance to wife of counsel fees and costs on appeal was not an abuse of discretion. West's Ann.Civ.Code, § 61, subd. 1; §§ 87, 137.2, 137.3.

13. Husband and Wife ⇐205(6)

For alleged wife, in her action for declaration of validity of marriage and for other relief, to be entitled to counsel fees and costs on appeal from order denying her support, costs, and counsel fees pendente lite she was not required to demonstrate that appeal would be successful but only to show to satisfaction of trial court that appeal was taken in belief, and upon advice of attorneys, that she had good grounds to expect a reversal. West's Ann.Civ.Code, § 61, subd. 1; §§ 87, 137.2, 137.3.

14. Appeal and Error ⇐119

In alleged wife's action for declaration of validity of marriage and for other relief, trial court's order allowing her counsel fees and costs on appeal from its order denying her support, costs, and counsel fees pendente lite was an appealable order. West's Ann.Civ.Code, §§ 87, 137.2, 137.3.

15. Appeal and Error ⇐113(1)

An appeal from an order denying motion to vacate appealable order does not lie if grounds upon which movant sought to have order vacated existed before its entry and were available on appeal therefrom.

16. Appeal and Error ⇐119

In alleged wife's action for declaration of validity of marriage and for other relief, order denying alleged husband's motion to vacate order granting alleged wife counsel fees and costs on appeal from order denying her support, counsel fees and costs pendente lite was not an appealable order. West's Ann.Civ.Code, §§ 87, 137.2, 137.3.

17. Husband and Wife ⇐248
Marriage ⇐54

Where no marriage de jure exists between parties, no true community interest in property accumulated during putative relationship of parties as alleged husband and wife exists, and correlative rights of parties in such property derive from principles of equity and justice designed to effect suitable division of property acquired through joint efforts of both. West's Ann. Civ.Code, § 61, subd. 1.

18. Marriage ⇐54

Woman who is good-faith party to invalid marriage earns interest in property accumulated by putative spouses by her wifely services, regardless of her proportionate contribution towards the acquisition of quasi-community property. West's Ann. Civ.Code, § 61, subd. 1.

19. Marriage ⇐54

Where invalid marriage has been procured by fraud of de facto husband, and putative wife has rendered services in course of their cohabitation, she is entitled

to quasi contractual recovery of amount equal to value of her services over and above value of support and maintenance received from de facto husband. West's Ann. Civ.Code, § 61, subd. 1.

20. Marriage ⇐54

Where putative wife had received substantial award of quasi-community property in return for her conjugal contribution, in her action against putative husband, and such award was not inadequate in relation to the value of the services which she rendered, she was not entitled to receive in addition a quasi contractual recovery for the services rendered. West's Ann.Civ.Code, § 61 subd. 1.

21. Breach of Marriage Promise ⇐14

A putative wife's action against putative husband, sounding in tort for deceit for alleged fraud in inducing her to enter into putative marriage relation is not proscribed by statute abolishing actions for breach of promise of marriage. West's Ann.Civ.Code, § 43.5(d).

22. Fraud ⇐28

An innocent woman who is induced by fraud and deceit to contract a void marriage and who subsequently cohabits with her putative spouse in performance of supposed conjugal relations is entitled to recover damages in an action for fraud where any illegal conduct of woman was induced solely by man's fraud. West's Ann.Civ.Code, § 43.5(d).

23. Election of Remedies ⇐1

There are three essential elements to the doctrine of "election of remedies", (a) existence of two or more remedies, (b) inconsistency between the remedies, and (c) choice, with knowledge of the facts, of one of the remedies, and if any one of these elements is absent, preclusion does not follow.

See publication Words and Phrases, for other judicial constructions and definitions of "Election of Remedies".

24. Election of Remedies ⇐3(1)

There is no inconsistency, so as to force an election of remedies, between a suit to settle the property rights between parties who had entered into a void marriage and an action for damages for fraudulently inducing plaintiff to enter into the void marriage. West's Ann.Civ.Code, § 61, subd. 1.

25. Fraud ⇐10

Where parties occupy a confidential relationship, deception as to the state of law constitutes a fraudulent representation.

26. Fraud ⇐23

If, at time parties were engaged to be married, woman reposed trust and confidence in man and relied on his statements which he knew to be false, that their forthcoming marriage in Mexico, which was subsequently performed four days after entry of interlocutory divorce decree in her favor in California, would be valid everywhere and she, by entering into relationship, relied upon such misrepresentations to her detriment, she was entitled to recover damages, from him for such fraudulent misrepresentation.

27. Marriage ⇐1

It is the policy of State to foster and protect marriages and to encourage spouses to live together, especially where there are minor children involved.

28. Contracts ⇐111

The public policy forbids any agreement either between husband and wife or between either and a stranger, having as its purpose the facilitation or promotion or procurement of divorce.

29. Contracts ⇐111

Where at time woman was still cohabiting with her husband, defendant made oral contract with her under which he agreed to divide his property with her and to support her children if she married him, even if her marriage was unsuccessful and she had previously contemplated divorce, such contract was promotive of divorce, and hence unenforcible as against public policy of State, precluding her recovery thereon in action against defendant maintained after she had divorced former husband and entered into invalid union with defendant. West's Ann.Civ.Code, § 61, subd. 1.

30. Contracts ⇐111

Contract based on any offer to divide his property with woman and to support her children and made after she had filed complaint for divorce but prior to entry of interlocutory decree was invalid and unenforcible as promotive of divorce, in view of fact there was still time for woman and her husband to compose their differences.

31. Contracts ⇐137(1)

Where contract for division of property and support of woman's children if she would marry man was void as promotive of divorce with woman's then spouse, the underlying illegality tainted transaction as a whole making no part of its obligations enforcible even as to support of woman's children who were not parties to the contract.

32. Husband and Wife ⇐262(1)

Unless contrary is shown, law presumes that money used in maintenance of family is drawn from community funds before there is encroachment on separate property.

33. Marriage ⇐54

Where parties had entered into putative marriage relationship, putative husband was under no obligation to support putative wife's children by former marriage out of his separate property, but as they were part of "family" their support was properly a quasi-community expense to be deducted from the quasi-community property, in making division between putative spouses.

34. Husband and Wife ⇐205(6)

In view of fact that existence of marriage is jurisdictional prerequisite to granting award for support, attorneys' fees and costs, where court in action by alleged wife against alleged husband properly found that no marriage existed but awarded alleged wife share of quasi-communal property, she was properly denied support, attorneys' fees and costs. West's Ann.Civ.Code, § 61, subd. 1; §§ 87, 137.2, 137.3.

35. Fraud ⇐64(1)

In putative wife's action against putative husband for, inter alia, alleged fraud in inducing her to enter into union, evidence on issue of whether putative wife, during the entire period of cohabitation and even after she had been informed by her attorney that validity of marriage lay in an unsettled area of law and after trial court, on application for support pendente lite, declared that parties were not married, continued to believe that they were legally married was for trial court. West's Ann.Civ. Code, § 61, subd. 1; §§ 87, 137.2, 137.3.

36. Husband and Wife ⇐205(6)

In view of jurisdictional prerequisite for award of support money, costs, and counsel fees, of establishment of existence of valid marriage, where court, in putative wife's action against putative husband determined that marriage had been invalid from its inception, it properly denied her support and suit money on appeal from judgment which awarded her share of property but denied her damages for fraud. West's Ann.Civ.Code, § 61, subd. 1; §§ 87, 137.2, 137.3.

37. Husband and Wife ⇐205(6), 295

In alleged wife's action against alleged husband for separate maintenance, or, in alternative, share of quasi-community property and other relief, where trial court entered order denying her support money and fees pendente lite but allowed alleged wife counsel fees and costs of appeal therefrom and, implicit in that appeal was issue of validity of marriage, she was not entitled to support and suit money on appeal from judgment determining that marriage was invalid as she was not entitled to two awards of funds to test same question. West's Ann.Civ.Code, § 61, subd. 1; §§ 87, 137.2, 137.3.

38. Equity ⇐8
Judgment ⇐363

A party may have relief in equity from consequences of his mistake of fact, and where he would be entitled to such relief in an independent suit in equity, he may have relief on motion under statute relating to relief from judgment or order taken by mistake. West's Ann.Code Civ.Proc., § 473.

39. Costs ⇐315

The fact that order taxing costs was appealable did not preclude its being set aside under statute relating to relief from orders and judgments entered by mistake. West's Ann.Code Civ.Proc., § 473.

40. Costs ⇐315

Where both parties mistakenly believed that no order had been made for a daily transcript and matter had inadvertently escaped judge's mind, order denying the proper taxing of costs for such transcript was result of inadvertence and mistake of fact, relief from which was available on motion. West's Ann.Code Civ.Proc., § 473.

41. Replevin ⇐119

Where sheriff's deputies entered owner's residence and took control of her automobile by placing seal of their office upon it, they thereby exerted official dominion over automobile, bringing it in custodia legis, and their actions constituted a sufficient "taking" within the meaning of the claim and delivery statute so that owner was entitled to recover on undertaking against one who had directed the taking. West's Ann.Code Civ.Proc., § 512.

See publication Words and Phrases, for other judicial constructions and definitions of "Taking".

42. Process ⇐168

The gravamen of action for abuse of process is established when there has been a perversion of court processes to achieve some objective which process was not intended by law to accomplish or which seeks to compel the party against whom it is used to do some collateral thing which he could not be legally compelled to do.

43. Process ⇐168

An action for abuse of process will lie, even though process has been validly issued, upon proof of an ulterior purpose and wilful act in use of process, not proper in regular conduct of proceeding.

44. Process ⇐171

In action by putative wife against putative husband, for abuse of process in having claim and delivery writ issued, resulting in taking of her automobile at time when title to property was in issue in separate proceeding which she had instituted against him, where he had, in claim and delivery proceeding, designated her by surname of her divorced husband rather than by his surname, evidence sustained finding that if writ was properly issued, putative husband had misused legal process of court which court found was done to induce her to discontinue action.

45. Process ⇐168

Putative husband's misuse of provisional remedy of claim and delivery against putative wife to accomplish result not lawfully obtainable, to induce her to discontinue domestic relations action constitutes an actionable abuse of process where injuries are caused.

46. Process ⇐171

Damages recoverable for abuse of process are compensatory for harm proximately flowing from wrong, and recompense for special damage such as mental suffering is legitimate element of damage.

47. Process ⇐171

In abuse of process action, counsel fees incurred in attempting to protect one's self from abuse is proper item of damages but only to extent that such expense relates to services required to obtain relief from misused process.

48. Process ⇐171

In abuse of process action based on taking by sheriff under claim and delivery writ issued on application of defendant, in view of fact that plaintiff had been relieved from effects of process under a restraining order, she was not entitled to recover, in addition to counsel fees for procuring restraining order, counsel fees in defense of claim and delivery action. West's Ann. Code Civ.Proc., § 512.

49. Replevin ⇐80

Attorney's fees may not be awarded as damages in actions for the recovery of personalty.

50. Process ⇐171

Under statute relating to exemplary damages, in abuse of process action, court upon finding that defendant was actuated by malice and was guilty of oppression in abusing process, could properly assess exemplary damages. West's Ann.Civ.Code, § 3294.

Leonard Horwin and Richard I. M. Kelton, Beverly Hills, for appellant and respondent Annelen Spellens.

Pacht, Ross, Warne & Bernhard, Isaac Pacht, Stuart L. Kadison and Harvey M. Grossman, Los Angeles, for respondent and appellant Sol Carl Spellens.

FOX, Justice.

The nine appeals arising out of this litigation present a great variety of legal questions in the field of domestic relations as well as in certain other phases of the law.

I. Résumé of the Facts.

Plaintiff (sometimes referred to as Annelen), married Robert Seymon in Germany in 1937. They came to America a year later. They had two children, born, respectively, in 1942 and 1947. Seymon was a traveling salesman with only a moderate income. It was necessary for Annelen to work, from time to time, as a dressmaker and seamstress to provide additional family support. Seymon declined to change to a type of employment which would permit him to spend more time at home with his family and increase his earnings. He assertedly associated with a girl friend and Annelen became involved with a married man. It appears that during the last several years of their marriage the Seymons lived in a state of discord and unhappiness. Annelen had threatened on a number of occasions to divorce Seymon.

In October, 1950, defendant (also identified herein as Sol) told Annelen that he was in love with her and wished to marry her. She had known him as a family friend. He was foreign born, a man of substantial wealth, extensive business experience, and represented himself as having wide legal experience. He had been married and divorced twice and was the father of three children. He was approximately 69 years of age; Annelen was 35. Sol stated that he was aware of the unhappy state of affairs between her and her husband and of her husband's failure to adequately provide for his family. Sol told her she was entitled to a divorce and, if she would get a divorce and marry him, he would take care of her and her children and make her a partner in all of his property. Annelen advised her husband of Spellens' interest in her and the proposition he had made. She sought for some three months to have her husband improve his marital conduct, show her affection, provide a greater income, and thus save the marriage. Her efforts, however proved fruitless.

In January, 1951, Annelen decided she was going to divorce her husband and so informed Sol, who made arrangements for her to obtain an attorney, and provided her with funds therefor. She filed suit for divorce on grounds of extreme cruelty on February 21, 1951. After the action was filed, Spellens and Annelen conferred with Seymon regarding a property settlement. Spellens advised Annelen to waive her rights to any community property and all but nominal ($1 per month) alimony. She followed this advice. Spellens promised Annelen again that he would support the children as his own and provide them with an education and he would make her a partner in all of his property.

Annelen was granted an interlocutory decree of divorce on March 13, 1951. About that time Spellens represented to Annelen that upon the interlocutory divorce decree being granted, they could be legally married in Mexico and that such marriage would be valid everywhere. Spellens took Annelen to Mexico where he procured an attorney who advised her to the same effect. Four days after the interlocutory decree was granted, Spellens and Annelen returned to Mexico and interviewed the same attorney. Spellens showed the attorney Annelen's interlocutory decree of divorce.

After examining the document, the attorney confirmed his previous advice that they could immediately enter into a legal marriage there which would be valid everywhere. Thereupon Sol and Annelen went through a marriage ceremony performed by the attorney. They immediately began living together as husband and wife, with Annelen's children as part of the family. In November, 1951, Annelen became pregnant and had a miscarriage in January, 1952.

During the period the parties lived together Sol was guilty of extreme cruelty toward plaintiff that caused her great mental anguish. In March, 1952, Sol suggested that they separate. When Annelen objected, Sol told her that he had been advised they were not legally married. Plaintiff then consulted counsel, telling him the facts concerning her relationship with Sol. She was advised that the validity of her marriage lay in the field of unsettled law, but that he thought he could establish its validity on the theory that Sol was estopped to deny its validity. The original complaint was thereupon filed on March 24, 1952.

The parties separated for a brief period after this action was commenced but soon went back together, and lived together as husband and wife until Sol moved out on September 22, 1952.

In her first amended complaint plaintiff sought, inter alia, a declaration that the marriage was valid and a decree for separate maintenance, or, in the alternative, if the court determined the marriage was invalid, damages because of Sol's fraudulent representations and promises, and an award of the "community property" of the parties.[1]

At this state of the case, plaintiff sought support pendente lite, attorney's fees and costs. Her request was denied in its entirety. She appealed from the order. Plaintiff then moved for support pending the appeal, and for attorney's fees to prosecute the appeal, and for costs. The court denied her support but ordered defendant to pay counsel fees of $2,500 and the actual cost of reporter's and clerk's transcripts and printing of briefs. She has appealed from the order denying her support. Sol moved to vacate the order awarding attorney's fees and costs on appeal. His motion was denied. He then appealed from the order making the award and from the order denying his motion to vacate it.

In due course, the trial court determined that the parties were never legally married and that defendant was not estopped to deny that he is or ever had been married to plaintiff.

Thereupon plaintiff, with the court's permission, filed her second amended complaint. She alleged three causes of action: (1) for damages, both actual and punitive, for fraudulently inducing her to enter into a void marriage; (2) in the alternative, to enforce defendant's agreement that he would give her one-half of his property if she would marry him, and for an award to her of all the "community property" the parties acquired while they lived together as husband and wife, i. e., from March 17, 1951, to September 22, 1952; and (3) as guardian ad litem of her two children, to recover damages based on defendant's promise to support and educate them. The trial court granted a nonsuit on plaintiff's causes of action for damages and to recover a one-half interest in defendant's property; also, on her suit on behalf of her children to recover for their support and education. Plaintiff challenges each of these rulings on this appeal. She also complains because the judgment did not provide for her support, attorney's fees and costs.

The court awarded plaintiff the entire quasi community property. Defendant's expense of $7,200 in maintaining plaintiff's two children from March 17, 1951 to September 22, 1952, was, however, deducted therefrom, leaving her a net of $10,052. Plaintiff attacks the ruling by which the expense of maintaining the children was charged against the quasi community prop-

1. Other causes of action were later added to this pleading.

erty. Defendant, on the other hand, appeals from that portion of the judgment which awards plaintiff quasi community property accumulated after March 20, 1952,[2] or, in any event, after May 29, 1952.[3]

The facts with respect to Annelen's appeal from an order involving an item of costs and Sol's appeal from a judgment in a claim and delivery proceeding growing out of his and Annelen's affairs will be stated when we come to discuss the questions raised by those appeals.

The court found, inter alia, that Annelen believed and relied on Sol's promises and representations; that he intended that she should believe and rely on them; that she acted in good faith in going through the marriage ceremony and in living with Sol as husband and wife until September 22, 1952, and that up to that time she believed, in good faith, that they were legally married. The court further found that "Spellens knew that he was not legally married to plaintiff and intended from the beginning that his marriage with plaintiff be invalid."

II. Was Plaintiff Entitled to Support, Counsel Fees and Costs Pendente Lite?

[1–5] "Fundamentally, as declared in Colbert v. Colbert, 1946, 28 Cal.2d 276, 279, 169 P.2d 633, 'The existence of the marriage is a jurisdictional prerequiste for the right of the court to order support, costs, and counsel fees pendente lite in an action for divorce or separate maintenance. [Citations.] And the invalidity of the marriage * * * may be shown at any time.' [Citation.]" Dietrich v. Dietrich, 41 Cal.2d 497, 502, 261 P.2d 269, 272. While the evidence to establish a disputed marriage need not be as complete and satisfactory upon an application for temporary support as that required on the trial of the issue Colbert v. Colbert, supra, 28 Cal.2d at page 280, 169 P.2d 633, the party seeking such relief, however, must make a reasonably plain case of the existence of the marriage. Dietrich v. Dietrich, supra, 41 Cal.2d at page 504, 261 P.2d 269; Bancroft v. Bancroft, 9 Cal.App.2d 464, 468, 50 P.2d 465; Hite v. Hite, 124 Cal. 389, 391–392, 57 P. 227, 45 L.R.A. 793; Carbone v. Superior Court, 18 Cal.2d 768, 772, 117 P.2d 872, 136 A.L.R. 1260. Measured by these principles, plaintiff failed to establish that she was entitled to pendente lite relief. As a matter of fact, she virtually established she was not entitled to such relief since the evidence incontrovertibly showed that she went through the marriage ceremony with defendant in Mexico only four days after receiving an interlocutory decree of divorce in this state from Seymon, who was still living. A marriage contracted under these circumstances is contrary to the express public policy of this state and is illegal and void from its inception. Civ.Code, sec. 61 (1); Sullivan v. Sullivan, 219 Cal. 734, 736, 28 P.2d 914; Dominguez v. Dominguez, 136 Cal.App.2d 17, 20, 288 P.2d 195; In re Estate of Elliott, 165 Cal. 339, 343, 132 P. 439; Parmann v. Parmann, 56 Cal.App.2d 67, 69, 132 P.2d 851. In the Sullivan case, supra, the parties, as in the instant case, went through a marriage ceremony in Tiajuana after the woman had obtained an interlocutory decree but before she had secured a final decree of divorce. The court stated 219 Cal. at page 736, 28 P.2d at page 915: "There can be no question that the attempted marriage was illegal and void under Civil Code, §§ 56 and 61."

[6] To supply the deficiency in her status as a legal wife, plaintiff argues that because of defendant's fraudulent representations and promises and her bona fide reliance thereon he should be estopped to deny the validity of their marriage in Mexico. In support of her position, plaintiff relies on a line of cases, of which Rediker v. Rediker, 35 Cal.2d 796, 221 P.2d 1,

2. It was on this date that plaintiff's attorney advised her that the validity of her marriage lay in the field of unsettled law.

3. Plaintiff was in court at a hearing on her order to show cause and heard Judge Mosk declare that he was convinced the parties were not and never had been husband and wife.

20 A.L.R.2d 1152, and Harlan v. Harlan, 70 Cal.App.2d 657, 161 P.2d 490, are representative, that hold in effect, that a party to a domestic relations action is estopped to deny the validity of a divorce he has secured, or that he has assisted the other party to procure from a former spouse, and on the strength of which the parties have later married. The estoppel doctrine declared in this line of cases has been applied to applications for relief pendente lite. Dietrich v. Dietrich, supra. Plaintiff contends that the principle of these cases should be extended to her situation and thus prevent defendant from asserting the invalidity of their marriage.

Absent aspects of public policy, plaintiff's argument would be persuasive. But we have a legislative declaration of public policy that covers this precise situation. It is in clear and unequivocal language. It states, section 61 (1) Civil Code: *"In no case can a marriage of either of the parties during the life of the other, be valid in this state, if contracted within one year after the entry of an interlocutory decree in a proceeding for divorce."* (Emphasis added.) This sentence was added to the section in 1903. The phrase "in no case" is significant. The Supreme Court, in the Rediker case, supra, has indicated that in such circumstances estoppel does not come into play. The court stated 35 Cal.2d at page 808, 221 P.2d at page 8: "Since the application of the doctrine of estoppel presupposes the entry of a final deree, cases involving remarriage after the entry of only an interlocutory decree [citations] are not in point." Here, the Mexican "marriage" was entered into four days after plaintiff received her interlocutory decree from Seymon and he was still living. To hold that defendant was estopped to deny the invalidity of the Mexican "marriage" would be to circumvent the plain language of the statute and erode the public policy the legislature has established. Our courts have shown no disposition to ameliorate the unhappy status of the parties even by the application of equitable principles where the marriage occurs during the interlocutory period. Parmann v. Parmann, supra; Dominguez v. Dominguez, supra.

The New York courts have frequently considered the application of the doctrine of estoppel in factual situations similar to the one at bar. They have consistently rejected its application. Landsman v. Landsman, 302 N.Y. 45, 96 N.E.2d 81; Schein v. Schein, 169 Miss. 608, 8 N.Y.S.2d 463; People v. Kay, 141 Misc. 574, 252 N.Y.S. 518; Beaudoin v. Beaudoin, 270 App.Div. 631, 62 N.Y.S.2d 920; Green v. Green, Sup., 124 N.Y.S.2d 432.

The following statement of the court in Green v. Green, supra, 124 N.Y.S.2d at page 433, is apposite to the problem at hand: "In this action for a separation the defendant husband moves for summary judgment dismissing the complaint. The plaintiff and one Myers were married in 1912. In 1923 Myers obtained a judgment of divorce in this state against the plaintiff because of her adultery. Thereafter the plaintiff and the defendant were married in this state in 1935, although the plaintiff had never obtained permission of the court to remarry. Myers is still living. The plaintiff cannot prevail in this action for a separation because she is not married to the defendant. There was never any valid marriage between the parties and no doctrine of estoppel can be invoked against the defendant's making the claim of invalidity. The marriage was void as against our public policy and the conduct of the parties cannot change that."

The Rediker and Harlan cases, in their holdings, illustrate the principle that one may be estopped to deny the validity of a final decree obtained prior to the marriage. But the language quoted from Rediker, supra, in harmony with the public policy announced in Civil Code section 61 (1), negates the argument that an estoppel may operate to create a marriage or the right to future support where only an interlocutory decree has been obtained by one of the parties. Public policy forbids such an extension of the doctrine of estoppel.

[7] Plaintiff argues that even though she has not established a marriage, the trial court should have awarded her support, counsel fees, and costs pendente lite as a putative spouse by analogy to the rights of a legal spouse. Pendente lite relief is granted to a legal spouse by virtue of the provisions of sections 137.2 and 137.3, Civil Code. To be entitled to an award under these sections the petitioning party, as we have previously pointed out, must make a reasonably plain showing of the existence of the marriage for this is "a jurisdictional prerequisite" to the granting of such relief. Colbert v. Colbert, 28 Cal.2d 276, 279, 169 P.2d 633, 635. Since she is unable to meet this requirement there is no authority in the court to grant her pendente lite relief. This is simply one of the recognized differences between the rights of a legal spouse and a putative spouse. The fact that a putative spouse may be awarded an interest in the property accumulated during the putative marriage, by analogy to the community rights of a legal wife under the last cited code sections, does not strengthen her argument for pendente lite relief. The reasons for granting a putative spouse an interest in the accumulated property are to prevent the unjust enrichment of the other spouse and because of the contributive effort of the putative spouse. No such considerations are recognized in passing on an application for relief pendente lite by a putative spouse whose marriage occurred during the interlocutory period.

[8] Plaintiff argues that in any event the trial court should have awarded her attorney's fees and costs pendente lite under Civil Code section 87, which authorizes such relief in actions for annulment. She asserts that her complaint included an action for annulment and that defendant's pleadings show that he also sought an annulment. The ruling, of course, must be viewed as of the time it was made and on the then state of the record.

[9] It may well be that plaintiff's first amended complaint contained allegations indicating that she was entitled to an annulment but her pleading was not drawn upon that theory and she did not pray for such relief. She sought a declaration that the marriage was valid, separate maintenance, and damages, both actual and punitive, for defendant's fraud. Examination of the transcript (Rep. Tr. Vol. 2) of the hearing on the order to show cause fails to disclose any suggestion on behalf of plaintiff that she was entitled to counsel fees and costs pendente lite under section 87, Civil Code, on the theory that she was seeking an annulment. She is not entitled to have the order reversed upon this belated suggestion.

[10] In support of her theory, plaintiff points to the allegations and prayer of defendant's answer to her first amended complaint. He alleged that the marriage was void and requested the court to so declare. But the significant fact is that the answer was not filed until more than ten days after the hearing and ruling on plaintiff's order to show cause. Obviously she cannot rely on that pleading to determine the character of the action.

It is apparent that the order of May 29, 1952, denying plaintiff any relief pendente lite must be affirmed.

III. Appeal No. 20318

Upon denial of her request for pendente lite relief plaintiff appealed. She thereupon cited defendant on a new order to show cause re support pending appeal, and attorney's fees and costs with which to prosecute her appeal. The court denied her support but granted attorney's fees and costs on appeal. Plaintiff appealed from the order denying her support and defendant appealed from the order granting suit money.

A. Plaintiff's Appeal

[11] By stipulation, the evidence taken at the hearing on the pendente lite order to show cause was before the court on this hearing. No significant additional evidence on the questions of plaintiff's right to support was received. On this record the court denied plaintiff support pending ap-

peal. What we said above in affirming the order denying plaintiff support pendente lite applies with equal force to the order denying her support pending appeal. For those reasons the order must be affirmed.

B. Defendant's Appeal

[12, 13] The reasons which impelled the trial court to deny suit money pendente lite are not controlling on an application for such relief pending appeal. While the trial judge of course believed his previous ruling was correct, he nevertheless realized it might be upset by a reviewing court. Plaintiff's attorney had advised her "on the basis of extensive research" that she had "good cause for appeal." The court was satisfied the appeal was taken in good faith. Plaintiff did not have the funds to finance the appeal. Defendant was amply able to provide them. In such circumstances it is not an abuse of discretion to award counsel fees and costs to enable the plaintiff to have the trial court's decision reviewed. Coleman v. Coleman, 23 Cal.App. 423, 426, 138 P. 362. Plaintiff, of course, "was not required to demonstrate that her appeal will be successful; she was only required to show to the satisfaction of the lower court that the appeal was taken in the belief, and upon the advice of her attorneys, that she had good grounds to expect a reversal * * *." Gay v. Gay, 146 Cal. 237, 240, 79 P. 885, 887. Plaintiff fully met this test. The court correctly awarded her suit money on appeal. The appeal from this order must be affirmed.

IV. Appeal No. 20236

[14–16] Following the granting of counsel fees and costs on appeal, defendant moved to vacate the order. His motion was denied. He attempted to appeal from this latter order. The earlier order awarding suit money was, of course, appealable and we have reviewed it above. An appeal from an order denying a motion to vacate an appealable order does not lie if the grounds upon which the moving party sought to have the order vacated existed before its entry and were available on appeal therefrom. Colbert v. Colbert, 28 Cal.2d 276, 281, 169 P.2d 633; Litvinuk v. Litvinuk, 27 Cal.2d 38, 44, 162 P.2d 8. This is the precise situation here involved. The order denying defendant's motion to vacate the order granting attorney's fees and costs is not appealable and the purported appeal therefrom must be dismissed.

V. The Appeals From The Judgment

The trial court in effect found that the quasi community property earned during the period the parties lived together, that is, from March 17, 1951, to September 22, 1952, was $58,574 and that after deducting the quasi community expense there was a balance of $10,052, all of which was awarded to plaintiff. Included in such expense and therefore deducted in arriving at the quasi community income was the sum of $7,200 which was expended by Sol during said period in the support of Annelen's minor children.

Annelen is dissatisfied with the amount awarded her on two grounds. In the first place, she contends she was entitled to an additional award to cover the reasonable value of the services she rendered during the period in question. Her second contention is that Sol should have borne the expense of maintaining her children and that such expense should not have been included in the quasi community expense, thus reducing the net quasi community income and ultimately the amount awarded to her.

Sol, on the other hand, argues that the quasi community income should terminate either on March 20, 1952, the date on which Annelen's attorney advised her that the validity of her marriage lay in the field of unsettled law, or, in any event, on May 29, 1952, at which time Judge Mosk, in denying relief pendente lite, stated from the bench in her presence that in his opinion the marriage was not valid.

A. Quasi Contractual Recovery Properly Refused

We turn first to Annelen's complaint that although the trial court found she had

rendered substantial services to Sol in the belief that she was his wife, she was denied compensation for the value of her services. She argues that the right to recover quasi community property and the reasonable value of the putative spouse's services are not alternative but supplemental rights. This argument, it would seem, fails to take cognizance of certain inherent and fundamental considerations relating to the doctrine of putative marriages.

[17–20] Since no marriage *de jure* exists, there is no true community interest in property accumulated during the putative relationship of the parties as husband and wife. Coats v. Coats, 160 Cal. 671, 678, 118 P. 441, 36 L.R.A.,N.S., 844; Schneider v. Schneider, 183 Cal. 335, 341, 191 P. 533, 11 A.L.R. 1386. The correlative rights of the parties in such property derive from principles of equity and justice designed to effect a suitable division of property acquired through the joint efforts of both. Caldwell v. Odisio, 142 Cal.App.2d 732, 299 P.2d 14. To achieve this objective with optimum fairness, the rights of the parties are ordinarily assimilated to those subsisting under or incident to a valid marriage, and the property accumulated during the period of the communal venture is allocated in such proportion as the equities of the situation dictate. Turknette v. Turknette, 100 Cal.App.2d 271, 274–275, 223 P.2d 495; Vallera v. Vallera, 21 Cal. 2d 681, 683, 134 P.2d 761; Coats v. Coats, supra. The woman who is a good-faith party to an invalid marriage earns her interest by her wifely services regardless of her proportionate contribution towards the acquisition of the quasi community property. Vallera v. Vallera, supra; Santos v. Santos, 32 Cal.App.2d 62, 65–66, 89 P.2d 164; Macchi v. LaRocca, 54 Cal.App. 98, 201 P. 143; Caldwell v. Odisio, supra, 142 Cal.App.2d 732, 299 P.2d 14. Where the invalid marriage has been procured by the fraud of the de facto husband, and the wife has rendered services in the course of their cohabitation, it has been held that she is entitled to quasi contractual recovery of an amount equal to the value of her services over and above the value of the support and maintenance received from the supposed husband. Sanguinetti v. Sanguinetti, 9 Cal.2d 95, 100, 69 P.2d 845, 111 A.L.R. 342; Mixer v. Mixer, 2 Cal.App. 227, 83 P. 273; Marsh v. Marsh, 79 Cal.App. 560, 250 P. 411. See Lazzarevich v. Lazzarevich, 88 Cal.App.2d 708, 200 P.2d 49. In all these latter cases, such recovery is permitted where there is either no quasi community property or the accumulated property is so meager in amount that distribution thereof would not constitute adequate compensation for the wife under the circumstances. Implicit in these decisions, of course, is the concept that the man would be unjustly enriched if he were allowed to profit from the uncompensated services of a woman disappointed in her belief that she had the legitimate status of a wife. However, whether the award made to the woman is that of a suitable division of the accumulated property or damages based on the contract implied in law, the recovery allowed stems from her contribution of services as wife, homemaker and helpmate. The good-faith spouse enters not into a contract of employment but a relationship—not, unfortunately, the one she contemplated but yet analogous to the marital relation. The property acquired during this relation constitutes the fruit of the joint labors of the man and wife. Thus, where the allocation of the quasi community property provides a fair adjustment of the property rights between the spouses, it would be permitting a double recovery to compensate the wife in addition for the very services which have earned her the right to a share in the accumulations of the community. Such a result would transcend the restitutionary principles and distort the equitable foundations upon which have been established the doctrine of the putative spouse. When, therefore, as in this case, the spouse has received a substantial award of quasi community property in return for her conjugal contribution, and there is no showing of its inadequacy in relation to the value of her services, she is not entitled to receive in addition a quasi contractual re-

covery for services rendered. Not even a lawful wife possesses such rights.

However, as will be shown in the succeeding discussion, Annelen is not without other remedy by reason of Sol's fraud.

B—Nonsuit of Annelen's Fraud Count Improper

In the allegations of her first cause of action in her second amended complaint, Annelen set out facts purporting to state a cause of action against Sol for fraud in inducing her to enter what he represented was a valid marriage. The court found that Annelen was engaged to Sol and trusted him; that Sol represented to Annelen that if she married him in Mexico after obtaining an interlocutory decree of divorce in California the marriage would be valid everywhere; that Sol intended that Annelen should rely upon this representation and that she did so rely in marrying him; that Sol knew at all times that his marriage was not legal and that he intended from the beginning that his marriage with Annelen would be invalid; that as a result of this cohabitation, Annelen became pregnant and suffered a miscarriage which required medical treatment and surgery and caused her great pain and suffering. However, the court granted Sol's motion for nonsuit as to so much of the first cause of action which sought damages for Sol's fraud in inducing Annelen to enter into a void marriage. The court predicated its decision on the ground that the action was barred by section 43.5, subdivision (d), of the Civil Code, providing that a cause of action does not lie for "breach of promise of marriage."

[21] Annelen's cause of action, which sounds in tort and is an action for deceit for Sol's fraud in inducing her to enter the marriage relation, is not proscribed by section 43.5, subdivision (d), of the Civil Code. Langley v. Schumacher, 46 Cal.2d 601, 603, 297 P.2d 977. The Langley case concerned the right of one induced to enter a voidable marriage to bring a cause of action against her former spouse for fraud. In that case, plaintiff procured an annulment of her marriage based upon her complaint that defendant had fraudulently induced her to marry him by promising to maintain a normal marital relationship although he secretly intended not to consummate the marriage. After the annulment was granted, plaintiff commenced an action to recover damages for the fraud thus practiced upon her. She alleged she had resigned from a paying job to marry defendant and that the latter fraudulently represented he would cohabit with her in a normal marital relationship. It was held that plaintiff's complaint stated a cause of action for fraud for an injury to a property right.

[22] The instant case is more aggravated. The court found, in effect, that Annelen had been tricked by Sol into entering a void marriage. It is the prevailing American view that an innocent woman who is induced by fraud and deceit to contract a void marriage and subsequently cohabits with her putative spouse in performance of her supposed conjugal obligations is entitled to recover damages in an action for fraud. Jekshewitz v. Groswald, 265 Mass. 413, 164 N.E. 609, 62 A.L.R. 525; Sears v. Wegner, 150 Mich. 388, 114 N.W. 224, 14 L.R.A., N.S., 819; Larson v. McMillan, 99 Wash. 626, 170 P. 324; Morrill v. Palmer, 68 Vt. 1, 33 A. 829, 33 L.R.A. 411; Humphreys v. Baird, 197 Va. 667; Amsterdam v. Amsterdam, Sup., 56 N.Y.S.2d 19; Blossom v. Barrett, 37 N.Y. 434; Mashunkashey v. Mashunkashey, 189 Okl. 60, 113 P.2d 190; 2 Schouler on Marriage, Divorce, Separation & Domestic Relations, 6th Ed., sec. 1146, p. 1406. See Restatement of Torts, sec. 555. These authorities recognize that an innocent woman induced by misrepresentation to contract a void marriage suffers a wrong in the nature of a personal injury. A woman so imposed upon has undergone a radical change of status in the critical eye of organized society and has been enticed into a meritricious liaison with all the attendant personal humiliation, social obloquy and mental anguish accompanying such a situation. The principle upon which the authorities cited permit

recovery of damages for fraudulently inducing one to enter a void marriage is recognized by way of obiter dicta in People v. Chadwick, 143 Cal. 116, 76 P. 884, a case in which defendant was prosecuted for sending a telegram to which he had forged the name of his fiancee's mother. The telegram induced in his fiancee, Norine Schneider, the belief that her mother had withdrawn her objection to Norine's marriage with defendant. It was contended on appeal that a marriage so induced did not constitute deceit since no financial loss would accrue to the person deceived. The court stated 143 Cal. at page 121, 76 P. at page 886: "Where, as in this case, a person is induced to change her *status* from that of an unmarried to that of a married woman, with all of the duties and obligations pertaining to the changed relationship, if this result is accomplished by deceit, she has, within the law, been deceived; she has been induced to do that which, but for the false practice, she would not have done, and has been led to change her position in most vital respects—respects which may affect her financially as certainly as they affect her social and domestic *status*." This is a wholesome principle. "The injury to one's person by the fraud of another is quite as serious as an injury to his pocketbook." Flaherty v. Till, 119 Minn. 191, 137 N.W. 815, 816.

We are in accord with the cases from other jurisdictions cited above which follow the line of reasoning expressed in Langley v. Schumacker, supra, and People v. Chadwick, supra, and hold that an action for deceit for fraudulently inducing a party to enter into a void marriage may be maintained. Considerations of public policy would not militate against recovery where the situation is such that no moral turpitude can be imputed to plaintiff and any illegal conduct on her part was induced solely by defendant's fraud. Mixer v. Mixer, 2 Cal. App. 227, 231, 83 P. 273. As stated in Work v. Campbell, 164 Cal. 343, 348, 128 P. 943, 945, 43 L.R.A.,N.S., 581; "It has been held that, where the fraudulent representation is intended to create and actually does create in the mind of the party a belief that under the circumstances represented the act which he is induced to do is neither illegal nor immoral, he may recover the damages he has sustained, even though a statute makes the act a criminal offense. [Citations.]"

[23, 24] Sol urges that Annelen, having accepted an award of quasi community property as a putative spouse, has made an election of remedies and may not also recover on the theory of fraud. It is settled that there are three essential elements of the doctrine of election of remedies, (a) the existence of two or more remedies, (b) inconsistency between the remedies, and (c) choice, with knowledge of the facts, of one of the remedies; and if any one of these elements is absent, the result of preclusion does not follow. Schumm v. Berg, 37 Cal.2d 174, 189–190, 231 P.2d 39, 21 A.L.R.2d 1051; Verder v. American Loan Society, 1 Cal.2d 17, 33, 32 P.2d 1081. It is clear that there is no inconsistency between a suit to settle the property rights between parties who have entered into a void marriage and an action for damages for fraudulently inducing one to enter the void marriage. In the first case, the putative spouse merely obtains an adjustment of property rights acquired during the existence of the quasi community, a right founded upon her status as a participant in a marital relationship in the good faith belief of its validity. Vallera v. Vallera, 21 Cal.2d 681, 683, 134 P.2d 761; In re Estate of Krone, 83 Cal.App.2d 766, 769, 189 P.2d 741. In the second case, she sues in tort for the redress of wrongs personal to herself,—for having been fraudulently induced to change here status and position, for humiliation, disgrace, or mental anguish sustained in entering a void, if not bigamous, marriage, for the value of the comfort, love and society she has bestowed on the putative husband, or, as appears in the case at bar, the physical injuries and suffering caused by her miscarriage during her pregnancy—all of which flow directly from the fraud perpetrated by defendant. Thus Annelen had two independent but consistent causes of action giving rise to dis-

tinct remedies which she was entitled to pursue. Bohn v. Watson, 130 Cal.App.2d 24, 36, 278 P.2d 454. In this connection, we deem it of interest to refer to section 555 of the Restatement of Torts, which reads: "One who by conscious misrepresentation that he is free to contract a lawful marriage or by a failure to disclose a bar thereto induces a woman to live with him as his wife is liable to the woman for any harm suffered because she has been induced to live with him in a meretricious relation." Comment (a): "Under the rule stated in section 152 of the Law of Restitution a woman who is induced to live with a man as his wife in reliance upon fraudulent misrepresentations that he is free to contract a lawful marriage or by his failure to disclose a bar thereto, is entitled to recover from the man the value of the services which she rendered during the continuance of the meretricious relationship. The rule stated in this Section gives to such a woman a right to recover, in addition, damages to compensate her for the humiliation which she has sustained and for the harm done to her social standing."

[25, 26] The court found that when Sol and Annelen were engaged to be married, Annelen reposed trust and confidence in him and relied on Sol's statement, which he knew to be false, that their marriage in Mexico would be valid everywhere. Where parties occupy a confidential relationship, deception as to the state of the law constitutes a fraudulent representation. Terry v. Bender, 143 Cal.App.2d 198, 300 P.2d 119. The record shows that Annelen justifiably relied on Sol's misrepresentations to her detriment. The essential elements of fraud thus appearing and there being no statutory bar to the action, we conclude, for the reasons discussed, that it was error to grant a nonsuit on the cause of action for fraud.

C—The Property and Support Agreement Unenforceable

One of Annelen's causes of action was to recover on an oral contract under which Sol agreed to divide his property with her and support her children if she married him. In this connection, Annelen testified that she and Mr. Seymon had an unsuccessful marriage and that she had contemplated divorce on two occasions. Her husband showed no affection for her and the children, according to her testimony, and did not work energetically enough to adequately support the family. In October, 1950, Sol and Annelen met for lunch, at which time Sol professed his love for her and promised that if she would marry him he would make her a partner in his business and take care of her children as though they were his own. Annelen told her husband of Sol's proposal and asked him to behave with greater affection and consideration so their 13-year marriage might survive. She testified Mr. Seymon brushed the matter off and remained indifferent as a husband and father. In February, 1951, she engaged an attorney with Sol's help and filed an action for divorce within four months after Sol's proposal. Shortly after the divorce action was filed, Sol advised Annelen to waive alimony and her rights in the community property and again promised that he would take care of her and her children and make her a partner in everything he had if she married him.

At the conclusion of Annelen's case in chief, the trial court granted a motion for nonsuit on Annelen's cause of action for recovery on this agreement, pronouncing the contract promotive of divorce and hence unenforceable as against public policy. Annelen appeals from this judgment. The appeal is without merit.

[27] It is the policy of this state to foster and protect marriages and to encourage spouses to live together, especially where there are minor children involved. Hill v. Hill, 23 Cal.2d 82, 93, 142 P.2d 417; Moss v. Moss, 20 Cal.2d 640, 128 P.2d 526, 141 A.L.R. 1422. In Moss v. Moss, supra, the Supreme Court held that an agreement supported by a consideration designed solely to effect the severance of the marriage relationship is abhorrent to public policy and therefore unenforceable. The authorities are uniform in support of the

principle of refusing to sanction agreements which have a direct tendency toward dissolving marriages. The Restatement of Contracts encapsules this policy in two sections. Section 586 reads: "A bargain to obtain a divorce, or the effect of which is to facilitate a divorce, is illegal." Section 588 provides: "A bargain by a married person to marry another than his present spouse on the death or divorce of the latter is illegal." In 17 Am.Jur., sec. 14, p. 1756, we find the following statement: "The rule is well established that any agreement whether between husband and wife or *between either and a third person* intended to facilitate or promote procurement of a divorce, is contrary to public policy and void." (Italics added.)

[28, 29] This pronouncement of public policy is adhered to in this state. In Smith v. McPherson, 176 Cal. 144, 146, 167 P. 875, L.R.A.1918B, 66, a breach of promise case, the court said: "Appellant contends that, as the original promise of marriage was given by defendant at the time defendant was a married man, and must necessarily rest for its fulfillment upon the basic consideration of securing a divorce, the plaintiff's whole case must fall to the ground. It is unquestionably true that a promise given under such circumstances is against the manifest policy of the law, and therefore wholly void. [Citations.] Nor will this court in the slightest modify so salutary a principle." In Hillbert v. Kundicoff, 204 Cal. 485, 486, 268 P. 905, the court reiterated this rule, citing Smith v. McPherson with approval. That this is the prevailing rule appears from numerous cases including the Smith case, cited in an annotation in 130 A.L.R. 1008. One of the reasons for holding void agreements of this class is pointed out by the annotator at page 1011, where he says, "* * * the fact that such an agreement encourages divorce is obvious."

Such being the settled law, the trial court correctly refused to enforce the contract *sub judice*. Patently the agreement between Sol and Annelen was intended to encourage the obtaining of a divorce and was necessarily promotive of the dissolution of the marriage relationship between Annelen and her husband. It was manifestly aimed at stimulating Annelen to divorce Seymon, for unless she bent her energies to obtain a divorce she could not marry Sol, and only by her success in obtaining such a result would she be free to marry Sol and receive the benefits of the contract. The natural and inevitable tendency of such a contract as that between Annelen and Sol is the destruction of a marital relationship. It must therefore receive the disapprobation of the courts.

[30] Annelen seeks to avoid the impact of these principles by reliance on Smith v. McPherson, supra, asserting that Sol renewed his promise shortly after she filed her action for divorce based on a fully matured cause of action. However, in the Smith case, the promises were renewed years after defendant was divorced and his former wife had remarried and when there was no obstacle to marriage. In the instant case, when Sol allegedly renewed the promise, in February, 1951, Annelen was still married to Seymon, with only a divorce complaint on file. There was still time for them to compose their differences and become reconciled as they did in 1942 and in 1947. The possibility of a reconciliation between a husband and wife after separation should not be inhibited or frustrated by the conduct of third parties. When a stranger to the marriage commits himself to an obligation in the wife's favor conditioned upon dissolution of her existing marriage relationship such an agreement is repugnant to the public interest and against the public policy of this state. It can hardly be doubted that the arrangement between Sol and Annelen precipitated the destruction of the latter's existing conjugal relationship. Annelen moved to sunder a marriage of 13-years' standing within four months after first hearing Sol's beguiling proposal. Annelen's release from the trammels of a current marriage being the *sine qua non* of the contract sued upon, it was clearly obnoxious as a bargain between a third party and a

married person in derogation of the latter's marriage status.

[31] There is no merit to the additional argument that the contract is enforceable at least to the extent of requiring Sol to support Annelen's children, who were not parties to the unlawful contract. It plainly appears that the contract sued upon was entire and indivisible, each and every part being material and nonseverable. The essence of the agreement was that Annelen divorce Seymon and marry Sol. This underlying illegality of the bargain tainted the transaction as a whole, making no part of its obligations enforceable. Heaps v. Toy, 54 Cal.App.2d 178, 128 P.2d 813,—in which a contract for support of plaintiff and her children was held unenforceable in its entirety because founded on a consideration against public policy; Prost v. More, 40 Cal. 347, 348; Conte v. Busby, 115 Cal.App. 732, 734, 2 P.2d 458.

The cases relied on by Annelen do not uphold agreements in any sense similar to the one here involved. In Howard v. Adams, 16 Cal.2d 253, 105 P.2d 971, 130 A.L.R. 1003, plaintiff contemplated a divorce from her husband in California. Plaintiff's aunt, fearful that the publicity might injure her business and social connections, promised to support plaintiff and her children if plaintiff procured her divorce in Nevada instead of California. By doing so, plaintiff could not obtain alimony and child support from her husband. The agreement of the aunt was enforced. It did not have divorce as its object, but rather the situs of a divorce already decided upon. Hill v. Hill, 23 Cal.2d 82, 142 P.2d 417, announces the proposition that a property settlement agreement between spouses contemplating a divorce upon failure of their marriage is not a contract *contra bonos mores*. Krieger v. Bulpitt, 40 Cal.2d 97, 251 P.2d 673, was a case in which defendant, who had been sued for divorce, engaged plaintiffs as his attorneys in defending the action. The fee was contingent on the value of the property obtained for defendant. The court upheld this agreement because "it did not have for its object the dissolution of a marriage. Rather * * * plaintiffs undertook the defense of a divorce action already instituted by the client's wife and the rendition of services for the protection of his interests upon any division of the community property." 40 Cal.2d at page 100, 251 P.2d at page 674. In Norman v. Burks, 93 Cal. App.2d 687, 209 P.2d 815, plaintiff and his wife had entered into a property settlement agreement and the wife had commenced a divorce action. At this time plaintiff and defendant, a young woman, became very friendly and plaintiff caused title to a dwelling and expensive furnishings to be placed in her name. However, defendant advised plaintiff she was marrying another man—and did so. Plaintiff sued for recovery of the house, furnishings and a ring he had given defendant. He prevailed on the theory that defendant held the property for plaintiff, who had paid therefor, on a resulting trust. It is clear none of these cases is analogous to the instant one, which directly precipitated divorce proceedings and induced permanent estrangement of Annelen and her husband.

D—Support of Children a Proper Community Expense

The simple answer to Annelen's argument that Sol should have borne the expense of supporting her children out of his separate property is that they were not his children, and he was therefore under no legal duty to support them. They were her children and, as between her and Sol, the obligation to support her children was hers.

[32, 33] The children were, of course, a part of the family. Their maintenance was therefore a family expense. "Unless the contrary is shown, 'the law presumes that money used in the maintenance of the family is drawn from community funds before there is encroachment on separate property.'" Logan v. Forster, 114 Cal.App.2d 587, 601–602, 250 P.2d 730, 738; In re Estate of Tompkins, 123 Cal.App. 670, 675, 11 P.2d 886; In re Estate of Cudworth, 133 Cal. 462, 468, 65 P. 1041. The court obviously followed this rule in charging the

maintenance of the children to quasi community expense. There was no error in the court's ruling on this aspect of the case.

[34] Plaintiff complains because the judgment did not award her support, attorneys' fees and costs. We need not elaborate on this point in view of our previous discussion. Suffice it to say here that the decision is proper since it was established at the trial on the merits that the marriage was void from its inception. Civil Code sec. 61(1); Rediker v. Rediker, 35 Cal.2d 796, 808, 221 P.2d 1, 20 A.L.R.2d 1152. She failed to establish the jurisdictional prerequisite for such relief. See Colbert v. Colbert, 28 Cal.2d 276, 169 P.2d 633.

E. Sol's Appeal from Portion of Judgment

[35] The trial court found that "at all times from and after March 17, 1951, to and including September 22, 1952, plaintiff believed in good faith that she was legally married to defendant." The trial court therefore used this period as the basis for determining the amount of quasi community property. Sol contends, however, that the evidence does not support this finding. His first argument is that Annelen could not entertain such belief after the conference with her attorney on March 20, 1952, at which time he advised her that the validity of her marriage lay in an unsettled area of the law. Her attorney also advised her that "he thought he could establish an estoppel operating against defendant" and thus establish the validity of the marriage. When cross-examined with reference to her attorney's advice, she testified, "I took his word for it." Whether, following this conference, she believed in good faith she and Sol were legally married was a question of fact. In view of her attorney's advice and her reliance on him it was a reasonable inference that she believed in good faith that they were legally married. Certainly we cannot say, as a matter of law, that she did not so believe after that interview.

Sol argues that, in any event, there is no evidence to sustain the finding of Annelen's bona fide belief in the validity of the marriage after she heard Judge Mosk declare from the bench that she and Sol were not and never had been legally married on May 29, 1952, when the judge denied her any pendente lite relief. It will be noted, however, that she filed notice of appeal from the order five days after it was made. Upon being cross-examined about her knowledge that the judge had expressed the opinion that the marriage was not valid she stated: "I believed at the time I could prove my marriage to be valid * * *." Not without significance is the fact that at the hearing on the order to show cause in August, 1952, the judge conceded the possibility that he might be in error and that his previous ruling might be upset on appeal; determined that the appeal was taken in good faith; and ordered Sol to pay counsel fees and costs for its prosecution. On cross-examination of plaintiff the Reporter's Transcript discloses the following:

> "Q. Nevertheless, despite the fact that you filed this lawsuit against Mr. Spellens, you continued to have sexual intercourse with Mr. Spellens? That is correct, is it not?
>
> "A. Yes, because in my way of thinking, we were married.
>
> * * * * * *
>
> "Q. And that continued for some months, did it not?
>
> "A. Yes."

During the course of the trial on March 4, 1953, Annelen testified: "I am still sure I am married to Mr. Spellens." These facts and circumstances and this testimony amply support the finding that Annelen believed in good faith that she and Sol were legally married up to the date of their final separation on September 22, 1952.

VI. Support and Suit Money on Appeal from Judgment

[36] Following the entry of judgment, plaintiff sought an order for support pending her appeal from the judgment and counsel fees and costs with which to prosecute such appeal. Her request was denied in its

entirety. She appealed from that order (Civ. No. 20987). The case having been tried on its merits and the invalidity of the marriage from its inception having been established, the ruling of the court was correct. As previously noted in connection with a similar request on the part of plaintiff, she failed to establish the jurisdictional prerequisite for such relief. See Dietrich v. Dietrich, supra, 41 Cal.2d 497, 502, 261 P.2d 269.

[37] Furthermore, plaintiff previously had been allowed suit money to test the correctness of the court's preliminary order which denied her pendente lite relief. Implicit in that appeal was the validity of the marriage. That question is the heart of her appeal from the judgment. To have allowed her suit money on appeal from the judgment would be to provide her with such funds twice to test the same question. This order must, therefore, be affirmed.

VII. Annelen's Appeal Re Costs

In a proceeding after judgment, Sol moved to re-tax costs. His motion was directed to an item of $220.60 which Annelen had paid for the reporter's transcript of the proceedings for a certain period. Such an item was taxable if the court had made an order therefor. The only question was whether in fact such an order had been made during the course of the trial, which took place almost a year previous to the hearing. Counsel for defendant mistakenly represented to the court that no such order was made. Counsel for plaintiff was under the mistaken belief that the court had not formally ordered the transcript. The judge also had apparently forgotten the making of the order. As a consequence, costs were re-taxed, eliminating the item in question.

The mistake was discovered when plaintiff's attorney received copies of the minute orders of the trial prepared for the appellate record. These minutes were received by counsel on July 16, 1954. An entry on July 17, 1953, stated: "A daily transcript is ordered." Annelen promptly moved, under section 473, Code of Civil Procedure, to be relieved of the order taken against her by mistake and inadvertence. The motion was made well within the six months' period required by law. At the hearing the court stated: "If the law permits, the court is presently disposed to correct what appears to be an error, in view of the minute order. If it does not permit, the motion will be denied." The court accepted the minute order as correct.

Counsel present the question of whether this was a judicial error, or one due to inadvertence or mistake. Regardless of what the law may be as to correction of judicial errors in this manner, it appears that the ruling operates upon a mistake of fact entertained by both counsel as well as the judge and the motion should have been granted.

[38] The record is clear that counsel for both parties mistakenly believed no order had actually been made for a transcript and the matter had inadvertently escaped the judge's mind. Consequently, the order was the result of inadvertence and mistake of fact. A party may have relief in equity from the consequences of his mistake of fact. Vartanian v. Croll, 117 Cal.App.2d 639, 646, 256 P.2d 1022; Soule v. Bacon, 150 Cal. 495, 497, 89 P. 324. And where he would be entitled to such relief in an independent suit in equity he would have made sufficient showing for relief on a motion under section 473. Vartanian v. Croll, supra.

Watkins v. McCartney, 70 Cal.App. 137, 232 P. 982, is somewhat analogous to the case at bar in that the court made an order unaware of a prior order made by another judge. On August 5 Judge Willis ordered that a writ of execution issue; on August 8, Judge Reeve ordered that the writ of restitution be recalled. On August 9 Judge Reeve ordered that "The order heretofore inadvertently entered on August 8, 1922, is hereby vacated and set aside and the order of August 5, 1922, is restored to full force and effect * * *." The "inadvertence" referred to "arose out of the fact that Judge Reeve did not know and was not ad-

vised at the time of signing the order of August 8th that relief of similar effect had been denied by Judge Willis on August 5th." 70 Cal.App. at pages 142–143, 232 P. at page 984. The court held that the facts entirely justified the order of August 9th and that it was in the proper exercise of the court's discretion.

[39, 40] The fact that the order taxing costs was appealable does not preclude the court from setting it aside under section 473. Harth v. Ten Eyck, 16 Cal.2d 829, 832, 108 P.2d 675.

The order denying plaintiff's motion to set aside the court's previous order retaxing costs in the sum of $220.60 for the reporter's transcript must be reversed with directions to grant plaintiff's motion.

VIII. The Claim and Delivery and Abuse of Process Judgment

[41] On about December 3, 1952, following the final separation of the parties, Sol, on the advice of his counsel at that time, brought a claim and delivery action to recover a Cadillac automobile in Annelen's possession as well as certain furniture and furnishings located in Annelen's residence (which they had formerly occupied as putative spouses). Issue as to the ownership of this property had been joined by these parties in their domestic relations action which was then pending and awaiting trial. In the caption of the claim and delivery complaint Annelen was designated as "Annelen Seymon." At the same time, Sol caused a writ of claim and delivery to be issued directing the Sheriff of Los Angeles County to take possession of the property in question.

Deputies from the sheriff's office came to Annelen's residence at approximately 9:00 a. m. and served her with the writ. They then proceeded to place their seal upon the Cadillac and commenced an inventory of the furnishings. Sol and his attorney visited the premises while these events were taking place. Sol told Annelen she could retain the property if she would abandon the domestic relations proceedings in which the parties were involved. However, Annelen immediately notified her counsel of the attempted removal. Shortly thereafter, Annelen's attorney obtained an order of court restraining further proceedings on the claim and delivery writ pending trial of the domestic relations action. The order was served on the deputies at about 12:30 p. m., following which they left the premises.

Five days later, Annelen filed her answer to Sol's claim and delivery action, as well as a cross-complaint, later amended, for damages on the theory of abuse of process.

The trial court, after finding the facts above recited, also found that the furniture was community property and that the Cadillac was the separate property of Annelen. It found (1) that Sol acted maliciously in causing the issuance of the writ of claim and delivery knowing that the question of title to the property was in issue in the marital proceeding; (2) that his designation of Annelen as "Annelen Seymon" in the claim and delivery action was the only occasion since the putative marriage in which Sol described her otherwise than by the name Annelen Spellens and the use of such nomenclature was likely to mislead, so that it would not be known that the same property was in issue between the parties in the domestic relations action; and (3) that one of Sol's purposes in the use of the writ was to compel Annelen to give up the said action.

The court further found that by reason of Sol's conduct, Annelen suffered mental anguish, emotional shock and embarrassment and was so damaged in the sum of $500; that Sol was guilty of oppression and malice in abusing the process of court in connection with the writ of claim and delivery, entitling Annelen to $1,000 as exemplary damages; and that Annelen was forced to incur attorney's fees both to obtain the restraining order and in defending the claim and delivery action, the reasonable value of which was $1,500.[4] Judgment was

4. Annelen's counsel testified (1) that the value of his services in connection with

entered against Sol on the claim and delivery action and for Annelen on her amended cross-complaint in the amount of $3,000, consisting of $500 actual damages, $1,000 exemplary damages, and $1,500 attorney fees.

One further proceeding need be noted. At the time he procured the writ of claim and delivery, Sol deposited a cash undertaking in the sum of $16,000. After entry of the judgment, Sol moved to exonerate the undertaking. The court ordered exoneration only to the extent of $12,000, and directed the release of this amount.

In connection with his appeal from the above judgment, Sol contends, in effect, that he is entitled to a return of his undertaking since there was no "taking" of property by the sheriff which would authorize recovery on the undertaking. He contends that Annelen's possession of the chattels to which the writ was directed was never disturbed. This argument cannot prevail in the light of the evidence. The record discloses that the sheriff's deputies entered Annelen's residence and took control of her automobile by placing the seal of their office upon it. By so doing, they physically exerted their official dominion over this property and brought it into *custodia legis*. Until it was redelivered upon divestment of the sheriff's control, it was in his keeping and Annelen was ousted of her immediate right to possession. This constitutes a sufficient taking within the meaning of the claim and delivery statute, section 512 of the Code of Civil Procedure. See Prescott v. Farquhar, 135 Cal.App. 469, 27 P.2d 390.

Lamb v. National Surety Co., 108 Cal. App. 297, 291 P. 647, is obviously inapplicable. In that case the sheriff at no time made any attempt to take possession of the property. As stated at page 299 of 108 Cal. App., at page 648 of 291 P.: "No affidavit or demand was deposited with or delivered to the sheriff, nor did the latter at any time have possession of the car." In this case, Sol directed the sheriff to take the property described in the complaint, and the sheriff did, in fact, affix the indicia of his office to the car and assumed control over it. He did not relinquish such control until served with the restraining order.

[42, 43] The point next presented is a consideration of the appeal from the judgment in Annelen's favor founded on Sol's alleged abuse of process. An examination of the authorities discloses that the gravamen of the action is established when there has been a perversion of court processes to achieve some objective which the process was not intended by law to accomplish or which seeks to compel the party against whom it is used to do some collateral thing which he could not legally be compelled to do. Tranchina v. Arcinas, 78 Cal.App.2d 522, 524–525, 178 P.2d 65. As noted in the Restatement of Torts, section 682, and cited with approval in the Tranchina case, supra, the action will lie even though the process has been validly issued upon proof of an ulterior purpose and a wilful act in the use of the process not proper in the regular conduct of the proceeding. These principles are supported by a wealth of authorities. Hall v. Field Enterprises, D.C.Mun. App., 94 A.2d 479; Italian Star Line v. U. S. Shipping Bd. E. F. Corp., 2 Cir., 53 F.2d 359, 80 A.L.R. 576; Ash v. Cohn, 119 N.J.L. 54, 194 A. 174; Dean v. Kochendorfer, 237 N.Y. 384, 143 N.E. 229; Ellis v. Millen Hotel Co., 192 Ga. 66, 14 S.E.2d 565; Coplea v. Bybee, 290 Ill.App. 117, 8 N.E.2d 55; 3 Restatement of Torts, sec. 682. In the second edition of his thesis on Torts, Dean Prosser epitomizes the matter thus: "The essential elements of abuse of process, as the tort has developed, has been stated to be: first, an ulterior purpose and second, a wilful act in the use of the process not proper in the regular conduct of the proceeding * * * The improper purpose usually takes the form of coercion to obtain a collateral advantage, not properly involved in the proceeding itself * * * by the use of the

the obtaining of a restraining order against the sheriff were reasonably worth $500; and (2) his services in contesting Sol's claim and delivery action were reasonably worth $1,000.

process as a threat or a club. There is, in other words, a form of extortion, and it is what is done in the course of negotiation, rather than the issuance or any use of the process itself, which constitutes the tort." (Pp. 668–669.)

[44–50] Applying these tests and the law stated in the Tranchina case, supra, it becomes unnecessary even to dwell on the circumstances, however worthy of stricture, that in procuring the writ, Sol designated Annelen under the surname "Seymon" and acted at a time when title to the property was in issue in a separate proceeding. Assuming the writ was properly issued, the trial court was justified in concluding that Sol had misused the legal process of the court. The trial court found that one of Sol's purposes in procuring the writ of claim and delivery was to cause Annelen to discontinue her domestic relations action. The employment of such writ as an instrumentality for exerting pressure to obtain a collateral advantage to which a party is not legally entitled is precisely the type of coercive conduct which the cases have denounced as the use of legal process for an improper purpose. Sol's misuse of the provisional remedy of claim and delivery by attempting to accomplish a result not lawfully obtainable under it constituted an abuse of the process of the law and was actionable as such in view of the injury caused. "Once the tort is proved, the damages recoverable are in general much the same as in cases of malicious prosecution." (Prosser on Torts (2d ed.), p. 669.) Damages recoverable for abuse of process are compensatory for the harm proximately flowing from the wrong and recompense for special damage such as mental suffering is a legitimate element of damage. Adelman v. Rosenbaum, 133 Pa.Super. 386, 3 A.2d 15, 17; Saliem v. Glovsky, 132 Me. 402, 172 A. 4, 8; 1 Am.Jur., sec. 38, p. 41. Counsel fees incurred in attempting to protect one's self from an abuse of process is likewise a proper item of damage, Barnett v. Reed, 51 Pa. 190; 72 C.J.S., Process, § 124, p. 1203, but only to the extent that such expense relates to services required to obtain relief from the misused process. See Stevens v. Chisholm, 179 Cal. 557, 178 P. 128. In the case at bar, Annelen's counsel testified that $500 was the reasonable value of his services in connection with his procurement of a restraining order against further proceedings under the writ. However, the court, in addition to allowing this amount as damages, also awarded counsel fees of $1,000. This award was the expense incurred in defending the claim and delivery action. This was error, since the defense of the principal action was not required to relieve Annelen from the effects of the process, which had been fully accomplished under the restraining order. Attorney's fees may not be awarded as damages in actions for the recovery of personal property. LeFave v. Dimond, 46 Cal.2d 868, 870, 299 P.2d 858. In addition to compensatory damages, the court awarded $1,000 as exemplary damages. Under Civil Code section 3294, punitive damages may be awarded where malice, fraud, or oppression exists. Livesey v. Stock, 208 Cal. 315, 321, 281 P. 70; Alterauge v. L. A. Turf Club, 97 Cal. App.2d 735, 739, 218 P.2d 802. In view of the finding that Sol was actuated by malice and was guilty of oppression in abusing the process of the court, the court was warranted in assessing exemplary damages.

The judgment in this matter should be modified by reducing the amount allowed for attorney's fees by $1,000, and as so modified affirmed.

IX. Disposition of Appeals

The appeal from the order denying defendant's motion to vacate the order of August 29, 1952, awarding plaintiff attorney's fees and costs on appeal is dismissed (Civil No. 20236).

The order re-taxing costs is reversed with directions to grant plaintiff's motion (Civil No. 21015).

The judgment (SMD–9365) is reversed with directions to determine the single question of whether the fraud (already found) damaged plaintiff more than the amount

awarded to her as quasi community property, and, if so, to increase the recovery by such excess, but no more, and to enter a new judgment accordingly (Civil No. 20975).

The judgment in Civil No. 20986 (Claim and Delivery and abuse of process—Superior Court No. 606810) is modified by reducing the award for attorney's fees from $1,500 to $500 and correspondingly reducing the amount of the judgment from $3,000 to $2,000. As so modified the judgment is affirmed.

All other orders appealed from are affirmed.

MOORE, P. J., and ASHBURN, J., concur.



147 Cal.App.2d 566

The PEOPLE of the State of California, acting BY AND THROUGH THE DEPARTMENT OF PUBLIC WORKS, Plaintiff and Appellant,

v.

J. P. LOUBET COMPANY, Defendant and Respondent.

Civ. 5502.

District Court of Appeal,
Fourth District, California.
Jan. 14, 1957.

The State brought action against owner of truck for damages for destruction of bridge, which was struck by truck in accident in which both truck driver and his helper were killed. The Superior Court of Riverside County, John G. Gabbert, J., entered judgment for the owner of the truck, and the State appealed. The District Court of Appeal, Mussell, J., held that evidence sustained the verdict for the owner of the truck.

Judgment affirmed.

1. Death ⇐58(1)

In action by the State against owner of truck for damages for destruction of bridge, which was struck by truck in accident in which both truck driver and his helper were killed, owner of truck was entitled to presumption of due care on part of truck driver.

2. Bridges ⇐27

In action by the State against owner of truck for damages for destruction of bridge, which was struck by truck in accident in which both truck driver and his helper were killed, evidence sustained verdict for owner of truck.

3. Appeal and Error ⇐1050(1)

In action by the State against owner of truck for damages for destruction of bridge, which was struck by truck in accident in which both truck driver and his helper were killed, admission of testimony that truck driver had worked for his father hauling hay for three or four years was not prejudicial error.

4. Bridges ⇐27

In action by the State against owner of truck for damages for destruction of bridge, which was struck by truck in accident in which both truck driver and his helper were killed, the competency or incompetency of the truck driver or his reputation for care was not the proper subject of inquiry.

5. Witnesses ⇐319

Where statement of defendant's witness was stricken out by the trial court, and jury was instructed to treat the statement as if jury had never heard it, trial court did not err in denying plaintiff right to impeach the witness with respect to such statement.

6. Bridges ⇐27

In action by the State against owner of truck for damages for destruction of bridge, which was struck by truck in accident in which both truck driver and his helper were killed, question whether truck driver was negligent was to be determined by facts existing at time of accident, and

it was immaterial whether he had a license to drive the truck when no causal relationship between the accident and the failure to have such a license existed.

George C. Hadley and Richard L. Franck, Los Angeles, for appellant.

Shaw & Barnett, Riverside, for respondent.

MUSSELL, Justice.

This is an action brought by the State of California to recover damages for the destruction of one of its bridges, alleged to have been caused by defendant's truck and trailer. The first trial of the action resulted in a verdict for plaintiff. A new trial was granted on all issues and a second trial resulted in a verdict for defendant. Plaintiff appeals from the judgment thereupon entered for defendant.

The bridge involved was located on United States Highway 99, about 18 miles south of Indio, in Riverside county. The concrete highway at that point runs generally north and south, is straight and level, and there is no obstructed visibility for a considerable distance north and south of the bridge.

Defendant's truck and trailer, loaded with approximately 22 tons of baled hay, left an inspection station approximately 35 miles south of the bridge at about 11:30 p. m. on the night of January 20, 1950. The driver, Sidney Charles Thomas, and his helper, Cruz Gomez, were driving the truck and trailer in a northerly direction on highway 99 when the truck gradually crossed the center line of the highway into the southbound traffic lane, ran into the oiled shoulder of the highway, collided with the southwest wing of the bridge and rolled off the bank into the stream bed. The trailer came to rest on its wheels and the truck was upside down. When the California Highway Patrol officers arrived at the scene, approximately one hour after midnight, they found the bridge, its understructure, the truck, the trailer and the baled hay all burning. The fire burned for several hours and was finally put out by the Division of Forestry. The driver of the truck, Sidney Charles Thomas, and his helper, Cruz Gomez, were both dead when the officers arrived and there were no eyewitnesses to the accident. The bridge was destroyed as a useable structure and this action was brought to recover the replacement cost thereof.

[1] Appellant contends that the verdict is not supported by proper evidence; that the doctrine of res ipsa loquitur is applicable and that the negligence of defendant is therefore inferred. However, since the driver of the truck and his helper were both killed in the accident, defendant was entitled to the presumption of due care. In Scott v. Burke, 39 Cal.2d 388, 398, 399, 247 P.2d 313, 319, the court, in discussing the weight to be given to inferences and presumptions, said:

> "The res ipsa loquitur doctrine raises 'an inference of negligence, not a presumption.' (Anderson v. I. M. Jameson Corp. (1936), 7 Cal.2d 60, 66, 59 P.2d 962.) However, just as either an inference or a presumption may outweigh positive evidence adduced against it by the opposing party, so may either outweigh the other; i. e., it is for the trier of fact to determine under the circumstances of each case whether to give greater weight to an inference than to a disputable presumption which conflicts therewith, or vice versa. * * * Thus, it may be stated as a legal concept that it was for the jury, in the light of all the circumstances of the case in evidence before them, to determine whether greater weight should be given to the res ipsa loquitur inference or to the presumptions of innocence and due care which conflicted with such inference. More accurately what that legal concept means—and exactly what its application in the instant case means—is this: That under appropriate circumstances, such as appear in this case, both the res ipsa loquitur inference

and the disputable presumptions of innocence and due care are elements tending towards proof to be considered by the trier of facts; and that it is the function of the trier of facts to determine in the light of all the evidence in the case, including the opposing inferences and presumptions, whether the proof preponderates in favor of one party and against another, or is evenly balanced, and thereupon to resolve the issues in accordance with the rules relating to the burden of proof."

[2] In the instant case it was the function of the jury to determine, in the light of all the evidence in the case, including the opposing inferences and presumptions whether the proof preponderated in favor of one party and against the other or was evenly balanced, and to resolve the issues in accordance to the rules relating to the burden of proof. Plaintiff contends that the evidence is consistent with its theory that the driver of the truck was either asleep or negligently inattentive. However, evidence was introduced showing the activities of the driver and his helper during several hours prior to the accident and the jury could infer therefrom that the driver was not asleep at the time of the accident. The record is silent as to what caused the truck to cross to the west side of the highway and strike the bridge, and we cannot hold that the verdict of the jury was unsupported by the evidence under the circumstances shown.

[3, 4] Appellant contends that the court erred in admitting testimony as to the past experience of Sidney Charles Thomas as a truck driver. In this connection, Bernard Loubet, one of the partners of defendant company, testified that Thomas and Gomez were working for him in 1950; that Thomas had been an employee about four months and Gomez for ten years; that he had known Thomas practically all his life and that Thomas worked for his (Thomas') father as a truck driver; that Gomez had about 15 to 18 years experience as a truck driver. A witness, Cummins, testified that he had known Thomas for many years and that Thomas had worked for his (Thomas') father hauling hay for three or four years. It does not appear that the admission of the testimony that Thomas had worked for his father hauling hay for three or four years amounted to prejudicial error. In Towle v. Pacific Improvement Co., 98 Cal. 342, 33 P. 207, 208, cited by plaintiff, the judgment in favor of the defendant was reversed because of error in admitting evidence that defendant's employee "was a good, first-class driver, careful in handling horses, and that during the four years he had been in the employ of defendant he had never been guilty of any mismanagement or carelessness in the conduct or care of the team." While the rule is in actions of this kind that the competency or incompetency of the truck driver or his reputation for care is not the subject of inquiry, there was no testimony in the instant case as to whether Thomas was a first-class driver or that he had at other times been careful or careless in the handling of trucks.

[5, 6] Appellant further contends that it was denied its right to impeach and rebut respondent's witness Loubet when on cross-examination he volunteered the information that the deceased driver had a chauffeur's license at the time of the accident. This statement of the witness was stricken out by the court and the jury was instructed to treat it as if they had never heard it. Furthermore, the negligence of the driver is to be determined by the facts existing at the time of the accident and it was immaterial whether he had a license to operate the truck when no causal relationship between the accident and the failure to have such a license existed. Strandt v. Cannon, 29 Cal.App.2d 509, 518, 85 P.2d 160.

The judgment is affirmed.

BARNARD, P. J., and GRIFFIN, J., concur.

147 Cal.App.2d 477

The PEOPLE of the State of California, Respondent,

v.

John E. O'MALLEY, Appellant.

Cr. 5661.

District Court of Appeal, Second District, Division 1, California.

Jan. 10, 1957.

Defendant was charged with the crime of petty theft with a prior conviction of felony. Judgment of conviction in the Superior Court of Los Angeles County, Allen T. Lynch, J., and the defendant appeals. The District Court of Appeal, White, P. J., held that record did not indicate that prior conviction which the trial court ordered stricken was the same prior conviction charged in the information in connection with petty theft thereby reducing the offense therein charged to a misdemeanor.

Judgment affirmed.

1. Criminal Law ⇐1202(3)

In prosecution for petty theft with a prior conviction of a felony of issuing checks without sufficient funds, record did not indicate that prior conviction which the trial court ordered stricken was the same prior conviction charged in the information in connection with petty theft, thereby reducing the offense therein charged to a misdemeanor. West's Ann.Pen.Code, §§ 667, 3024.

2. Criminal Law ⇐641

In prosecution for petty theft, record did not indicate that public defender failed to subpoena certain witnesses when requested so to do by the defendant.

John E. O'Malley, in pro. per.

Edmund G. Brown, Atty. Gen., for respondent.

WHITE, Presiding Justice.

In an information filed by the District Attorney of Los Angeles County, defendant was accused in Count I of the crime of petty theft with a prior conviction of a felony, to wit, issuing checks without sufficient funds, Penal Code, Sec. 667. The information charged the unlawful taking by defendant of the sum of $12 from Mr. and Mrs. Emerson Young, and that prior to the commission of the offenses therein set forth, defendant was convicted in the Superior Court of Los Angeles County of the crime of issuing check without sufficient funds. That judgment thereon was pronounced May 29, 1931, pursuant to which defendant served a term of imprisonment in Folsom State Prison. The information also contained five additional counts charging burglary (Count II); petty theft with a prior conviction of felony (Count III); burglary (Count IV); petty theft with a prior conviction of felony (Count V); and burglary (Count VI). It was also charged that before the commission of the foregoing offenses, defendant was convicted in the Superior Court of the County of Los Angeles of the crime of forgery, a felony. That judgment thereon was pronounced against defendant on February 1, 1923, pursuant to which he served a term of imprisonment in the State Prison.

Defendant pleaded not guilty as to the offenses charged in all six counts of the information and denied the alleged prior convictions.

Following trial before the court sitting without a jury, defendant was found guilty of the offense charged in Count I, and not guilty on Counts II, III, IV, V, and VI. On motion of the district attorney the prior conviction of the crime of forgery upon which judgment was pronounced on February 1, 1923, was ordered stricken. From the judgment of conviction on Count I, defendant prosecutes this appeal.

Since the only ground urged for a reversal of the judgment presents a question of law it becomes unnecessary to set forth the factual background surrounding this prosecution.

When appellant received the formal and usual notice that the record on appeal had been lodged in this court and advising him of the time within which he should file his

opening brief, he wrote to this court requesting that a document which he denominated "Petition Submitted in My Appeal" be considered "as my charges and the basis of my appeal". In said communication he also requested that this court appoint counsel to represent him on appeal, stating that he was without funds or property with which to employ an attorney. Pursuant to such request this court appointed a member of the Bar to represent appellant. Appointed counsel, after an examination of the record, advised this court that he "could find no meritorious ground upon which to present a brief on appeal".

We have therefore, painstakingly examined the record on appeal and find ourselves in accord with the conclusion reached by appointed counsel that appellant's contentions made in the foregoing "Petition" cannot be sustained.

[1] As a first ground for reversal of the judgment appellant contends that the prior conviction which the trial court ordered stricken was the same prior conviction charged in Count I of the information in connection with the charge of petty theft, thereby reducing the offense therein charged to a misdemeanor (petty theft), and that the court therefore, erroneously adjudged appellant guilty of petty theft with a prior felony conviction, a felony.

Recourse to the record however does not sustain appellant in his contention, because it reveals that the prior conviction of a felony charged in Count I was conviction of issuing checks without sufficient funds in 1931. Documentary evidence of this conviction of a prior felony was introduced by the plaintiff. (People's Exhibit No. 1.) The prior conviction which was stricken was the conviction of the crime of forgery, a felony, on or about the 1st day of February, 1923, and was a different and separate prior from the one alleged as part of the substantive crime in Count I. Hence, it appears from the record and exhibits that the prior conviction which the court ordered stricken was the prior that was alleged under the provisions of Penal Code, Section 3024—to increase the time of appellant's imprisonment, and was a separate and distinct prior from that which was alleged as part of the substantive crime in Count I. Such prior would not increase the time of imprisonment where the charge was petty theft with a prior conviction, which was evidently what the district attorney had in mind when he moved to dismiss the prior conviction of forgery, judgment on which was rendered February 1, 1923. See In re Boatwright, 216 Cal. 677, 682, 683, 15 P.2d 755.

[2] Finally, appellant contends that his counsel, the Public Defender, failed to subpoena certain witnesses when requested so to do by appellant. We find nothing in the record to support this contention, and our examination of the record on appeal reveals that appellant's counsel handled his defense both ably and energetically.

For the foregoing reasons, the judgment is affirmed.

DORAN and FOURT, JJ., concur.



147 Cal.App.2d 450

In the Matter of the ESTATE of Luella J. SANDERS, etc., Deceased.

Patricia J. RADICE, Petitioner and Appellant,

v.

Emory V. SANDERS, as Administrator W.W.A., Respondent.

Civ. 5275.

District Court of Appeal, Fourth District, California.

Jan. 7, 1957.

Petition seeking the removal of an administrator of the estate of deceased on the ground that the marriage of the administrator and the deceased was void because of a prior existing marriage in that

an Oklahoma divorce decree did not terminate the marriage relation between the administrator and another until six months after entry of the decree and that the administrator married the deceased within such period. From an adverse order of the Superior Court, Riverside County, Hilton H. McCabe, J., the petitioner appealed. The District Court of Appeal, Coughlin, J. pro tem., held that marriage of the administrator and the deceased was not void.

Order affirmed.

1. Divorce ⇐380

Effect of Oklahoma decree of divorce in California was governed by laws of that State. 12 O.S.1951 §§ 1280, 1282.

2. Divorce ⇐382

In action for removal of an administrator of estate of deceased on ground that marriage of administrator and deceased was void because of a prior existing marriage in that an Oklahoma divorce decree did not terminate marriage relation between administrator and another until six months after decree was entered and that administrator's marriage to deceased within such period was void under Oklahoma law, marriage between administrator and former wife was dissolved upon rendition of divorce decree and hence administrator's marriage to deceased was not void. 12 O.S.1951 §§ 1280, 1282.

3. Marriage ⇐3

Ordinarily the law of the place of the marriage controls the question of its validity.

4. Courts ⇐8

A statute which prohibits remarriage of divorced persons within a specified time after the entry of a decree which terminates the marriage relation has no extra territorial effect.

5. Divorce ⇐382

In action to remove an administrator on ground that marriage of administrator and deceased was void because of a prior existing marriage and that an Oklahoma divorce decree did not terminate marriage relation between administrator and another until six months after decree was entered and that administrator's marriage with deceased within six months was void, marriage of administrator with deceased in Arizona was valid in California in view that Oklahoma statute prohibiting remarriage of divorced persons within a specified time had no extraterritorial effect. 12 O.S.1951 §§ 1280, 1282.

David N. M. Berk, Beaumont, for appellant.

Wallace P. Rouse, Indio, for respondent.

COUGHLIN, Justice, pro tem.

This is an appeal from an order dismissing a petition seeking the removal of Emory V. Sanders, as administrator with the will annexed of the Estate of Luella J. Sanders, Deceased. Letters of administration had been issued to Emory as the surviving spouse of decedent. Luella died testate, leaving a will executed prior to her marriage which made no provision for Emory, and named an executor who predeceased her. The petition for removal alleged that the marriage of Emory and Luella was void, because of a prior existing marriage.

At the hearing of the petition in question it was established that Emory had been married to Clara I. Sanders; that he was divorced; "that the divorce was entered in Portland, Oklahoma, on the 24th day of April, 1951"; that he was a resident of California "in the month of April, 1951" and resided therein continuously thereafter; and that he and Luella were married in Yuma, Arizona on August 18, 1951, and lived together as husband and wife until her death on March 31, 1955.

Appellant contends that the Oklahoma divorce did not terminate the marriage relation between Emory and Clara until six months after the decree was entered, and as he married Luella within six months after this divorce the later marriage was void. This contention is based

on certain provisions of the Oklahoma statutes which, among other things, declare that it shall be unlawful for either party to a divorce to marry another person within six months after the decree is entered, and require that such a decree recite that it does not become absolute and take effect until the expiration of six months from the time it is rendered.

[1] The effect of the Oklahoma decree of divorce is governed by the laws of that state. Means v. Means, 40 Cal.App.2d 469, 473, 104 P.2d 1066; In re Estate of Winder, 98 Cal.App.2d 78, 87, 219 P.2d 18.

In the case of Plummer v. Davis, 169 Okl. 374, 36 P.2d 938, 940, the Supreme Court of Oklahoma held that the marriage of a divorced person within six months after the rendition of a decree of divorce, the marriage and divorce both occurring in that state, was voidable and not void. This decision, of necessity, was based upon the conclusion that the marriage which was the subject of the divorce action had been terminated by the decree therein, otherwise the subsequent marriage within the prohibited period would have been void as a plural marriage. Whitney v. Whitney, 192 Okl. 174, 134 P.2d 357. In its opinion the court places particular emphasis upon the decision in the case of Conn v. Conn, 2 Kan.App. 419, 42 P. 1006, which interpreted the effect of a Kansas statute substantially identical with the Oklahoma statute wherein it was said: "'* * * our statute simply declares that it shall be unlawful for either party to marry within six months after the decree is entered. It does not in terms pronounce them incapable of entering into the marriage relation within that period, nor does it declare void a marriage solemnized in violation of the prohibition of the statute.'" With respect to the requirement that the decree of divorce should recite certain restrictions upon its effectiveness, the Oklahoma court said: "In Brown v. Capps, 164 Okl. 91, 22 P.2d 1008, this court held in section 2 of the syllabus 'Section 676, O.S.1931 (512, C.O.S.1921 [12 O.S.1951 § 1282]), which provides that "every decree of divorce shall recite the day and date when the judgment was rendered in the cause, and that the decree does not become absolute and take effect until the expiration of six months from said date," must be considered to apply only to that portion of section 674, O.S.1931 [12 O.S.1951 § 1280], which relates to appeals and remarrying within six months following the date upon which the divorce is granted.'"

In two prior Oklahoma decisions the sole issue for determination was the effect of the decree of divorce upon the existing marriage. No subsequent marriage was involved. In each instance the court held that the granting of a decree of divorce dissolved the marriage. In re Smith, 2 Okl. 153, 37 P. 1099; Yeats v. State, 30 Okl.Cr. 320, 236 P. 62.

A third prior decision, Harvey v. State, 31 Okl.Cr. 299, 238 P. 862, 863, 51 A.L.R. 321, considers the effect of the Oklahoma divorce laws and states: "Under this statute the decree of divorce is sufficient to dissolve the marriage tie at the time it is rendered, but there is an inhibition in the nature of a penalty on a marriage by the parties with any third person within 6 months from the date of the decree."

In two other prior decisions, the Oklahoma court considered the effect of the statutes of that state on the marriage of a person divorced in that state, which occurred within six months after the rendition of the divorce decree. Niece v. Territory, 9 Okl. 535, 60 P. 300; Atkeson v. Sovereign Camp, W.O.W., 90 Okl. 154, 216 P. 467, 32 A.L.R. 1108. At the time the divorces in these cases were granted, the statutes provided that any divorced person marrying within the six months' period "shall be *deemed* guilty of bigamy, and such marriage shall be *absolutely void.*" (Italics ours.) This provision was stricken from the statutes in 1925. In Niece v. Territory, supra, the appellant had been charged with bigamy; the remarriage occurred in the state of Oklahoma; and the court held that under "the provisions of

section 4551 of the Statutes of 1893, it is unlawful for either party to a divorce suit to marry any other person within six months from the date of the decree of divorcement, and every person marrying contrary to the provisions of this section is guilty of bigamy." In Atkeson v. Sovereign Camp, W.O.W., supra [90 Okl. 154, 216 P. 470], the plaintiff sued for insurance benefits as the wife of a deceased member of the defendant association; she and her husband, who was divorced in Oklahoma where both of them were domiciled, were married in Texas within six months after rendition of the divorce decree; and the court held that "the attempted marriage of Lee B. Atkeson to Mattie Atkeson, while the former was under the restrictions imposed by the laws of this state, *by making a temporary visit* to the state of Texas, was void, and that the said Mattie Atkeson can derive no rights nor base any claim thereon in *the courts of this state.*" (Italics ours.) In referring to these two decisions the court in Yeats v. State, 30 Okl.Cr. 320, 236 P. 62, 64, makes this pertinent observation: "In a few cases the courts say, or by loose language intimate, that the marriage relation between the parties does not actually terminate until the end of that period [the six month period]. This discrepancy also appears in some of the Oklahoma decisions." The opinion in Yeats v. State, supra, recognizes the distinction between cases involving an application of the Oklahoma divorce laws to a second marriage, and those considering the effect of an Oklahoma divorce decree on the marital status of the parties named therein, and says: "It must, of course, be conceded that the defendant could not consummate a legal second marriage in this state within the 6-month period, but many of our sister states have held that one might do so in another state where the marriage and divorce laws of the latter contain no such prohibition. They so hold upon the theory that in effect within this state the marital relation is dissolved the moment the decree of divorce is rendered, and that the prohibition against remarriage is in the nature of a penalty which a sister state having a different policy will not enforce, so that within such a sister state a second marriage may be consummated within the 6-month period, valid in that state." It is noteworthy that in 1925 the Oklahoma statutes were amended to specifically provide that a marriage outside of the state during the prohibited period was unlawful and "deemed" bigamous. There would have been no need for the amendment if a decree of divorce had not dissolved the marriage forthwith as a subsequent marriage in any state, during the existence of the prior undissolved marriage, would have been unlawful and bigamous.

The courts of other states, in construing the Oklahoma statutes or others similar thereto, have held that a marriage which is the subject of a divorce action under those statutes, terminates upon the rendition of the decree of divorce, even though it is unlawful for either party to the action to marry any other person within six months. Green v. McDowell, 210 Mo.App. 517, 242 S.W. 168; Bauer v. Abrahams, 73 Colo. 509, 216 P. 259; Durland v. Durland, 67 Kan. 734, 74 P. 274, 276, 63 L.R.A. 959; In re Troemper's Estate, 160 Kan. 464, 163 P.2d 379, 382.

[2] It is our opinion that the marriage between Emory V. Sanders and Clara I. Sanders was dissolved upon the rendition of the divorce decree by the Oklahoma court on April 24, 1951.

[3, 4] The only remaining question for decision is whether the Arizona marriage of Emory and Luella was valid in California. "Ordinarily, the law of the place of marriage controls the question of its validity." Colbert v. Colbert, 28 Cal.2d 276, 280, 169 P.2d 633, 635. The courts of Arizona have followed the rule holding that statutes which prohibit the remarriage of divorced persons within a specified time after the entry of a decree which terminates the marriage relation have no extraterritorial effect. Horton v. Horton, 22 Ariz. 490, 198 P. 1105. This, also, is

the law in California. In re Estate of Wood, 137 Cal. 129, 69 P. 900; People v. Woodley, 22 Cal.App. 674, 681, 136 P. 312. Under these rules the marriage of Emory and Clara was valid.

[5] In her reply brief appellant states that she "is leaning heavily upon the case of Means v. Means, 40 Cal.App.2d 469 [104 P.2d 1066]" which considered the effect of a decree of divorce obtained in Wisconsin. The ground for appellant's reliance on the cited case is the similarity between certain provisions of the Wisconsin divorce statutes and those of the Oklahoma statutes. The courts of Wisconsin have held that under the statutes of that state a divorce decree is not effective until the expiration of one year from the granting of such decree. However, the laws of Oklahoma and not the laws of Wisconsin govern the decision in the instant case.

The order appealed from is affirmed.

BARNARD, P. J., and GRIFFIN, J., concur.



147 Cal.App.2d 625

The PEOPLE of the State of California, Plaintiff and Respondent,

v.

Mary MARIN, a/k/a Mary Garcia, Defendant and Appellant.

Cr. 1129.

District Court of Appeal, Fourth District, California.

Jan. 16, 1957.

Defendant, originally charged with presenting false claims to County Welfare Department, pleaded guilty to violation of statute making it misdemeanor to obtain money under false pretenses. The Superior Court of San Bernardino County, Archie D. Mitchell, J., rendered judgment placing defendant on probation on condition that she serve 60 days and make restitution in the sum of $544, or "in such amount as Probation Officer determines", and she appealed. The District Court of Appeal, Griffin, J., held that record showed that trial court intended that such specified sum be maximum to be restored and that if defendant could convince Probation Officer that a lesser amount was due, sum might be reduced, and that under such circumstances, it was proper.

Judgment affirmed.

1. Criminal Law ⇐982

Trial court granting defendant's application for probation was authorized fully to consider probation officer's report reviewing facts and history of case and recommending action taken. West's Ann. Pen.Code, §§ 1203, 1203.1.

2. Criminal Law ⇐982

In proceeding wherein defendant was charged with presenting false claims to county welfare department and pleaded guilty under statute making it misdemeanor to obtain money under false pretenses, evidence before trial court on defendant's application for probation warranted imposing order of restitution of $544 or in such amount as probation officer would determine. West's Ann.Pen.Code, §§ 72, 532a, 1203, 1203.1.

3. Criminal Law ⇐982

In proceeding wherein defendant originally charged with presenting false claims to county welfare department pleaded guilty to violation of statute making it a misdemeanor to obtain money under false pretenses and was granted probation upon serving 60 days and restoring the sum of $544, or "in such amount as the Probation Officer determines", record showed intention of trial court that such amount would be maximum to be restored and that if defendant could convince probation officer that a lesser amount was due, the sum might be reduced and, under such circumstances, order was proper. West's Ann. Pen.Code, §§ 72, 532a, 1203, 1203.1.

4. Criminal Law ⇐982

Trial court, during time of probation, upon proper showing, is authorized to modify original probation order. West's Ann.Pen.Code, §§ 1203, 1203.1.

Carl T. Rimbaugh, San Bernardino, for appellant.

Edmund G. Brown, Atty. Gen., Elizabeth Miller, Deputy Atty. Gen., for respondent.

GRIFFIN, Justice.

Defendant was charged with the offense of presenting false claims to the County Welfare Department, Penal Code Sec. 72, a felony. She entered a plea of not guilty and subsequently withdrew this plea and entered a plea of guilty of violating section 532a of the Penal Code, a misdemeanor and a claimed included offense. The court granted defendant's application for probation on condition that she serve 60 days in the county jail and make restitution or reimbursement to the county in the sum of $544, or "in such amount as the Probation Officer determines". She served the 60 days.

The grounds of appeal are that the order for reimbursement as to the amount is not definite and certain; that the ascertainment of the amount is improperly delegated to the probation officer, and accordingly unauthorized; that the requirement of reimbursement is contrary to law and that the evidence is insufficient to support the finding in the amount determined.

[1] The court was authorized to and did fully consider the probation officer's report reviewing the facts and history of the case and recommending the action taken by the court. Sec. 1203, Penal Code; People v. Giles, 70 Cal.App.2d Supp. 872, 161 P.2d 623.

[2-4] Counsel for defendant, in his brief, attempts to review the evidence which he contends would show that all of the sum of $544 was not illegally collected by virtue of certain alleged claims in reference to defendant's marital status and the number of occupants in the house at the time, and has lodged the record of the testimony taken at the preliminary examination with this court in proof of this claim. He moved to allow its consideration in evidence on this appeal. We have examined it and found no evidence that would assist us in determining the legal issue here presented. Accordingly, the motion should be denied. Suffice it to say, the evidence before the trial judge warranted imposing the order of restitution in the amount indicated. Penal Code Sec. 1203.1; People v. Labarbera, 89 Cal.App.2d 639, 643, 201 P.2d 584. It was the purpose and intent of the trial judge, as gleaned from the record, that this amount would be the maximum, and if defendant could convince the probation officer that a lesser amount was due, this sum might be reduced accordingly. Under these circumstances, no prejudicial error resulted. People v. Lippner, 219 Cal. 395, 26 P.2d 457. The trial court, during the time of probation, upon proper showing, is authorized to modify its original order. People v. McClean, 130 Cal.App.2d 439, 279 P.2d 87. It appears that defendant was afforded a fair hearing on her application for probation, and defendant's contentions were there fully set forth in respect to the recommended order of restitution. Furthermore, it may be well questioned whether the notice of appeal was filed within the time prescribed by law.

Motion to receive transcript of preliminary examination in evidence denied. Judgment affirmed.

BARNARD, P. J., and MUSSELL, J., concur.

147 Cal.App.2d 570

PEOPLE of the State of California, Plaintiff and Respondent,

v.

Edward M. MILLEN, Defendant and Appellant.

Cr. 1096.

District Court of Appeal, Fourth District, California.

Jan. 14, 1957.

Defendant was convicted of burglary and from a judgment of the Superior Court of San Diego County, Edgar B. Hervey, J., pro tem., defendant appealed. The District Court of Appeal, Barnard, P. J., held that direct and circumstantial evidence as to identification was sufficient to support the conviction.

Affirmed.

1. Criminal Law ⇐741(2)

In criminal prosecution, question of identification is one of fact, and fact that a witness may to some extent qualify his testimony as to identification is a matter going to weight of that testimony and one to be considered by trier of fact.

2. Burglary ⇐41(6)

Direct and circumstantial evidence as to identification was sufficient to support conviction of burglary.

Eugene V. McPherson, Joseph A. Armstrong, Gladys Towles Root, Los Angeles, for appellant.

Edmund G. Brown, Atty. Gen., Clarence A. Linn, Asst. Atty. Gen., Raymond M. Momboisse, Deputy Atty. Gen., for respondent.

BARNARD, Presiding Justice.

On May 25, 1956, an information was filed charging the defendant with the crime of burglary alleged to have been committed on or about March 20, 1955. The defendant pleaded not guilty, waived a jury trial, and was found guilty by the trial judge. He has appealed from the judgment sentencing him to prison.

Early in the evening of Saturday, March 19, 1955, a Miss Bittner left her apartment accompanied by a Mr. Ehle. They returned to the apartment shortly after midnight. As they entered the living room they saw a man's head peering through the doorway between the kitchen and the living room. The man fled and Mr. Ehle followed him outdoors to the rear. When he could not see the man outside he returned, picked up a pocket knife, and went out to the front. He then saw a black or dark MG automobile with a white canvas top parked in the street, the engine of which was running. He approached the car in the hope the occupant might have seen the intruder leave. When he was three feet from the car it suddenly was driven away with such speed that it was burning rubber. Mr. Ehle slashed the canvas top of the car as it passed him, and then threw the knife at the rear of the car. He did not hear the knife hit the street, and after a thorough search the knife could not be found. It was then discovered that Miss Bittner's purse had been taken from the apartment. The purse was returned to her the next day by a small boy who said he found it in an alley. Two or three days later, Mr. Ehle saw a black MG automobile with a white canvas top, which belonged to the defendant, and reported it to the officers. An officer examined this car and found a hole about six inches square cut in the canvas top, at the same spot where Mr. Ehle had slashed the top of the fleeing MG. There was also a ⅜-inch slit in the cover of the tire on the rear of the car. This slit went through into the tire itself, and was on the top portion of the tire facing outward. The defendant was questioned by the officers but left the San Diego area before the investigation was completed.

Appellant's only contention is that the evidence is insufficient to sustain a conviction. It is argued that there was a lack of positive identification of the appellant as the man seen in Miss Bittner's apartment, and that the other circumstantial evi-

dence is insufficient to show that the appellant is the person who committed this burglary.

Mr. Ehle, on the stand, positively identified the appellant as the person whose head he saw sticking through the doorway. When appellant's counsel asked him whether he had not on March 23, when he had seen the appellant at his sister's home, stated to the officers that he was "very sure" that it was the man, he replied that he believed that he had said something like that. When he was asked if he had not at that time told the officers that he thought it was the man but could not say positively, he said he did not remember saying that. Miss Bittner on the stand pointed to the appellant and testified that she believed he was the man whom she had seen with his head sticking through the door. She admitted that on March 23, when she had seen the appellant at his sister's home, she had stated to the officers that she thought this was the man but could not say positively because she did not want to convict an innocent man. She also testified that she stated at that time that she was very sure that this was the man.

[1, 2] The question of identification was one of fact, and the fact that a witness may to some extent qualify his testimony as to identification is a matter going to the weight of that testimony and one to be considered by the trier of fact. People v. Waller, 14 Cal.2d 693, 96 P.2d 344; People v. Robarge, 111 Cal.App.2d 87, 244 P.2d 407. Not only was the direct testimony as to identification sufficient to support the judgment, but there were other circumstances which furnish strong corroboration. The appellant had a black MG car with a white canvas top, with a hole cut in the top at the exact place where Mr. Ehle had slashed the top of the car which was in the street with the engine running. His car also had a slit in the spare tire and cover at the rear of the car, where Mr. Ehle had thrown the knife. The occupant of the car drove rapidly away when Mr. Ehle approached, and it is significant that he did not make any complaint or report to the authorities when Mr. Ehle slashed the top of his car. The appellant testified that while driving his car on the afternoon of Saturday, March 19, he found the top of his car burning; that he put the fire out and went to a service station; and that he cut the burned place out because it was decided that the top would look better that way. However, he had told the officers on March 24 that he had noticed the top of his car burning while he was driving on Sunday, March 20; that on Monday he went to the service station and showed them the burned spot; and that they decided that the car would look better if the burned place was cut out. A service station man, testifying for the appellant, testified that the appellant came into the station on or about March 19, with a "burnt" place in his top; that they cut out the burned place; that they usually washed his car on Saturday, and he did not work on Sunday; that he washed the car on the day it was brought in with a burn in it; and that "I wouldn't swear to the date, no." While the matter was being investigated the officers had a talk with the appellant on March 24, 1955, and made an appointment with him for the next day. However, the appellant left San Diego on March 25 without keeping this appointment and was not seen again until he was located by the officers, apparently about a year later. In deciding the case the trial judge pointed out that the defendant's story on the stand as to how he got a burned place in the top of his car was unbelievable, and stated that he was convinced that in several other parts of his testimony the appellant had not told the truth. The appellant was also impeached by his admission on the stand that he had previously been convicted of attempted burglary. The evidence is amply sufficient to support the judgment.

The judgment is affirmed.

GRIFFIN and MUSSELL, JJ., concur.

147 Cal.App.2d 480

Samuel H. LASRY, Plaintiff and Appellant,

v.

Charles LEDERMAN and Benjamin Lederman, Defendants and Respondents.

Civ. 21746.

District Court of Appeal, Second District, Division 3, California.

Jan. 10, 1957.

Hearing Denied March 5, 1957.

Action for declaratory relief, an accounting, and other relief based upon an alleged agreement whereby the parties formed a partnership or joint venture for the purpose of purchasing, exploiting and reselling certain real property. From a judgment of the Superior Court of Los Angeles County, Clarence M. Hanson, J., tried to the court granting a motion of defendant for nonsuit, the plaintiff appealed. The District Court of Appeal, Shinn, P. J., held that the evidence established the existence of a joint adventure and that the granting of a nonsuit was error.

Judgment reversed.

1. Appeal and Error ⇐927(3)

Where defendants' motion for nonsuit was granted, evidence and reasonable inferences therefrom must be construed in the light most favorable to plaintiff on appeal.

2. Joint Adventures ⇐1.1

A "joint venture" is an undertaking by two or more persons jointly to carry out a single business enterprise for profit.

See publication Words and Phrases, for other judicial constructions and definitions of "Joint Venture".

3. Joint Adventures ⇐1.2

In a joint adventure, there must be a community of interest in the enterprise, a sharing of profits and losses, and joint participation in the conduct of the business.

4. Joint Adventures ⇐1.5

The existence of a joint venture depends upon the intention of the parties.

5. Joint Adventures ⇐1.4

A joint adventure may be created by an express agreement or its existence may be inferred from their acts and conduct.

6. Joint Adventures ⇐1.15

Evidence was sufficient to support a finding that a joint venture for purpose of acquiring, exploiting and selling a building was created by agreement of the parties.

7. Trial ⇐165

In ruling on a motion for nonsuit, trial court must assume the truth of the plaintiff's testimony.

8. Joint Adventures ⇐1.10

Where parties agreed to acquire, exploit and sell a building, fact that agreement was indefinite with respect to improvements necessary to place the property in satisfactory condition for occupancy would not defeat the creation of a joint adventure agreement.

9. Joint Adventures ⇐1.10

The law requires little formality in the creation of a joint venture and the agreement is not invalid because it may be indefinite with respect to its details.

10. Joint Adventures ⇐4(1)

If there was an agreement for a joint venture, parties assumed the status of fiduciaries and neither one would have a right while the agreement existed to acquire the subject property to the exclusion of others.

11. Frauds, Statute of ⇐56(9)

If testimony of plaintiff was sufficient to establish the creation of a joint venture for the acquisition and disposal of a building, the agreement, although oral, would be valid and such an undertaking would not be within the purview of the Statute of Frauds. West's Ann.Civ.Code, § 1091.

12. Trial ⇐165, 384

Rule that in ruling on a motion for nonsuit, the trial court must draw those inferences favorable to plaintiff even though opposing inferences could reasonably have been drawn, applies whether the trial is to the court or a jury, and the court

in such ruling may not consider the credibility of plaintiff's witnesses or weigh the evidence, but must assume the truth of the testimony.

13. Trial ⇐139(1)

A jury is the exclusive judge of the facts and the plaintiff has a right to have the jury pass upon the factual issues and to a favorable verdict if it would have adequate support in the evidence.

14. Trial ⇐384

In ruling on a motion for nonsuit in nonjury case, the trial judge must defer his decision though the evidence of the defendant will probably serve no purpose other than to bury a cause long since dead.

15. Trial ⇐165

In ruling on a motion for nonsuit, the trial court draws those inferences which it deems reasonable and rejects those it deems unreasonable.

16. Appeal and Error ⇐996

If reviewing court is in disagreement with respect to reasonableness of inferences the trial court has rejected on a motion for nonsuit and which leads to a different decision, reversal of judgment is required even if the reviewing court is of the view that the inferences drawn by the trial court are the more reasonable.

17. Trial ⇐384

The rule requiring a trial judge in a nonjury case in ruling on a motion for nonsuit to assume facts which may be contrary of what he believes them to be is accepted in California as a concomitant of the same rule in jury cases.

18. Joint Adventures ⇐5(3)

In action for an accounting under a joint adventure agreement to acquire and exploit and sell a building, tried to the court, granting of defendant's motion for nonsuit was error.

Albert E. Marks, Beverly Hills, for appellant.

Alfred S. Gainsley, Nathan April, C. Bernard Kaufman, Los Angeles, for respondents.

SHINN, Presiding Justice.

Plaintiff appeals from a judgment of nonsuit in an action for declaratory relief, an accounting, and other equitable relief, based upon an alleged oral agreement whereby plaintiff and defendants formed a partnership or joint venture for the purpose of purchasing, exploiting and reselling certain real property.

The complaint alleges that plaintiff and defendants entered into an oral agreement in September 1954 whereby they formed a joint venture for the purpose of acquiring title to a building at 11th and Santee Streets in Los Angeles; that each of the parties agreed to pay one-third of the purchase price for said building and that each should own an undivided one-third interest in the joint venture and its assets. It also alleges that during October 1954, without plaintiff's consent and contrary to said agreement, defendants purchased said building and acquired title thereto as tenants in common; that defendants paid $155,000 for the building, with a down payment of one-third of the purchase price, and a deed of trust for the balance. It further alleges that on October 22, 1954, plaintiff tendered to defendants the sum of $30,000 to cover one-third of the down payment and other incidental expenses in connection with the purchase of the building; plaintiff agreed to assume one-third of the obligation due under the trust deed; such tender and agreement were refused by defendants; and that defendants deny that plaintiff has any interest in the joint venture or in the building. Plaintiff alleges on information and belief that defendants have leased a portion of the building for occupancy and are collecting rentals, but that they refuse to account to him for said rentals. He also alleges that he has performed all of the conditions of said oral agreement, save as he has been prevented by defendants, and that he is ready, willing and able to perform those conditions whose performance has been pre-

vented by them. He further alleges that an actual controversy exists with respect to the rights of plaintiff and defendants under their oral agreement. The prayer is for a declaratory judgment that plaintiff and defendants entered into the joint venture and that the building is the property of the joint venture; that title to the building be conveyed to the joint venture; that plaintiff be ordered to pay to defendants one-third of the down payment and to assume one-third of the balance of the trust deed obligation; that defendants be required to account for all rentals and income received from the building, and that a receiver be appointed to take possession of the building and collect the rentals.

The answer admits that defendants purchased the building and hold title thereto as tenants in common. It denies all the other allegations of the complaint. It was pleaded, as a separate defense, that the alleged oral agreement was for the purchase and sale of an interest in real property and that there was no agreement or memorandum of an agreement subscribed by either defendant.

Trial was to the court. At the commencement of the trial defendants made a motion to exclude evidence on the grounds that the agreement was barred by the Statute of Frauds and that the complaint did not state a cause of action. Their motion was denied.

Plaintiff was the only witness. The following is the substance of his testimony. Defendants Charles and Benjamin Lederman are brothers and plaintiff had had previous business dealings with them. Around the 1st of September, 1954, plaintiff saw a sign in front of a vacant building at 11th and Santee Streets in Los Angeles indicating that the building was for sale. After obtaining information about the building from a real estate broker, he met defendants at their office on September 12th or 13th. The conversation which took place at that time is the basis of the alleged oral understanding between the parties. Without first disclosing the identity of the property, plaintiff told defendants that he had information about an unoccupied building which could be renovated, leased and eventually resold at a considerable profit. He told them it would be an excellent investment both for income and capital gain purposes and offered to take defendants in on a fifty-fifty basis. Defendants said that they preferred to go into the venture on a one-third basis. This was agreeable to plaintiff, who then divulged the location of the building and stated that it could be purchased for $175,000 or less. Benjamin Lederman said that the building had been offered to defendants during the previous year for over $300,000 and plaintiff then explained to them that the difference in price was due to the fact that the building was now completely untenanted. Defendants told him to buy the property at the best price for the three of them and each agreed to pay one-third of the purchase price. Plaintiff told defendants that the building was badly run down and would require the expenditure of a good deal of money before it would be suitable for leasing. He said it would be necessary to remodel, paint and decorate it; the elevator would have to be renovated and a new store front would have to be put in. Defendants each agreed to pay one-third of the cost of repairs and one-third of the operating expenses when requested to do so by plaintiff. Defendants told plaintiff to handle the repairs and the leasing of the renovated building himself. Plaintiff learned several weeks later that defendants had purchased the building for their own benefit. He saw defendants in their office on October 8th. Charles Lederman told him that he and his brother had bought the building so as to put it in the estate of the Ledermans. Plaintiff protested to defendants that they had violated their agreement. They did not deny this. Defendants told him that they paid only $155,000 for the building, with a down payment of only thirty percent, and that those terms were better than the terms which plaintiff had said he could obtain. On October 22nd plaintiff tendered defendants a check for $30,000, representing one-third of the down

payment on the building, and his estimate of one-third of the cost of repairs and one-third of the operating expenses until the building was completely leased and operating at a profit. Plaintiff told defendants that he would assume one-third of the remaining trust deed balance. The tender and agreement were refused. Charles Lederman told plaintiff that he had no claim whatsoever against defendants, but Benjamin told him that they would discuss the matter at a later time and that plaintiff would hear from them. When plaintiff heard nothing further from defendants he sent them a letter containing a formal demand.

Defendants' motion for a nonsuit was granted. The court ruled that, apart from the question of the Statute of Frauds, no joint venture had been created by the parties, that their September conversation amounted to no more than preliminary negotiations with a view to a later, more detailed agreement, and that the complaint did not state a cause of action upon any theory.

[1] The sole question presented on the appeal is whether the court erred in granting a nonsuit upon the ground that the evidence was insufficient to warrant a finding that the parties entered into a joint venture. Interpreting the evidence and the reasonable inferences therefrom in the light most favorable to plaintiff, we are persuaded that the court erred in granting defendants' motion.

[2–5] A joint venture is an undertaking by two or more persons jointly to carry out a single business enterprise for profit. Nelson v. Abraham, 29 Cal.2d 745, 749, 177 P.2d 931. There must be a community of interest in the enterprise; a sharing of profits and losses; and joint participation in the conduct of the business. (28 Cal.Jur.2d 478–480.) The existence of a joint venture depends upon the intention of the parties, Universal Sales Corp. v. Cal. etc. Mfg. Co., 20 Cal.2d 751, 764–765, 128 P.2d 665; it may be created by an express agreement or its existence may be inferred from their acts and conduct. Martter v. Byers, 75 Cal App.2d 375, 171 P.2d 101; Nelson v. Abraham, supra, 29 Cal.2d 745, 177 P.2d 931; 28 Cal.Jur.2d 484–486. As there was no evidence in the instant case of any acts or conduct from which the court could infer the existence of a joint venture, we must look exclusively to the oral agreement.

[6] The trial court expressed the conclusion that the oral understanding between the parties was no more than an agreement to enter into a joint venture at some future date on terms which would be mutually satisfactory to plaintiff and defendants. We are of the opinion that plaintiff's testimony, if believed, would support a finding that a joint venture for the purpose of acquiring, exploiting and selling the building was created by the September agreement. The parties agreed to purchase, renovate, lease and eventually resell the building in the expectation of substantial profit. Each was to have a one-third interest in the property and to share equally in the rentals and in the proceeds of a resale. Each was to contribute one-third of the purchase price and to share equally the expenses of renovation and operation. It is true that there were matters upon which they reached no agreement. Nothing was said respecting the terms of purchase or the cost of repairs. But plaintiff stated the building could be obtained for $175,000 and the parties knew that extensive repairs would be necessary to put the building in tenantable condition. Plaintiff testified that defendants authorized him to take care of the repairs and the leasing but this was merely collateral to the purchase of the property. If the parties understood they had reached no definite agreement for management of the property it would not necessarily follow that they did not reach an agreement to acquire it.

[7] In ruling upon the motion for nonsuit it was the duty of the court to assume the truth of the plaintiff's testimony that defendants accepted plaintiff's proposal without qualification or the proposal of any different or additional terms or conditions of the purchase. Since the inten-

tions of the parties would determine whether they entered into a joint venture it was necessary that the court draw inferences from their statements as related by plaintiff.

The court concluded that the parties merely discussed the advisability of a purchase, and intended to give the matter further consideration. Our question is not whether this was a reasonable inference for the court to draw. As to that we express no opinion. The inquiry is whether it was the only reasonable one. Plaintiff contends that the major objective was the purchase of the property, that the price of $175,000 was satisfactory to all parties, and that since no other terms of payment were discussed it was understood that the purchase price would be paid in cash unless better terms could be obtained. He contends it was understood that considerable sums would have to be spent to place the property in suitable condition for occupancy but that it was not the intention to defer the purchase until specific plans for renovation and improvements had been agreed upon. He points out that the agreement to purchase the property was unconditional and that he was to proceed to arrange for its purchase without any further meeting of the parties, and he argues that there was no understanding that there would be some further meeting or discussion with respect to the extent and cost of the improvements before the property was acquired.

[8, 9] It is true that the agreement to which plaintiff testified was indefinite with respect to the improvements that would be found desirable in order to place the property in satisfactory condition for occupancy. This, however, was a matter as to which agreement was not required before the property was purchased. It was something that might have required a considerable amount of study and the consideration of the needs of prospective tenants. If these were matters as to which the parties did not disagree the fact that they did not agree or attempt to agree on a definite plan of improvement would not render incomplete the agreement to engage in a joint venture. The law requires little formality in the creation of a joint venture and the agreement is not invalid because it may be indefinite with respect to its details. Andrews v. Bush, 109 Cal.App. 511, 293 P. 152; Replogle v. Ray, 48 Cal.App.2d 291, 119 P.2d 980; San Francisco Iron & Metal Co. v. American Milling, etc., Co., 115 Cal. App. 238, 1 P.2d 1008; 48 C.J.S., Joint Adventures, § 3, p. 818; 138 A.L.R. 968, 981.

[10] If there was an agreement for a joint venture the parties assumed the status of fiduciaries and neither one would have had a right, while the joint venture existed, to acquire the subject property to the exclusion of the others.

[11] If the testimony of plaintiff was sufficient to establish the creation of a joint venture the agreement, although oral, would be valid. Such an undertaking by joint adventurers is not within the purview of the Statute of Frauds. Coward v. Clanton, 79 Cal. 23, 21 P. 359; Bates v. Babcock, 95 Cal. 479, 30 P. 605, 16 L.R.A. 745; Koyer v. Willmon, 150 Cal. 785, 90 P. 135; Arnold v. Loomis, 170 Cal. 95, 148 P. 518; Scott v. Jungquist, 179 Cal. 7, 175 P. 412; Fitzgerald v. Provines, 102 Cal.App.2d 529, 227 P.2d 860. If there was no sufficient proof of the creation of a joint venture the agreement between the parties would have been invalid because it was not in writing. Mazzera v. Wolf, 30 Cal.2d 531, 183 P.2d 649.

If the court could reasonably have inferred that the parties agreed to acquire the property for $175,000 and that there was no understanding that the purchase would be conditional upon some future agreement as to terms, or the extent of desired improvements, it was the court's duty in ruling upon the motion for nonsuit to draw those inferences even though opposing inferences could reasonably have been drawn. That is the rule applicable to nonsuits.

[12–14] The rule is the same whether the trial is to the court or a jury. Goldstone v. Merchants' etc. Co., 123 Cal. 625, 56 P. 776; Archibald Estate v. Matteson, 5

Cal.App. 441, 450, 90 P. 723; Freese v. Hibernia Sav. etc. Soc., 139 Cal. 392, 73 P. 172. The court may not consider the credibility of plaintiff's witnesses or weigh the evidence. It must assume the truth of the testimony. It must draw all reasonable inferences from the evidence that are favorable to the plaintiff and reject those that are unfavorable. The wisdom of the rule in jury cases is obvious. The jury is the exclusive judge of the facts. A plaintiff has a right to have the jury pass upon the factual issues and to a favorable verdict if it would have adequate support in the evidence. It is not so clear that it is a wise rule in nonjury cases. It could well be argued that there is little purpose in requiring a trial judge to listen to a long, drawn-out defense when he is convinced the plaintiff has failed to prove a case. In theory, however, his mind must remain a blank with respect to the credibility of the witnesses and the weight of the evidence and the inferences until the case is submitted. This, of course, is pure fiction. He is not brought to consciousness of his convictions immediately upon submission of the case. But under the rule he must defer his decision although the evidence of the defendant will probably serve no purpose other than to bury a cause long since dead. If there is a reason for the rule which deprives the judge of the power to grant a nonsuit when he is convinced that the evidence of plaintiff is so unsatisfactory and unreliable as to make it his duty to render a judgment for defendant, other than the fact that it is the prevailing rule, 89 C.J.S., Trial, § 595, p. 396, it has escaped our attention. It is not necessarily the better rule.[1]

[15, 16] In the present case, as in many others, opposing inferences from the facts in evidence are possible. In ruling on a motion for nonsuit the trial court draws those inferences which it deems reasonable and rejects those it deems unreasonable. If the reviewing court is in disagreement with respect to the reasonableness of the inferences the trial court has rejected, and which would lead to a different decision, there is no alternative to a reversal of the judgment. And this is true even if the reviewing court is of the view that the inferences drawn by the trial court are the more reasonable.

Our purpose in discussing the nonsuit rule in nonjury cases is to further emphasize the limitations it places upon the powers of trial courts. It forbids the court to grant a nonsuit even though the plaintiff and his witnesses, although testifying to sufficient facts, are deemed unworthy of belief or their testimony unreasonable and

1. "When the trial is before a jury, the court cannot weigh the testimony upon a motion for a nonsuit, for the reason that it cannot weigh it at any time; but, when the trial is without a jury, the court must eventually weigh the testimony for the purpose of determining where the preponderance is, and there is no reason why it should not so weigh it at the earliest possible time, when the rights of the plaintiff will not be cut off by its so doing; and when the plaintiff has introduced all of his proof, and rested, no right of his will be cut off if the court then determines what has been proven. It cannot be presumed that plaintiff's case will be strengthened by the evidence put in by the defendant. If, when plaintiff had submitted his evidence, the defendant had rested without putting in any proof, it is clear that the court would have had to determine the questions of fact made by the pleadings upon a preponderance of the testimony. Hence, under the rule contended for by the appellant, the court might be put in the anomalous position of denying the motion for a nonsuit, and immediately thereafter, upon the refusal of the defendant to put in any proof, deciding the case in his favor. No good purpose could be subserved by refusing to a trial court the right to determine the law in the light of the evidence upon a motion for a nonsuit, the same as upon final submission. It was the right of the court, upon the motion for nonsuit, to decide as to the preponderance of the evidence; and it having decided that such preponderance was with the defendant, and there having been testimony to support such finding, the judgment rendered thereon must be affirmed." Lambuth v. Stetson & Post Mill Co., 14 Wash. 187, 44 P. 148, 149.

unreliable. It overlooks the fact that the trial judge is the judge of the facts as well as the law and suspends his power to decide questions of fact until final submission of the case. It often requires reviewing courts to reverse and remand causes for retrial when it is apparent that the judgment of nonsuit was rendered for the sole reason that the trial court deemed the evidence of the plaintiff insufficient to entitle him to any relief, and when there is no logical reason to anticipate that a retrial will result in a different judgment.

The case we are considering is of that class. The trial court, after considering the testimony of plaintiff, drew certain inferences as to the intentions of the parties. The question is whether the court could reasonably have drawn contrary inferences, or in other words, if defendants had submitted their case upon the evidence of plaintiff would a finding that the parties entered into a joint venture have had substantial support in the evidence. In answering that question a reviewing court would have to give full credit to the testimony of plaintiff and deduce therefrom the inferences most favorable to him.

[17, 18] The rule which requires the trial judge in a nonjury case, in ruling on a motion for nonsuit, to assume facts which may be to the contrary of what he believes them to be has been accepted in California without question as a concomitant of the same rule in jury cases. Statutory law requires it in the latter cases for the reason that the jury, and not the court, judges the facts. As applied to nonjury cases it is a court made rule but is nevertheless, for the present, at least, binding upon both trial and reviewing courts. And although we find no weakness in the logic of the Supreme Court of Washington which we have quoted, and again call attention to the rigors of the California rule, there is no alternative to application of the latter rule in the present case, and in all like cases.

The judgment is reversed.

PARKER WOOD and VALLÉE, JJ., concur.

147 Cal.App.2d 357

C. H. STEVENS, Plaintiff and Appellant,

v.

Vincent A. MARCO, Marco Industries Company, et al., Defendants and Respondents.

Civ. 21559.

District Court of Appeal, Second District, Division 2, California.

Dec. 31, 1956.

Hearing Denied Feb. 27, 1957.

Alleged inventor's action against individual to whom he had assigned rights on invention for patenting, manufacturing and commercial exploitation and another, for breach of contract and for alleged fraud in inducing him to release of rights and to execute accord upon allegedly false representation of conflicting existing patents. From a judgment of nonsuit rendered by the Superior Court of Los Angeles County, Harold C. Shepherd, J., the plaintiff appealed. The District Court of Appeal, Fox, J., held that evidence on issue of whether individual defendant had been guilty of fraud was for jury.

Judgment reversed.

1. Appeal and Error ⇐927(3)

In considering propriety of nonsuit, reviewing court must resolve every evidentiary conflict in plaintiff's favor, accepting as true all evidence adduced, direct or indirect, supportive of plaintiff's case and indulging in every legitimate inference which may be drawn from such evidence for plaintiff's benefit.

2. Appeal and Error ⇐927(3)

In considering propriety of nonsuit, reviewing court assumes as established all the evidence, and every proper intendment therefrom, favorable to plaintiff's causes of action.

3. Fraud ⇐64(3)

In alleged inventor's action against assignee of alleged invention, for alleged breach of assignment and royalty contract, and for alleged fraud, in breach of fiduciary duty in obtaining plaintiff's release of

rights upon allegedly inducing belief that his alleged invention was in conflict with existing patents, evidence on issue of whether such defendant had made fraudulent representations to plaintiff was for jury.

4. Fraud ⇐7

"Confidential and fiduciary relations" are, in law, synonymous and exist whenever trust and confidence is reposed by one in the integrity and fidelity of another.

See publication Words and Phrases, for other judicial constructions and definitions of "Confidential Relations" and "Fiduciary Relations".

5. Fraud ⇐7

When parties are so circumstanced or associated in business that one party must rely on good faith and integrity of other, fiduciary character of relationship may exist despite absence of blood relationship.

6. Fraud ⇐7

Where inventor entrusts his idea or device to another under arrangement whereby the other party agrees to develop, patent and commercially exploit the idea in return for royalties to be paid inventor, a confidential or fiduciary relationship arises between the parties making such other owe inventor duty of utmost good faith and fair dealing as one occupying status akin to that of a trustee.

7. Fraud ⇐64(5)

In alleged inventor's action, against assignee of alleged invention, for alleged breach of contract under which invention was patented by assignee, manufactured and exploited, and for alleged fraud in allegedly inducing inventor to release rights upon representation of conflict with existing patents, evidence on issue of whether parties had entered into a fiduciary relationship or arrangement similar to joint venture was for jury.

8. Fraud ⇐7

Where inventor and assignee entered into agreement for patent, exploitation and manufacture of invention, parties could have entered into fiduciary relationship regardless of whether it was expressly one of joint venture.

9. Joint Adventures ⇐4(1)

Fact that persons engaged in joint venture may quarrel or be at odds over business in which they are associated, or may even be involved in litigation with one another does not as a matter of law relieve them of fiduciary duties.

10. Patents ⇐183

One who has entered into fiduciary relationship with inventor under agreement to patent, manufacture and exploit the invention may not by fraudulently rescinding the agreement and obtaining inventor's release of rights abrogate the fiduciary relationship.

11. Patents ⇐183

Where one, under assignment agreement with inventor agrees to patent, manufacture and commercially exploit the invention, and has superior if not exclusive knowledge of facts relating to the matter, he is under fiduciary duty to disclose them in their entirety to inventor and failure so to disclose may amount to fraud. West's Ann.Civ.Code, § 1710, subd. 3.

12. Fraud ⇐17

Where relation of trust and confidence exists demanding that information communicated respecting subject of dealings between parties be full and complete, any concealment or misrepresentation will amount to fraud to entitle party injured thereby to an action. West's Ann.Civ.Code, § 1710, subd. 3.

13. Fraud ⇐21

Even when contracting parties are adverse to each other, either has right to rely on express statement made by other of an existing fact, the truth of which is known to the other and unknown to him. West's Ann.Civ.Code, § 1710, subd. 3.

14. Fraud ⇐22(1)

Where one is justified in relying, and does in fact rely, upon false representations his right of action is not destroyed merely because opportunities for examination or means of knowledge were open to him, where no legal duty devolved upon him

to employ such means of knowledge. West's Ann.Civ.Code, 1710, subd. 3.

15. Patents ⇐183

Where confidential relationship existed between inventor and assignee, under agreement for patenting, manufacturing and commercial exploitation of device and inventor had never seen contents of patent applications, he was entitled to rely upon assignee's representations regarding a conflict with other patents. West's Ann.Civ.Code, § 1710, subd. 3.

16. Fraud ⇐17

One who learns that his statements, even if he thought them to be true when made, have become false due to change in circumstances has duty, before his statements are acted upon, to disclose new conditions to party relying on his original representations.

17. Limitation of Actions ⇐195(5)

Under statute providing that cause for fraud does not accrue until discovery by plaintiff of facts constituting fraud, one claiming that statute has been tolled because of his ignorance of fraud must show when fraud was discovered, circumstances of discovery, what discovery was and why it was not discovered sooner, and fact that investigation would have revealed falsity of misrepresentation will not alone bar recovery. West's Ann.Code Civ.Proc., §§ 337, subd. 1, 338, subd. 4.

18. Limitation of Actions ⇐100(11)

Limitation for fraud commences to run only after one has notice of circumstances sufficient to make reasonably prudent person suspicious of fraud on inquiry, and when no duty is imposed by law to make inquiry and where, under circumstances, prudent person would not be put on inquiry, mere fact that a means of knowledge is open to him and he has not availed himself of it does not commence the running of limitation. West's Ann.Code Civ.Proc., § 338, subd. 4.

19. Limitation of Actions ⇐199(2)

In alleged inventor's action against assignee of invention for alleged fraud in allegedly inducing him to release rights upon representation that invention conflicted with existing patents, evidence on issue of whether his delay of seven years after executing release in finding out that patents had been issued to assignee was reasonable so that limitation did not commence to run against him prior thereto was for jury. West's Ann.Code Civ.Proc., § 338, subd. 4.

20. Accord and Satisfaction ⇐20
Release ⇐23

If assignee of rights on invention obtained accord and release of rights from inventor through fraudulent misrepresentations, such accord and release would not bar inventor's cause against assignee based on contractual claims.

21. Accord and Satisfaction ⇐26(1)
Release ⇐55

Where inventor and assignee of rights entered into confidential and fiduciary relationship, if assignee obtained an unconscionable advantage by execution of accord and release, a presumption would arise that they were obtained by fraud, placing burden upon an assignee, in action against him by inventor, of overcoming such presumption. West's Ann.Civ.Code, § 2235.

22. Accord and Satisfaction ⇐21
Release ⇐23

A rescission in pais of an accord and release, if they were fraudulently induced, would restore parties to their rights and obligations under contract before they were executed. West's Ann.Civ.Code, § 1691.

23. Limitation of Actions ⇐199(2)

In alleged inventor's action against assignee of invention for fraud in allegedly inducing him to release rights upon representation that invention conflicted with existing patents, evidence on issue of whether assignee engaged in constructive fraud so as to stop running of limitation on contract count was for jury.

24. Election of Remedies ⇐7(1)

In alleged inventor's action against assignee of invention for alleged breach of assignment contract and fraud in allegedly inducing him to release rights and sign accord upon representation that invention con-

flicted with existing patents, his dismissal of his cause of action for rescission of accord and release did not amount to an affirmance of those instruments and did not confine his action to damages for alleged fraud.

25. Patents ⇐183

Where individual assignee of inventor's rights on invention which he was to patent, market and commercially exploit transferred such rights to corporation which he subsequently formed and of which he was president and sole shareholder, corporation was chargeable with full notice of inventor's royalty interest, under agreement with individual assignee and took transfer of such individual assignee's rights and interests in invention subject to all claims and equities which inventor could assert against individual assignee.

J. Robert Maddox, Beverly Hills, for appellant.

John P. McGinley, Los Angeles, for respondent Marco.

Robert N. Gold, Beverly Hills, for respondent Marco Industries Co.

Loeb & Loeb, Herman F. Selvin, Los Angeles, for respondents.

FOX, Justice.

Plaintiff appeals from a judgment of nonsuit in an action in which he sought damages for breach of contract, fraud, money had and received and goods sold and delivered.

[1, 2] Under familiar rules of appellate procedure in considering the propriety of a nonsuit, we must resolve every evidentiary conflict in plaintiff's favor, accept as true all evidence adduced, direct or indirect, supportive of plaintiff's case and indulge in every legitimate inference which may be drawn from such evidence for plaintiff's benefit. Aguirre v. City of Los Angeles, 46 Cal.2d 841, 844, 299 P.2d 862; Singer v. Marx, 144 Cal.App.2d 637, 301 P.2d 440. In our statement of the record, the court assumes as established all evidence, and every proper intendment therefrom, favorable to plaintiff's causes of action.

In 1942, plaintiff was employed by Consolidated-Vultee Aircraft in San Diego, California, as an electrical engineer. He had never finished high school and was self-educated in his profession. In the middle of 1942, plaintiff's work was devoted to the design of the electrical systems installed in military aircraft. While so engaged, the idea occurred to him that various lights used in aircraft to indicate whether or not particular aeronautical equipment was functioning might give a false impression because of a burned out bulb. He conceived a device, which would be part of the indicator light assembly, by which the pilot could test the bulb and quickly determine whether it was defective.

Plaintiff had no experience with patents or patent applications but he was interested in having this device patented and commercially exploited. Plaintiff made a sketch of such a device and, through a friend named Wilford, was introduced to defendant Marco. He was told Marco had the facilities to develop and market the device. Marco was an attorney and an officer, stockholder and sales manager of the Searl Aero Industries, a corporation capable of manufacturing the indicator-light device in quantity. Marco told plaintiff that if Searl were given the sales and production rights he would obtain the necessary patent protection at no cost to plaintiff.

On July 15, 1942, the parties executed a written contract under which Marco agreed to proceed diligently with the engineering development of the light and to secure at his own expense and in his own name the necessary patent protection. Plaintiff agreed to assign to Marco all right, title and interest in the light as well as the exclusive right to patent, manufacture and sell the light in exchange for three percent interest in any patent, or, at plaintiff's election, in return for payment of 3% of the net sales price of all lights sold. Upon signing of this agreement, plaintiff assigned his interest in the light to Marco.

On February 13, 1943, the contract was modified in certain respects. The new contract recited (1) that patent applications had been filed in Marco's name; (2) that Marco would assign a 3% interest in the patent to plaintiff upon its issuance; (3) that Searl had been given an exclusive contract to manufacture the light and was authorized to pay plaintiff 3% of the net sales price. Plaintiff expressly warranted in the contract that Consolidated had no property rights in the light and agreed that if others claimed rights in the patent or an infringement, payment to him might be suspended until settlement of the dispute. On February 18, 1943, Marco filed an application for a patent on what was termed a "tell-tale and testing light."

In March, 1943, a question arose as to whether Consolidated had some interest in the light because of an invention agreement which plaintiff had previously signed with Consolidated. Marco went to San Diego to discuss the matter with an official of Consolidated and subsequently engaged in negotiations with Consolidated regarding the matter. On April 24, 1943, Consolidated sent Marco a waiver of "all right in and to the indicator light invented by C. H. Stevens."

Thereafter, Searl proceeded with the development of the light. Plaintiff actively assisted in the process of preparing a prototype and checked the reactions of pilots to the light in test flights. In June, 1943, Searl commenced production of the light. Certain companies, including one called Dial Light, were given sales licenses. In August, 1943, plaintiff received his first royalty check, and subsequent payments were remitted to him monthly.

On October 12, 1943, Marco filed a second application for a patent for what he described as a "signal light." In his statement accompanying the application, Marco described the invention as "of a generally similar nature to that constituting * * my copending application * * * upon which the present device constitutes an improvement." Marco never showed plaintiff either of the patent applications filed in his name. For convenience, these applications will be subsequently denominated Marco 1 and Marco 2, respectively.

In 1944, plaintiff informed Marco that he would like a new contract to be drawn. Marco acquiesced. Plaintiff employed an experienced patent attorney named Curtis to prepare the agreement. It was signed on March 9, 1944 So far as material, it recited that Marco was the inventor of the indicator light devices which were the subject of the two patent applications, that he owned an interest in, and controlled the business of Searl, a licensee of the invention, and that plaintiff had contributed valuable engineering services in their development which entitled him to compensation. It was therefore agreed that Marco would use his best business judgment and diligence in developing and selling the device and would pay plaintiff, on the fifteenth of each month, 3% of 95% of the gross selling price of the lights, including devices embodying this invention or improvements. The improvements would include all inventions by Marco or Searl during the life of the agreement, which was stated to be for the terms of the patents, if granted, or, if disallowed, for ten years thereafter. Plaintiff agreed to assign to Marco any improvements he might make on the light. Marco agreed to keep books of account showing sales which would be accessible to plaintiff.

After the execution of this agreement, an engineer named Fred Aves, who was employed by Searl, perfected a device known as a "light shutter and dimmer," a unit which could be attached to and used in combination with the signal lights on which Marco had made patent application. The device was assigned to Marco. On June 7, 1944, Aves applied for a patent on this shutter. Plaintiff testified he had no knowledge either of the Aves patent application or its ultimate issuance until 1953.

With the passage of time, the volume of sales increased beyond Searl's capacity to meet the demand. Thereupon Marco licensed Dial Light Co. to manufacture and

sell the light in the territory east of the Mississippi River and limited Searl's area of operations to the western part of the United States. Plaintiff was advised of this arrangement. Although he continued to receive royalties from Searl, plaintiff failed to obtain royalties from the Dial Light operation. He complained of this in a series of letters to Marco in the spring of 1945.

Plaintiff did a great deal of work in propagating acceptance and sale of the light. At Marco's request, plaintiff was successful in obtaining approval of the light by the Air Force, enabling it to be used on military planes and increasing its sales potential. Marco supplied plaintiff with an entertainment expense account, sample lights, and advertising material, and plaintiff went on sales tours for the purpose of soliciting orders for the light. He made one complete sweep of the aircraft industry on both the east and west coast pushing the sales of the indicator light.

On June 13, 1945, Marco wrote a letter to Stevens regarding the Dial royalties. The concluding part of this letter reads, in part as follows: "Another matter of great importance is that our patent attorneys have reported that conflicting patents exist between our panel light patents and a patent obtained and filed on January 25, 1938, and granted on March 5, 1940, Number 2192345. This patent has been assigned to one of the large light companies in 1940, who retained the property rights of the same. It might be that you have some views on this matter as no doubt this conflict will end in litigation very soon."

It will be recalled that prior to the time this letter was written Marco had filed three patent applications, two in his own name and the third in the name of Aves, although he was assignee thereof. Marco was represented by patent attorneys in Washington, D. C., one of whom was named Crammond. As the claims made for the various devices were processed through the Patent Offices, the patent examiners cited to Marco's attorneys various earlier patents relating to the subject matter of the applications either as examples of prior art or as possibly constituting a block with respect to approval of all the claims advanced. In addition, the Patent Office indicated that there was a misjoinder in Marco 1 and Marco 2 of unrelated inventions and required a separation between the claims relating to a pilot lamp system and those relating to the shutter. Various amendments to the claims were made by Marco's attorneys in their efforts to meet objections of the Patent Office and its rejection of particular claims.

With respect to the patent situation and the existence of the conflict referred to in Marco's letter of June 13, 1945, the record shows the patent alluded to in that letter was one issued to a certain Foute.[1] Sometime in June, 1945, Marco received from his patent attorney Crammond, a copy of a patent examiner's report on the Aves application. That report cited six patents as bearing on the Aves application, including the Foute patent. Marco testified he telephoned Crammond and discussed a possible conflict with the Foute patent. He testified that Crammond's view was that a conflict was "something that could be important, and that thing, that importance would not be determined until after the patent had been completely processed. * * *" Thereafter, Marco procured a copy of the Foute patent and discussed it with various persons, including Aves. Aves took little stock in the possibility that the Foute patent would be a block. In a letter written to the Commissioner of Patents on July 18, 1945, about five weeks after

1. The Foute patent had been assigned to the Drake Mfg. Co., manufacturers of panel lights. Marco testified he believed when he wrote to Stevens on June 13, that the Drake Company would protect its rights and that there would be litigation because of the Foute "conflict." At no time did Drake advise Marco of any infringement on the Foute patent nor did they ever initiate litigation of this nature.

Marco wrote Stevens of the Foute conflict, Crammond stated this view: "The Foute patent * * * does not appear to be particularly related to the devices of the claims. It relates merely to the method of mounting a base or socket on a tube."

We return to the sequence of events following plaintiff's receipt of the letter of June 13, 1945. Plaintiff did not reply to this letter. He testified that as a result of this letter a serious question arose in his mind as to whether the light was actually his invention rather than one which had been the subject of a prior patent. He feared also that a large light company would bring legal action against him. However, when he received a royalty check from Searl in July, he began to feel the situation was not as serious as he had imagined. Therefore, through his attorney Curtis, he wrote Marco on July 18, 1945, requesting an accounting of the Dial Company royalties, which he had not received.

As matters developed, however, despite the fact that Searl continued to manufacture and sell lights, plaintiff failed to receive royalties from Searl either in August or September. Instead, in the latter part of September, Marco served him with a written notice of rescission dated August 31, 1945. After first reciting the contractual arrangements between the parties, the document, signed by Marco, states:

"Whereas, notice has been given to the undersigned, Vincent Anthony Marco, of an existing conflicting patent obtained and filed on January 25, 1938, granted March 5, 1940, Patent No. 2,192,345, embodying the basic claims and principles of the Indicator Light, the sole rights to which were assigned by you to the undersigned, and upon which you, C. H. Stevens, made warranty that no other person or Company had a property right in and to said device:

"Now, therefore, you, C. H. Stevens, are hereby notified that the undersigned, Vincent Anthony Marco, hereby renounces, repudiates and terminates any and all agreements heretofore entered into by and between you and the undersigned, and particularly the agreements of July 15, 1942, February 13, 1943, March 1, 1943, and March 9, 1944; that the undersigned hereby abandons any position as assignee, licensee, or patentee under any of the agreements aforementioned; that the undersigned renounces any and all protection, if any, of any assignments or licenses given by you to the undersigned; that the undersigned hereby refuses to make any further payments as royalties or payments on patent interests or interest in net sales as included in said agreements aforesaid.

"You are further notified that the undersigned, Vincent Anthony Marco, gives you this notice for the reason that it now appears that you had no authority to assign to the undersigned any right, title or interest in and to the Indicator Light covered by the agreements by you mentioned; that you had no right to license the exclusive manufacture and sale thereof; that the warranties expressly stated and made by you in the agreement of February 13, 1943, and impliedly stated in all other agreements entered into by and between you and the undersigned have been breached; that the assignments and licenses heretofore made by you to the undersigned are invalid and void, and that the consideration for any and all agreements made between you and the undersigned concerning the exclusive manufacture and sale of the said Indicator Light has failed.

"You are further notified that the undersigned no longer recognizes the binding force of any agreement between you and the undersigned concerning the manufacture and sale of said Indicator Light, and will hereafter conduct himself in hostility to and in defiance of all agreements heretofore entered into between you and the undersigned, and that the undersigned declares that he is freed and discharged from any liability or obligation of making any further payments hereafter as royalty, patent interest, or interest in net sales under any of the agreements aforementioned."

Plaintiff testified this letter induced in him the belief that he had sold Marco "a bill of goods," that his idea infringed a prior patent, that no patent would therefore be obtainable since his idea was not original. Believing he would be sued, plaintiff recorded a declaration of homestead.

On October 11, 1945, plaintiff and his attorney Curtis met in San Diego with Marco and his lawyer for a conference on the matter of the Dial royalties. Marco informed plaintiff that the Army and Navy had stopped payment of the Dial royalties and that he would be paid when the funds were released. The discussion then turned to the patent conflict. Marco had a copy of the Foute patent and stated "that he was unable to perform under the contract, he couldn't make them [the lights] if there was an infringing patent." Marco offered to let Curtis examine the patent but the latter refused, stating that the meeting was called solely to discuss the Dial royalties, and that Marco would have to perform regardless of a patent conflict. The interview became stormy and Curtis advised plaintiff to sue Marco. Plaintiff testified he did not accept Curtis' statement that he had a cause of action against Marco because he did not believe Marco could perform under the contract. He also relied on Marco's statement that he would be paid the Dial royalties upon their release.

After the meeting of October 11, 1945, the parties had no further contact until June 26, 1946. Plaintiff had been apprised that the impounded Dial royalties were released and on that day he came to Marco's office to collect his share. He was accompanied by his employer, Ralph Wilford. At this meeting plaintiff was paid the sum of $2,764.99 by Marco. Thereupon, plaintiff executed an accord and satisfaction. At the same time plaintiff signed a printed form entitled "Release of All Demands" the effect of which was to release and discharge Marco from every character of obligation due plaintiff. Plaintiff offered evidence of what was said at this meeting for the purpose of showing fraudulent misrepresentations made by Marco at the time these instruments were executed. This evidence was excluded on the ground that plaintiff's complaint did not plead the making of, or his reliance on, any fraudulent representations subsequent to August 31, 1945.

Plaintiff testified that at the time he signed the release and accord and satisfaction and thereafter until 1953, he reposed trust in Marco and entertained the belief that there was an existing patent in conflict with his idea for an indicator light, that he would probably be sued by the large company that owned the conflicting patent and that by signing the release he would be free from any litigation as a result of having sold Marco "a no good idea." Plaintiff testified that Marco had represented at the meeting of October 11, 1945, that if there was an infringement he could no longer manufacture lights and when that meeting broke up plaintiff stated he felt Marco could no longer perform under the agreement.

Marco had continued during this time to prosecute all three patent applications, which were finally granted in 1947. Warren Jessup, a patent attorney, testifying as an expert, examined the official file wrapper containing all action taken with respect to the above applications. He stated that with respect to Marco 1, the file showed that by February 14, 1946, the patent examiner indicated he would allow some of the claims. Indication of allowance of claims by the patent examiner in Marco 2 appeared as early as February 20, 1946. Marco 1 was passed for issue of a patent on October 30, 1946. Marco 2 was passed for issue on June 16, 1947, while the Aves' application was passed for issue on December 6, 1946. However, at Marco's request, issuance of the patents was deferred until July 29, 1947, at which date all three patents were simultaneously issued.

In Jessup's opinion, the Foute patent was not in conflict with either of the Marco applications, nor with the Aves application. Jessup testified that the contents of a patent application are secret and not a matter of

public record. After it has issued the patent is available to the public.

Marco testified that although he believed there was a conflict between the Foute patent and the Aves application on June 13, 1945, that was not his belief one year later, when plaintiff signed the release, because that matter had been resolved in the meantime. He also testified that he never believed there was a conflict between Marco 1 or Marco 2 and the Foute patent as to the individual elements, exclusive of the head, set forth in those applications. By the time plaintiff signed the release Marco knew there was no longer any danger of infringement litigation.

In 1947, defendant Marco Industries Co. was formed by Marco, who was then its president and sole stockholder. In December of that year, a license agreement between Marco and the corporation was executed, by which Marco assigned the three patents to the corporation and gave it the right to manufacture and sell the indicator light west of the Mississippi. Marco's royalty was originally 10% of the sales, but subsequently a new agreement was made by which Marco transferred the patents to the company for the sum of $300,000, payable in installments until 1963. At the time this action was tried, the gross sales of the lights amounted to over $4,000,000.

By the end of 1945, plaintiff had dissociated himself from the aircraft industry From October, 1945, to 1948, he worked in a wholesale appliance business in San Diego. After a short interlude as a salesman, plaintiff became special agent for an insurance company in San Diego and continued in that occupation until he filed his complaint. From the time he signed the accord and release, plaintiff had no further contact with Marco until about 1953. During the intervening years he testified he had no information that any patents were granted or that Marco, Searl, Dial or any other defendant was manufacturing the indicator lights nor did he have knowledge of circumstances that would rouse his curiosity. He made no inquiries during this period about the Foute patent.

In February, 1953, plaintiff attended a public display of aircraft equipment in San Diego. In examining the folders and catalogues at the exhibit, he read about indicator lights being produced by the Marco Industries Company under three patent numbers. The accompanying statement asserted: "Over 3,000,000 lights manufactured." That was the first time plaintiff became aware that patents had been granted. Two weeks later, he obtained copies of the three patents mentioned in the folder and the Foute patent. He then engaged patent attorneys to compare the patents. He was advised that they didn't see any conflict between the patents. On August 25, 1953, plaintiff served upon defendants a notice of rescission of the release and the accord. This action was filed on October 2, 1953.

The original action was framed in six counts. At the outset of the trial plaintiff elected not to proceed on count one (to enforce a rescission of the accord and the release) and count three (for declaratory relief).

Count two was an action at law for damages for breach of the agreements between plaintiff and Marco.

Count four was an action for damages based on fraud in inducing plaintiff to believe the lights could no longer be manufactured or sold, thereby inducing him to execute the release and accord. The misrepresentations alleged were (1) the portion of Marco's letter of June 13, 1945, previously quoted, and (2) the notice of August 31, 1945, in which Marco wrote plaintiff: "That there was an existing, conflicting patent obtained and filed on January 25, 1938, granted March 5, 1940, Patent No. 2,192,345 (hereinafter referred to [as] Foute Patent) embodying the basic claims and principles of said indicator light embodying a bulb-testing device, and that as a consequence thereof the said Vincent A. Marco renounced, repudiated and terminated any and all agreements."

Counts five and six were for money had and received and for goods sold and delivered, respectively.

To this pleading defendants responded with an answer which, in addition to denials, interposed the affirmative defense of limitations, Code Civ.Proc., secs. 338(4) and 337(1), laches, compromise, accord and satisfaction and release.

At the close of plaintiff's case, judgment was entered in favor of Mrs. Marco with plaintiff's acquiescence. Marco moved for a nonsuit based on (1) insufficiency of the evidence; (2) the bar of the statute of limitations, 338(4); (3) plaintiff's knowledge of the facts allegedly constituting false representations; (4) lack of a confidential relationship; (5) plaintiff's inexcusable failure to investigate the facts presented to him; (6) no evidence of concealed fraud or fiduciary relationship. (Laches was withdrawn.) A motion for nonsuit in behalf of Marco Industries was also made on all above grounds, including lack of privity of contract.

Both motions were granted without limitation as to the ground.

[3] Defendant's argument in support of the order of nonsuit is essentially structured on the following propositions: (1) that the release and the accord conclusively barred any cause of action on the contract; (2) that plaintiff failed as a matter of law to establish actionable fraud; and (3) that any relief, based on the alleged fraud, was barred by the statute of limitations. As these contentions are developed in the briefs with commendable vigor and exhaustive reference to the authorities, it is manifest that defendants honor more in the breach than in the observance the principles binding on an appellate court in reviewing a nonsuit. It is axiomatic that those principles require us to give plaintiff's evidence all the value to which it is legally entitled and to consider every inference which can reasonably be drawn tending to sustain plaintiff's case. It is from this perspective that we have stated the controlling facts and it is with this orientation that they must be evaluated. Measured by this standard, it is not to be doubted that there was substantial evidence favorable to plaintiff on the issue of fraud and misrepresentation, and that it was error to grant a nonsuit.

[4–6] One of the fundamental fallacies underlying defendant's position is the assumption that there was no confidential relationship between plaintiff and Marco, so that the presumptions and special rules of law which govern when that relationship exists are not here applicable. The facts and the law utterly belie this. "Confidential and fiduciary relations are, in law, synonymous, and may be said to exist whenever trust and confidence is reposed by one person in the integrity and fidelity of another." In re Estate of Cover, 188 Cal. 133, 143, 204 P. 583, 588. When the parties are so circumstanced or associated in a business transaction that one party must rely on the good faith and integrity of the other, the fiduciary character of the relationship may exist despite the absence of a blood relationship. Cox v. Schnerr, 172 Cal. 371, 378, 156 P. 509; Bank of America v. Sanchez, 3 Cal.App.2d 238, 243, 38 P.2d 787; Adams v. Talbott, 61 Cal.App.2d 315, 320, 142 P.2d 775. Plaintiff testified he trusted Marco implicitly and had confidence in his promises and representations. The record shows that plaintiff was the inventor of a novel device, as to which he had an inchoate privilege to apply for a patent. Golden State & Miners' Iron Works v. Angell, 89 Cal. 643, 27 P. 65; Hendrie v. Sayles, 98 U.S. 546, 25 L.Ed. 176; 35 U.S. C.A. § 33.* With the enconomic exploitation of his invention in mind, he disclosed this secret to Marco, who promised that if plaintiff transferred his interest therein to him, he would proceed to prosecute an application for a patent, manufacture and sell the device, and pay plaintiff a royalty on gross sales. It was further agreed in the contract of March 9, 1944, that plaintiff's royalties were to extend also to the sale

* Now 35 U.S.C.A. §§ 111, 112.

of devices which embodied any improvements Marco might make or acquire, while plaintiff agreed to assign to Marco any improvements he might make. Where an inventor entrusts his secret idea or device to another under an arrangement whereby the other party agrees to develop, patent and commercially exploit the idea in return for royalties to be paid the inventor, there arises a confidential or fiduciary relationship between the parties. See Hollywood M. P. Equipment Co. v. Furer, 16 Cal.2d 184, 188–189, 105 P.2d 299; Schaake v. Eagle Automatic Can Co., 135 Cal. 472, 485, 63 P. 1025, 67 P. 759; O'Hara v. Harman, 14 App.Div. 167, 43 N.Y.S. 556, 558; Reynolds v. Saco-Lowell Shops, D.C., 54 F. Supp. 109, 114. Indeed, it would be difficult to postulate a relationship more confidential than one in which a secret is imparted to a person professing to have the ability and facilities to develop, patent, and exploit it upon his promise to give the inventor a return in the form of royalties. In the instant case, the salutary character of such a rule is manifest. Plaintiff transferred to Marco a new and valuable idea and Marco assumed full responsibility for securing a patent. Since the processing of a patent application is secret, plaintiff could learn only what Marco cared to divulge about the progress of the Marco applications, as well as other applications on improvements, and he had of necessity, because of Marco's superior position in this respect, to repose a special confidence in Marco's integrity. In addition, since Marco was in charge of the marketing of the device, plaintiff had also to rely on his business judgment with respect to production, and on his fidelity with respect to keeping and furnishing honest accountings of sales. Here, too, Marco occupied a superior position. There was present, therefore, all the classic elements of a confidential relation, and Marco owed to plaintiff the fiduciary obligations of utmost good faith and fair dealing of one occupying a status akin to that of a trustee. As stated in Cox v. Schnerr, supra, 172 Cal. 371, 378, 156 P. 509, 513, "And this rule [of fiduciary obligation] does not apply merely to those who bear a formal relation of trust to those with whom they deal—not only to attorneys, physicians, trustees, clergymen, kinsmen, *and others who by the very force of their occupations or relationship are presumed to be in the class of persons bound to act with the utmost good faith. It applies in every case 'where there has been a confidence reposed which invests the person trusted with an advantage in treating with the person so confiding.'*" (Italics added.) Of like effect is Bradley Co. v. Bradley, 37 Cal.App. 263, 267, 173 P. 1011. The instant case is patently within the scope of such rule.

[7] Furthermore, the jury might also have found, as a matter of fact, that the parties were allied in an enterprise similar to that of joint venturers for mutual gain. The royalty agreements between the parties are not, as defendants contend, merely "a contract of assignment and sale." The last agreement of the parties, executed on April 9, 1944, plainly indicates that Marco was to exploit and develop the use of the patents for their joint profit and that any subsequent improvements made by either would accrue to their mutual benefit. At Marco's request, plaintiff traveled all over the country and engaged in extensive publicity, sales and demonstrational work in behalf of the light. Bearing these factors in mind, the case of Universal Sales Corp. v. California Press Mfg. Co., 20 Cal.2d 751, 128 P.2d 665, 673, while not in all respects similar, is most didactic. In that case, defendant developed a particular machine which was still in an experimental stage. Defendant sold this machine to plaintiff, who was under no obligation to pay if the machine did not function adequately. The contract also provided that in consideration of the purchase of the machine and demonstration of its advantages by plaintiff, defendant agreed to pay plaintiff 20% of the gross selling price it received from further sales of the machine. Plaintiff agreed to foster the sale of the manufactured machine. Defendant also agreed to endeavor to patent the machine and agreed that plaintiff would have a 20%

interest in such patent—and in any improvements thereon that might be thereafter made by either party. Plaintiff was to bear 20% of the cost of prosecuting the patents. Thereafter, plaintiff assisted in creating a market for this machine. In construing the contract to ascertain the relationship of the parties, the trial court found, among other things, that the contract was a mutual agreement of the parties to work together and pool their inventive ideas in an endeavor to perfect the machine. The Supreme Court commented as follows on this question: "In other words, the defendant, having the facilities for the manufacture of machinery, desired the benefit to be derived in experimentation with the press incident to continuous milling operations and the plaintiff undertook to contribute to the venture practical demonstration of the mechanism under the direction of experienced employees, and to do advertising and promotion work for the purpose of creating a market for an efficient pellet-producing machine. This cooperation promotive of the common enterprise and involving the combination of the skill and efforts of both the plaintiff and the defendant suggests that the parties intended to establish a contractual relationship between themselves akin to that of joint adventurers. Further indication of this purpose is the royalty clause of the agreement referable to the plaintiff's share of the gross proceeds of sales of presses *based upon* the original model, *whether such sales be negotiated by the plaintiff or the defendant,* and the clause relating to the respective interests of the parties in any patent of the machine and *'any improvements thereon that may be thereafter made by either party.'* While in a technical joint venture there is usually a sharing of profits and losses in the prosecution of the common enterprise [citation], the mode of participating in the fruits of the undertaking may be left to the agreement of the parties. [Citation.] Whether the parties to a particular contract have thereby created, as between themselves, the strict relation of joint adventurers or some other relation involving cooperative effort, depends upon their actual intention, which is determined in accordance with the ordinary rules governing the interpretation and construction of contracts."

[8] In the instant case, since plaintiff and Marco agreed that each would provide the other with the benefits of any improvements, since plaintiff's royalties were based not only on his original idea but on sales of the device embodying improvements made by either party, since plaintiff participated actively and energetically in the venture by sales and promotional work and contributed generously of his time and his contacts to further the acceptance of the light in civilian and military aircraft circles, there was substantial evidence on which the jury might find a cooperative undertaking of the parties founded on a fiduciary relationship. In Pacific Atlantic Wine, Inc., v. Duccini, 111 Cal.App.2d 957, 964, 245 P.2d 622, 626, it is stated: "It is clear that the main purpose of the April, 1935, contract between the plaintiff and the defendants was to provide for the development of the glass spray apparatus to the point of its effective use and operation and then to exploit it commercially by manufacturing and selling it or licensing others to manufacture and sell it. That constituted the parties joint adventurers." It is not necessary to precisely define the relationship thus created as one of joint venture in order to hold it to have created a fiduciary relationship. This is clearly pointed out in Nelson v. Abraham, 29 Cal. 2d 745, at page 750, 177 P.2d 931, at page 934, where the court stated: "It is, however, unnecessary to place a precise legal designation on the relationship between the parties. The present controversy is between the parties to a contract by which the plaintiff admittedly became entitled to a one-third share of the net profits from operation without acquiring an interest in the business. The oral agreement and the conduct of the parties thereunder, considering the nature of the undertaking and the surrounding circumstances, define their respective rights, liabilities and duties one

to the other without the necessity for designating their relationship by a particular label." At page 751 of 29 Cal.2d, at page 934 of 177 P.2d, the court further remarks: "The one who is entrusted with the rights of another is charged with the duty of guarding those rights with the utmost good faith."

[9-10] Further discussion would only be a belaboring of the obvious fact that there was a substantial evidentiary basis for finding that the relationship between plaintiff and Marco was a confidential and fiduciary one. As stated in Sime v. Malouf, 95 Cal.App.2d 82, 95, 212 P.2d 946, 953, 213 P. 2d 788, "Defendants quite understandingly endeavor to escape the responsibilities of fiduciaries rather than to justify their conduct." Marco cannot, in this case, be held to a less exacting standard than that of a fiduciary. Nor can he take advantage of his fraud, the existence of which will be subsequently developed, to disclaim the continuation of a fiduciary relationship following his assumption of a hostile attitude towards plaintiff. "The fact that persons engaged in a joint venture may quarrel or be at odds over the business in which they are associated, or may even be involved in litigation with one another, does not as a matter of law relieve them of their fiduciary duties [citations]. * * * The successful consummation of a fraud would be a relatively simple matter if the mere negation of the agreement, or the provocation of strained relations, were sufficient to exempt one joint adventurer from his duty of highest good faith to his associates." Sime v. Malouf, 95 Cal.App.2d at pages 97, 98, 212 P.2d at page 955, supra. Here, Marco was at all times the custodian of plaintiff's secret invention; he continued to prosecute the patent applications; and at all times he continued to manufacture, sell and profit from the device plaintiff had conceived. It was his bounden duty, therefore, to act with the integrity and probity of a fiduciary during such time in relation to plaintiff.

Against this background we turn now to a consideration of the evidence bearing on the question of Marco's fraud, overreaching and abuse of confidence in the transactions between the parties.

[11, 12] In his letters to plaintiff, Marco represented that it had been reported to him that a "conflicting patent exists between our panel light patent" and the Foute patent and that this conflicting patent embodied "the basic claims and principles of said indicator light embodying a bulb testing device." However, as the record shows, the Foute patent was not cited in connection with Marco 1 or Marco 2, which embodied plaintiff's basic idea, but solely in connection with the Aves application, of which plaintiff testified he had no knowledge. Marco had seen the patent examiner's report citing Foute in connection only with the Aves application. The record is barren of any evidence suggestive of a conflict between Foute and Marco 1 or 2, the only applications of which plaintiff was aware, and according to which design many of the lights were being manufactured. Knowing his information related only to the Aves application, Marco failed to disclose this fact to plaintiff. His statements to plaintiff that Foute conflicted with "our panel lights" and that it conflicted with plaintiff's idea of an indicator light embodying a bulb testing device were clearly false representations. In Gillespie v. Ormsby, 126 Cal.App.2d 513, 527, 272 P.2d 949, 958, this court stated that "in dealing with the question of false representations, * * one who speaks is not only obligated to tell the truth but he is equally bound not to suppress or conseal any facts within his knowledge which materially qualify those stated [citations]." Having suppressed the fact that the only possible conflict was between Foute and Aves, Marco created the impression that plaintiff's idea was not patentable, and that further manufacture of the lights in the face of such conflict would be an infringement. Having superior, if not exclusive, knowledge of all the facts, Marco was bound to disclose them in their entirety so that plaintiff would fully and accurately understand the actual state of affairs. Where a relation of trust and confidence exists demanding that information

communicated respecting the subject of dealings between parties be full and complete any concealment or misrepresentation will amount to fraud sufficient to entitle the party injured thereby to an action. Kruse v. Miller, 143 Cal.App.2d 656, 300 P.2d 855; Sime v. Malouf, supra, 95 Cal. App.2d 82, 101, 212 P.2d 946, 213 P.2d 788; Vance v. Supreme Lodge of the F. B., 15 Cal.App. 178, 182–183, 114 P. 995. Section 1710(3) of the Civil Code is a statutory expression of this principle.

Marco argues that since the Aves shutter was an "improvement" it was a part of the indicator light within the meaning of the contract between the parties. We need not concern ourselves with whether or not this is technically correct under the law of patents. What is here crucial is the fact that Marco deliberately created the impression, by suppressing the fact that it was only in relation to Aves' so-called improvement that the Foute patent was cited, that plaintiff's basic idea for an indicator light was not patentable. This especially appears from the letter of August 31, 1945, referring to a conflict between Foute and plaintiff's idea of a device embodying a bulb testing device. From the record the jury could find that Marco never honestly entertained the belief that Foute conflicted with plaintiff's basic idea, a finding that would be buttressed by the fact that he never interrupted his manufacture of the light embodying plaintiff's invention.

[13, 14] Because of the confidential relationship between them and since plaintiff had never seen the contents of Marco's patent applications (which were exempt from public scrutiny) plaintiff was entitled to rely on Marco's tendentious representations regarding a conflict. "Even when contracting parties are adverse to each other, either has the right to rely upon an express statement made by the other of an existing fact, of which the truth is known to the other, and unknown to him." Calmon v. Sarraille, 142 Cal. 638, 642, 76 P. 486, 488. Furthermore, where one is justified in relying, and does in fact rely, upon false representations, his right of action is not destroyed merely because opportunities for examination or means of knowledge were open to him where no legal duty devolved upon him to employ such means of knowledge. Teague v. Hall, 171 Cal. 668, 671, 154 P. 851; Blackman v. Howes, 82 Cal. App.2d 275, 279, 185 P.2d 1019, 174 A.L.R. 1004. It is noteworthy that Jessup testified that as an expert in patent law he could not tell whether the Foute patent conflicted with Marco's patent applications without having before him copies of both the patent and the applications. In 1945 and 1946, plaintiff never was shown the latter and they were unavailable to him from official sources since their contents were secret.

[15, 16] But the record contains other substantial and impressive evidence of fraud in the form of Marco's deliberate concealment of extremely significant facts which reached him subsequent to his repudiation of the contract and which eliminated any doubt that plaintiff's device was patentable. As early as February, 1946, the patent examiner indicated that he would allow some of the claims made with respect to Marco 1 and 2. A legitimate inference is that Marco was so informed by his patent attorney within a reasonable time. Marco himself testified that before plaintiff executed the accord and the release he was was possessed of knowledge that none of the patent applications conflicted with Foute and that there would be no litigation. Having with great alacrity purported to repudiate his contractual obligations towards plaintiff because of an alleged patent conflict and the threat of an infringement action, elementary business ethics, no less than a strict code of behavior exacted of a fiduciary, required Marco to disclose to plaintiff these changed circumstances, this altered state of his knowledge, prior to the execution of the accord and the release. " 'Deceit may be negative as well as affirmative; it may consist in suppression of that which it is one's duty to declare, as well as in the declaration of that which is false.' " Gillespie v. Ormsby, 126 Cal.App.2d 513, 527, 272 P.2d 949, 958. In his work on Torts (2d ed.), Dean Prosser states: "One

who has made a statement and subsequently acquires new information which makes it untrue or misleading must disclose such information to anyone whom he knows to be still acting on the basis of the original statement." (P. 534.) Section 551(2) of the Restatement of Torts reads: "One party to a business transaction is under a duty to exercise reasonable care to disclose to the other before the transaction is consummated * * * (b) any subsequently acquired information which he recognizes as making untrue or misleading a previous representation which when made was true or believed to be true." Comment (f) relating to clause 2(b), supra, states: "One who having made a representation which when made was true or believed to be so remains silent after he has learned that it is untrue and that the person to whom it is made is relying upon it in a transaction with him is morally and legally in the same position as if he knew that his statement was false when made." It is the prevailing law that one who learns that his statements, even if thought to be true when made, have become false through a change in circumstances, has the duty, before his statements are acted upon, to disclose the new conditions to the party relying on his original representations. Childress v. Nordman, 238 N.C. 708, 78 S.E.2d 757, 761; Chilson v. Houston, 9 N.D. 498, 84 N.W. 354; Porter v. Beattie, 88 Wis. 22, 59 N.W. 499; McGinn v. McGinn, 50 R.I. 236, 146 A. 636, 638. Had Marco furnished the information to plaintiff that the Foute patent was not a conflicting one and that the threat of legal action had disappeared, it would have rectified the impression which his earlier statements had created. There is no record that Marco ever gave this information to plaintiff and a jury would be entitled to infer plaintiff signed the accord and release in ignorance of the truth, which Marco studiously concealed from him. Why else would plaintiff discharge Marco from the valuable rights owed him under the contract, but for the fact that Marco failed to undo the misapprehension engendered by his representations, and by his silence and concealment perpetuated in plaintiff the delusion that his invention infringed on an earlier patent and that litigation was the anticipated result.

[17] In light of the facts and the controlling law, plaintiff established a prima facie case of actionable fraud. Marco contends, however, that such an action is barred by the statute of limitations. Code Civ.Proc., sec. 338(4). He relies on the fact that plaintiff made his alleged discovery of the fraud some seven years after he signed the accord and the release by "getting a copy of the Foute patent and examining it." He contends plaintiff "could and should have done exactly the same thing seven years before." However, Marco ignores the fact that seven years later plaintiff, having learned of the issuance of the patents, was able for the first time to compare the Foute patent with the Marco and Aves patents, whose contents he had never previously seen, and as a result of such comparison he was able to discover the fraud. Section 338(4) provides that a clause of action for relief on the ground of fraud is not to be deemed to have accrued until the discovery by plaintiff of the facts constituting the fraud. To come within the purview of this section, one who claims that the statute has been tolled because of his ignorance of the fraud must show when the fraud was discovered, the circumstances of the discovery, what the discovery was and why it was not discovered sooner. Hobart v. Hobart Est. Co., 26 Cal.2d 412, 437–438, 159 P.2d 958; Tognazzini v. Tognazzini, 125 Cal.App.2d 679, 687, 271 P.2d 77; Mortimer v. Loynes, 74 Cal.App.2d 160, 171, 168 P.2d 481. The fact that an investigation would have revealed the falsity of the misrepresentations will not alone bar recovery. Hobart v. Hobart, supra; Schaefer v. Berinstein, 140 Cal.App.2d 278, 294, 295 P.2d 113, 124.

[18] The applicable law has been well expressed recently in the Schaefer case, supra (hearing denied): "The statute commences to run only after one has notice of circumstances sufficient to make a reason-

ably prudent person suspicious of fraud, thus putting him on inquiry. 'Where no duty is imposed by law upon a person to make inquiry, and where, under the circumstances, "a prudent man" would not be put upon inquiry, the mere fact that means of knowledge are open to a plaintiff, and he has not availed himself of them, does not debar him from relief when thereafter he shall make actual discovery. The circumstances must be such that the inquiry becomes a duty, and the failure to make it a negligent omission.' Tarke v. Bingham, 123 Cal. 163, 166, 55 P. 759, 760.

"In many cases it has been said that means of knowledge are equivalent to knowledge. This is true only where there is a duty to inquire, as where plaintiff is aware of facts which would make a reasonably prudent person suspicious. Lady Washington C. Co. v. Wood, 113 Cal. 482, 45 P. 809. Where there is a duty to investigate, the plaintiff may be charged with knowledge of the facts which would have been disclosed by an investigation; but where there is no prior duty to investigate, the statute does not run until he has notice or knowledge of facts sufficient to put a reasonable man on inquiry. 'In the absence of a duty to make inquiry, as pointed out above, the statute does not run merely because the means of discovery were available, and plaintiff is not compelled to disprove that such means existed. He need only establish facts sufficient to show that he made an actual discovery of hitherto unknown information within three years before the filing of the action. * * * The requirement that plaintiff show what information he received or what suspicious facts came to his notice is imposed in order that the court may determine whether or not the discovery was made within the time alleged, that is, whether plaintiff actually learned something he did not know before.' Hobart v. Hobart Estate Co., 26 Cal.2d 412, 442, 159 P.2d 958, 974. * * *

"In cases involving confidential relationships, the rule requiring allegations stating the circumstances which are relied upon by the plaintiff as excusing prior discovery of the fraud is relaxed. Bainbridge v. Stoner, 16 Cal.2d 423, 430, 106 P.2d 423. In Hobart v. Hobart Estate Co., 26 Cal.2d 412, 159 P.2d 958, 973, the court points out that it is recognized that in cases involving a fiduciary relationship 'facts which would ordinarily require investigation may not excite suspicion, and that the same degree of diligence is not required.' [Citations.]"

[19] From the evidence, we cannot hold as a matter of law that any of the circumstances known to plaintiff should have put a reasonably prudent person on inquiry. This is usually a question of fact. Neet v. Holmes, 25 Cal.2d 447, 467, 154 P.2d 854; Schaefer v. Berinstein, supra, 140 Cal.App. 2d at page 294, 295 P.2d 113; Dabney v. Philleo, 38 Cal.2d 60, 66, 237 P.2d 648. The record shows that Marco's fraudulent concealment induced plaintiff to execute a release at a time when he believed Marco's statements, had faith in his integrity, and did not have the full means of investigation open to him. Having executed such release, plaintiff dissociated himself entirely from the aircraft industry, entered a new line of business, had no further contact with Marco, and, presumably because of his confidence in Marco, made no further inquiry as to the facts. The facts are not such as to make imperative a duty of continuous investigation or inquiry as the only reasonable course to be taken consistent with the exercise of ordinary prudence and judgment. Sears, Roebuck & Co. v. Blade, 139 Cal.App.2d 580, 589–591, 294 P.2d 140; Dabney v. Philleo, supra. It was a question for the jury to determine whether plaintiff's delay was reasonable and excusable. It is not a question we can decide as a matter of law on these facts. The case of Sibert v. Shaver, 111 Cal.App.2d 833, 245 P.2d 514, involving the assignment of patent rights between parties standing in a confidential relationship is deserving of reference in this context.

[20–22] In the light of the various aspects of the case to which we have alluded, it is also clear that the accord and the release do not constitute a bar to appellant's

cause of action at law upon his contractual claims. In view of the confidential relationship, and the fact that Marco obtained an unconscionable advantage by their execution, a rebuttable presumption arises that they were obtained by fraud, Civ.Code, sec. 2235; Roeder v. Roeder, 118 Cal.App. 2d 572, 580, 258 P.2d 581; Chung v. Johnston, 128 Cal.App.2d 157, 164, 274 P.2d 922, and the burden was upon Marco of overcoming such presumption of fraud which arises by operation of law. Roeder v. Roeder, supra; Chung v. Johnston, supra; Highland Park Inv. Co. v. List, 27 Cal.App. 761, 763, 151 P. 162. Furthermore, the evidence shows that after discovering the fraud, plaintiff proceeded to rescind the accord and release. Civ.Code, sec. 1691. Such a rescission *in pais* annulled those documents and restored the parties to their rights and obligations under the contract. Bowman v. Victor, 83 Cal.App.2d 693, 699, 189 P.2d 876; Loaiza v. Superior Court, 85 Cal. 11, 31, 24 P. 707, 9 L.R.A. 376.

[23] Although urged below, no contention is made on appeal that these contractual rights (counts 2 and 5) are barred by limitations. In the light of evidence of Marco's concealed fraud, such a defense cannot prevail as a matter of law. Sears, Roebuck & Co. v. Blade, 139 Cal.App.2d 580, 294 P.2d 140.

[24] There is no merit to Marco's contention that plaintiff's dismissal of his cause of action for rescission of the record and release amounted to an affirmance of those instruments and confined him to his action for damages for the fraud inducing their election. In Mackenzie v. Voelker, 123 Cal.App.2d 538, 266 P.2d 867, plaintiff brought an action containing two counts based on fraud. The first was for rescission and was dismissed at plaintiff's request. At page 541 of 123 Cal.App.2d, at page 869 of 266 P.2d the court states "that if the complaint is considered as asking for two alternative remedies, plaintiff could not be held to have been committed to an affirmance or disaffirmance of the contract by so pleading. It was held in Tanforan v. Tanforan, 173 Cal. 270, 273, 159 P. 709, that it is proper practice to ask for inconsistent remedies and when all the evidence is in, it is then for the court to say to which remedy plaintiff is entitled." In accord is Karapetian v. Carolan, 83 Cal.App.2d 344, 188 P.2d 809, 1 A.L.R.2d 1075.

[25] The final question presented relates to the propriety of the nonsuit in favor of Marco Industries Company That corporation was organized in 1947, with Marco as its president and sole stockholder. The record is silent as to any change of Marco's position in either capacity and the inference is justified that there was no such change at all times here material. In about 1948, Marco and defendant Marco Industries Company entered an agreement under which Marco assigned the patents to the company and granted it a license to manufacture the lights west of the Mississippi for a royalty of 10 per cent of the sales. In 1953, a new agreement was executed under which Marco granted, assigned and sold "all of his right, title and interest" in the patents to the company for the sum of $300,000 payable in installments. In view of Marco's position as president of the company, it is clear that the corporation is chargeable with full notice of plaintiff's royalty interest in the patents, Western Oil & Refining Co. v. Venago Oil Corp., 218 Cal. 733, 738, 24 P.2d 971, 88 A.L.R. 1271; Bogart v. George K. Porter Co., 193 Cal. 197, 210, 223 P. 959, 31 A.L.R. 1045; Blue Diamond Plaster Co. v. Industrial Acc. Comm., 188 Cal. 403, 408, 205 P. 678; Eagle Indem. Co. v. Industrial Acc. Comm., 92 Cal.App.2d 222, 225, 206 P.2d 877, and that it took the transfer of Marco's right, title and interest in the patents subject to all claims and equities plaintiff could assert against the transferor. Western Oil & Refining Co. v. Venago Oil Corp., supra, 218 Cal. at pages 737–738, 24 P.2d 971; Dougherty v. California Kettleman etc., 9 Cal.2d 58, 81, 69 P.2d 155; Childs Real Estate Co. v. Shelburne Realty Co., 23 Cal. 2d 263, 267, 143 P.2d 697. Under the principles of the cases last cited, plaintiff was entitled to enforce his royalty rights in

the patents against defendant company as a transferee with notice. The nonsuit in its favor was consequently erroneous.

We deem it advisable to reiterate, in order to avoid any unfortunate misunderstanding, that the observations we have made concerning Marco's fraud are based upon the evidence adduced by plaintiff alone and derive from the requirement that we must accord such evidence every beneficial intendment in support of plaintiff's case. It has not been our purpose, of course, to determine questions of the credibility of witnesses or any of the ultimate issues of fact.

The judgment of nonsuit in favor of defendants Vincent A. Marco and Marco Industries Company is reversed.

MOORE, P. J., and ASHBURN, J., concur.

Hearing denied; SCHAUER, SPENCE and McCOMB, JJ., dissenting.



147 Cal.App.2d 433

Robert C. WILSON and Mary Wilson, Plaintiffs and Respondents,

v.

R. J. HISEY, Tempe E. Hisey and Karl W. Felser, Defendants.

George W. Swift and Sherman S. Stewart, Defendants and Appellants.

Civ. 5503.

District Court of Appeal, Fourth District, California.

Jan. 4, 1957.

Action by lessee for rescission, fraud and damages brought against real estate salesmen who had negotiated lease, the lessors and another. The Superior Court, San Bernardino County, Martin J. Coughlin, J., entered judgment for lessees and salesmen appealed. The District Court of Appeal, Mussell, J., held that where lessees relied on the representations of the salesmen to the effect that there was only one trust deed on property and that trust deed was payable at rate of $250 per month which included both principal and interest but the facts were that there was another trust deed on the property and first trust deed was payable at $250 per month plus interest, finding that the salesmen were negligent in the discharge of their duties as agents for lessees was supported by substantial evidence, even though salesmen's failure to recommend title search might not constitute negligence.

Judgment affirmed.

1. Appeal and Error ⇐1010(1)

Finding supported by substantial evidence cannot be disturbed on appeal.

2. Brokers ⇐38(4)

In action by lessees for rescission, fraud and damages, where lessees relied on the representations of the salesmen to the effect that there was only one trust deed on property and that trust deed was payable at rate of $250 per month, which included both principal and interest, but the facts were that there was another trust deed on the property and first trust deed was payable at $250 per month plus interest, finding that the salesmen were negligent in the discharge of their duties as agents for lessees was supported by substantial evidence, even though salesmen's failure to recommend title search might not constitute negligence.

3. Brokers ⇐22

Real estate salesmen who negotiated a lease for a chicken farm as agents for lessees were required to exercise reasonable skill and ordinary diligence and not to act negligently, and were required to exercise the particular skill to be reasonably expected of them and to have special knowledge with respect to the agency assumed.

James L. King, San Bernardino, for appellants.

J. H. Petry, San Bernardino, for respondents.

MUSSELL, Justice.

The complaint in this action is for rescission, fraud and damages. At the conclusion of the trial, plaintiffs moved to amend the complaint to conform to the evidence and to show an additional cause of action based on negligence of the defendants. This motion was granted and the court rendered judgment in favor of plaintiffs and awarded damages to them occasioned by the negligence of defendants George Swift and Sherman Stewart. They appeal from the judgment and contend (1) That the evidence does not support the findings and conclusions of law; and (2) That the findings, conclusions of law and judgment are contrary to the law.

On December 28, 1952, plaintiffs called at the real estate office of the Swift Realty Company in Fontana, in San Bernardino county. They desire to purchase a chicken ranch in that area and discussed the matter with defendant Sherman Stewart, who was a salesman employed by defendant George Swift, a real estate broker who owned and operated the Swift Realty Company. Stewart examined a listing of a ranch, signed by R. J. Hisey and his wife. This listing, by its terms, expired December 24, 1952. It described the ranch and further provided that the buyer was to assume an existing trust deed balance of approximately $19,000, payable $250 or more monthly, with 6% interest included. Plaintiff Wilson asked Stewart if there was any other encumbrance on the property except this trust deed and Stewart told him and his wife that there was none. Plaintiffs and Stewart then went to see the ranch and talked with Mr. and Mrs. Hisey. However, it does not appear that anything was said about the terms of the proposed purchase. Plaintiffs returned to the Swift Realty Company office on the ensuing two or three Sundays. On one of these visits, a Mr. Feiser, who was in the office and who had sold the ranch to the Hiseys, was asked if he thought the Hiseys would consider a trade and he replied that in his opinion Mr. Hisey would not trade. Stewart suggested to plaintiffs that they lease the property and also procure an option to buy it. He told them that the Hiseys would lease it for $200 per month, $2,400 a year. On January 18, 1953, plaintiffs came to the office of the Swift company and told Stewart they had decided to lease the Hisey ranch and offered to pay $2,400 for a year's lease, $2,000 down and the balance of $400 in August. Stewart told plaintiffs that Mr. Swift would draw up the papers and that he could handle it very well for them. Mr. Swift was introduced to plaintiffs by Stewart, who then explained the terms of the proposed transaction. Swift and Stewart made written notes and, after discussing some of the terms of the agreement with Feiser, Swift typed out the lease and option involved in this action.

The lease, dated and executed on January 18, 1953, was for the term of one year ending February 4, 1954, for a total rental of $2,400, $2,000 to be paid in cash and the further sum on or before August 5, 1953. It provided further, as follows:

> "There is an existing Deed of Trust on above property, of an approximate balance at present of $19,000 payable $250.00 or more monthly with 6% interest included. It is agreed by and between Lessor and Lessee that in the event of pending or threatened foreclosure on said Deed of Trust by Trustee, Lessor will immediately thereupon sell, transfer, convey and assign all his right, title and interest in and to said property to Lessee; and Lessee agrees to pay to Lessor, the sum of $100.00 cash at the time of such conveyancing and to assume the then existing balance on said Deed of Trust."

On the same date the Hiseys executed a real estate option, expiring February 4, 1954, providing therein that plaintiffs could purchase the property at a price not exceeding $24,000. The option further provided, inter alia, for the assumption by the lessors of the then existing balance on the trust deed, on which the balance was approximately $19,000, payable $250, or more, monthly, with 6% interest included. The

consideration recited in the option was the sum of $1. Plaintiffs gave a check to Swift for $500 and he, after deducting $72 for the services of his company, delivered a check to the Hiseys for the balance of the deposit, and the following week plaintiffs paid the Hiseys the further sum of $1,500.

Wilson left his employment as service engineer and moved onto the ranch on February 1, 1953, and purchased approximately 2,000 chickens to raise thereon. Within a week or ten days thereafter, Wilson received information that there was a second trust deed on the property and that the first trust deed called for the payment of $250 monthly, plus interest.

In March, 1953, the Wilsons served notice of rescission of the lease and option on the Hiseys and on April 7, 1953, they moved from the ranch.

Wilson testified that on February 16, 1953, he received a letter from Mr. Hisey, mailed from Texas, in which Hisey stated that he could not make the payments on the property and that his only recourse was to let Wilson take it over as agreed in the lease. Wilson further testified that if he had known there was a second trust deed against the Hisey property, and if he had known that the payment on the first trust deed required the payment of $250, plus interest at 6% on about $19,000, he would not have entered into the transaction. In this connection Mrs. Wilson testified that if she had known the true facts concerning the first and second deeds of trust, she would not have entered into the agreement.

Appellants' answer to the original complaint affirmatively alleges that George Swift and Sherman Stewart acted as agents for the joint parties in the transaction which resulted in the execution and delivery of the lease and option. In appellants' answer to the amendment to the complaint it is admitted that George Swift and Sherman Stewart prepared a written lease for plaintiffs at the request of and for them. It is further admitted therein that there was a first deed of trust and a second deed of trust on the Hisey ranch, and further that the first deed of trust did provide for monthly payments of $250 per month, together with interest at 6% per annum.

The trial court found, among other facts:

"III. That *is* is true that at the time said lease and option were executed there existed two notes secured respectively by first and second deeds of trust against the real property described in said lease and option and that the note secured by the first deed of trust provided for monthly payments of $250.00 on principal, plus payment of interest at 6% per annum; that the note secured by the second deed of trust was still unpaid; that the defendants George Swift and Sherman Stewart did represent to the plaintiff that at that time there was only one note secured by one deed of trust against said property and that said note provided for payments of $250.00 per month, which payments included interest."

"V. That it is not true that defendants George Swift, Sherman Stewart or Karl W. Feiser, or any of them, knew that the representation that there was only one note secured by only one deed of trust and that the payment provided by said note was $250.00 per month which included interest was a false representation.

"VI. That it is true that in reliance upon the said representations by defendants George Swift and Sherman Stewart plaintiffs did enter into said lease and option; did pay lessors $2,000.00; did terminate their employments; did move onto the premises at an expense of $135.00; and did purchase certain chickens."

"VIII. That it is true that negotiations were carried on by and between plaintiffs Wilson and defendants R. J. Hisey and Tempe E. Hisey in which defendants George Swift and Sherman Stewart acted as agents for said plaintiffs Wilson; that said negotiations were conducted by said defend-

ants Swift and Stewart on behalf of plaintiffs and said defendants Swift and Stewart did in said negotiations act as agents for plaintiffs Wilson; that said negotiations resulted in the execution and delivery of the lease and option hereinbefore mentioned; and that defendants Swift and Stewart prepared and wrote said lease and option.

"IX. That it is true that defendants Swift and Stewart did not have information, belief or knowledge concerning the true facts of the encumbrances against the property involved and did not have information, knowledge or belief of the true facts concerning the two notes secured by the deeds of trust or the terms of said notes."

"XI. That it is true that defendants Swift and Stewart failed to exercise the amount of care and diligence required of them as agents of the plaintiffs in negotiating, preparing and writing said lease and option.

"XII. That *is* is true that defendants accepted as true the statements of defendants Hisey concerning said property and the encumbrances thereon and the note secured by said encumbrances, and made no other effort or investigation to determine the true facts.

"XIII. That it is true that the defendants Swift and Stewart did not suggest or advise that a title search be made on said property and did not advise that an escrow be opened for the consummation of the transaction involving the lease and option.

"XIV. That it is true that plaintiffs did not know there was more than one note and deed of trust against the property and did not know the true terms of said note; and it is true that plaintiffs would not have entered into the lease and option had they known there was more than one note and deed of trust or if they had known the true terms of the two notes and deeds of trust; and it is true that they were not able to comply with the provisions of said notes."

"XVII. That it is true that plaintiffs Wilson relied upon representations and statements made to them that there was only one deed of trust against the property they leased and upon which they took an option and upon the representation that said deed of trust was to secure one note payable at the rate of $250.00 per month including both principal and interest; that it is true these representations were false.

"XVIII. That it is true that defendants Swift and Stewart, on behalf of plaintiffs Wilson, negotiated a lease and option on the property involved and that defendants Swift and Stewart suggested the manner in which the transaction should be handled and completed and suggested the machinery by which the transaction could be effected, and that as a result of these suggestions no escrow was opened and no title search was made.

"XIX. That it is true that defendants Swift and Stewart prepared and wrote the lease and option and at no time did they or either of them check to ascertain the true status of the title of the property in question or the nature or extent of *of* the obligations which were encumbrances against the property other than to accept as true the statements of the owners of the property with respect thereto.

"XX. That it is true that defendants Swift and Stewart were negligent in the discharge of their duties as agents of plaintiffs Wilson."

[1] These findings are supported by substantial evidence and therefore cannot be here disturbed. Berniker v. Berniker, 30 Cal.2d 439, 444, 182 P.2d 557.

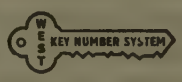
[2, 3] Appellants argue that this appeal presents the basic question whether, as a matter of law, there is negligence by one

who prepares a written lease upon real property for one year and a written option thereon for one year, for which option the stated consideration is $1, to fail to recommend that a title search be made upon the real property. However, the evidence shows that plaintiffs relied upon the representations of the defendants, who were their agents, that there was only one trust deed against the property which they leased and upon which they took an option to purchase, and that the trust deed in question was payable at the rate of $250 per month, which payment included both principal and interest. These representations were false. Swift and Stewart negotiated the lease and option on the property; they suggested the manner in which the transaction should be culminated; and prepared the lease and option agreements. While the failure to recommend a title search on the property might not constitute negligence, Stewart made the positive statement to the plaintiffs that there was no other encumbrance on the property except the first trust deed and that the payments thereon included the interest, without seeking to ascertain the true facts. The question whether the defendants were negligent was one of fact for the trial court and its finding that the defendants were negligent in the discharge of their duties as agents for plaintiffs is supported by substantial evidence. Defendants, as agents for plaintiffs, were required to exercise reasonable skill and ordinary diligence and not to act negligently. They were required to exercise the particular skill to be reasonably expected of them and to have special knowledge with respect to the agency assumed. 2 Cal.Jur.2d, Agency, Sec. 113.

Appellants, in support of their position, rely heavily upon Graham v. Ellmore, 135 Cal.App. 129, 26 P.2d 696. However, that action was for damages for fraud and the question of the liability of an agent for negligence was not there discussed. The agent therein had been told by the owners of the property that there was only one encumbrance on it and there was an implied finding that the salesman had reasonable grounds for believing the statement to be true. In the instant case, the salesman had no information on the subject and made the statement relied upon without ascertaining what the facts were with respect to the second trust deed on the property, and, as is said in Graham v. Ellmore, supra, 135 Cal.App. at pages 132–133, 26 P.2d at page 697: "Whether such statement was warranted by his information, and whether he had reasonable grounds for believing the same to be true, depend upon all the circumstances of the particular case, and are questions, primarily, for the trial court."

The judgment is affirmed.

BARNARD, P. J., and GRIFFIN, J., concur.



147 Cal.App.2d 665

Ralph VITALE, by Adrienne Principal, his guardian ad litem, Plaintiff and Respondent,

v.

Louise VITALE, Individually and as guardian of the person of Ralph Vitale, an incompetent person, Defendant and Appellant.

Civ. 17173.

District Court of Appeal, First District, Division 1, California.

Jan. 18, 1957.

Proceeding to annul marriage on the ground of husband's unsoundness of mind at the time of the marriage, by husband's guardian ad litem against wife. The Superior Court, County of Santa Clara, Leonard R. Avilla, J., entered judgment annulling marriage, and wife appealed. The District Court of Appeal, Bray, J., held that the finding of jury that husband was of unsound mind at the time of mar-

riage was reasonable and supported by substantial evidence.

Judgment affirmed.

1. Marriage ⇐7

The degree of mental capacity at the precise time when marriage is celebrated controls as to validity or invalidity of marriage, and if a marriage is contracted during a lucid interval marriage is valid.

2. Marriage ⇐60(7)

In action to annul marriage on ground of husband's unsoundness of mind at the time of marriage, finding of the jury that husband was of unsound mind at the time of marriage was supported by substantial evidence.

3. Marriage ⇐60(7)

While it is a party's mental condition on the day party was married which controls as to the validity or invalidity of marriage, the condition of unsoundness of mind may be determined from party's condition prior and subsequent to the day of marriage.

4. Evidence ⇐571(2)

Where doctors' opinions were based on examination of a husband within a few days of marriage and opinions were based on an actual observation of the husband, doctors' opinions that husband was of unsound mind at the time of marriage were sufficient to support finding of mental illness at time of marriage.

H. W. Glensor, San Francisco, Donald J. Kennedy, Palo Alto, for appellant.

Alfred J. Harwood, San Francisco, for respondent.

BRAY, Justice.

On the ground of plaintiff's unsoundness of mind at the time of the marriage plaintiff was granted a judgment annulling it. Defendant appeals, claiming insufficiency of the evidence to support the finding that plaintiff was of unsound mind on the day of the marriage and that on the contrary, the evidence conclusively proves him to have been of sound mind on that day.

Evidence.

[1] Defendant correctly states that the degree of mental capacity at the precise time when the marriage is celebrated controls as to its validity or invalidity, and that if a marriage is contracted during a lucid interval the marriage is valid. See 38 C.J. p. 1288; 55 C.J.S., Marriage, § 12, p. 825.

Plaintiff is a 56 year old plumber of Italian parentage. Defendant is a 38 year old employee of a telephone company. They met in the late summer of 1952 and started going out together. By Christmas plaintiff began proposing marriage. Defendant, because of ill health, refused. In May, 1954, defendant finally accepted and on May 24th they were married in Reno. They returned to plaintiff's home in Palo Alto and lived together there until June 6th. On that day plaintiff went to a hospital. Defendant learned that he was there as a mental patient, and upon a doctor's advice, she signed a petition charging him with being mentally unsound. He was transferred to Agnew State Hospital, and after a hearing committed there, where he is still confined.

Plaintiff's son Frank testified that when plaintiff returned November 2, 1953, from a trip to Europe his father had changed. Frank then related many instances in which his father talked incoherently, had hallucinations, believed that some organization was after him, and that television programs, cards in a drug store and other matters evidenced plots against him. In Frank's opinion his father was of unsound mind. Asked by defendant as to whether in his opinion plaintiff was of unsound mind at all times between November 2, 1953, and the date of the trial, including May 24th, the day of the marriage, Frank replied affirmatively.

Mrs. Tharp, a real estate agent who knew plaintiff well for over ten years, testified that after returning from Europe plaintiff acted "very odd," was upset, heard

noises, had been "framed" by a woman who was after his money and from whom he was trying to get away (which was untrue), pointed to a dog on a postcard and claimed it was a woman. In her opinion plaintiff was very unsound and confused.

One Beccelli knew plaintiff for about seven years. After plaintiff's return from Europe, plaintiff stated that people were following him. Plaintiff unjustly accused the witness of putting white powder in his coffee. In August, at Agnew when the witness stated that he had heard plaintiff had been married, plaintiff stated he knew nothing about it. In the witness' opinion plaintiff after his return from Europe "was off his mind."

Plaintiff called three expert witnesses. Defendant called none. Dr. Quirmbach, Clinical Director of Agnew State Hospital who saw plaintiff for the first time at Agnew about June 8th (about fifteen days after the marriage), testified that plaintiff then had a paranoid psychosis, which could also be described as schizophrenia; that on June 8th he was not competent to understand the obligations of the marriage relation, nor to undertake any act of importance, and that his psychosis continued from November, 1953. When asked his opinion concerning plaintiff's competency on May 24th to comprehend the duties and responsibilities of marriage he stated that plaintiff could not do so, basing his reasoning on the fact that plaintiff "was markedly psychotic and delusioned, and a delusional mental illness such as this colors a man's or person's whole actions and activity and thinking. So that whatever he does is in some way touched by it when an illness becomes as marked as this, and so that he isn't really competent to make decisions as a rational person, rather is influenced by the false ideas that he has," and further that plaintiff entered into the marriage "as a kind of a device to ward off the troubles that were conflicting him at the time and bothering him," and that his "delusional ideas so affected his relationship with the woman that he did not understand what he was entering into."

Dr. Wilbur (apparently a medical practitioner) who knew plaintiff since some time in the 1930's, saw plaintiff at his office on May 22nd (two days before the marriage), and testified that the day before plaintiff called him from Los Angeles and said he had a cut on his elbow which he had received in Los Angeles and which he wanted the witness to fix. When asked how he got the cut plaintiff said the witness knew all about it, as the witness was there when it happened. (This was not true.) Plaintiff admitted that he had voluntarily cut himself. The cut was 1¾ inches long directly over an artery. The witness sent plaintiff to Dr. Johnston. Plaintiff had put needles in each of his own toes and told Dr. Wilbur that he was sure that when the doctor had repaired plaintiff's bunions the preceding February, the doctor had put radio receiving sets in each of his toes, so that the cops could keep track of plaintiff. Dr. Wilbur further testified that plaintiff was of unsound mind on May 22nd, and was unable to understand the nature and responsibilities of marriage and even simpler relationships than that.

Dr. Johnston, the psychiatrist to whom Dr. Wilbur referred plaintiff, saw him on May 26th (two days after the marriage). Plaintiff told him that on the boat returning from Europe he first noticed that people were trying to communicate with him over television and through the receiving sets which Dr. Wilbur had put in his toes. Plaintiff told him about other delusional activities on the boat. Plaintiff's ability to do abstract thinking was greatly impaired. His condition was "paranoid schizophrenic reaction of a severe type." He did not have sufficient mental capacity to understand the duties and responsibilities of marriage. While plaintiff indicated that he had previously been married and divorced he did not tell the witness of his marriage two days before. Asked on cross-examination if the witness knew that at the time of the wedding and for a couple of weeks thereafter plaintiff had given no intimation of mental disturbance, the witness would

change his opinion, he replied that he would not.

Mrs. Carey, a witness for defendant, testified that before he went to Europe plaintiff stated that he would like to marry defendant, and on his return stated that he liked her as much as ever.

Mr. Cavitt, an insurance broker, tax consultant and accountant, knew plaintiff since 1948, and prepared his income tax returns for 1952 and 1953 from data given by plaintiff. The witness listed plumbing labor performed by plaintiff for others from October 26th to December 20, 1953, and collections made by plaintiff for the years 1953 and early 1954. The witness testified that up to as late as February, 1954, plaintiff clearly and concisely discussed his business affairs and showed no lack of understanding them. About two weeks before plaintiff's marriage plaintiff told the witness he expected to get married and he thought he had a girl who would accept him. There was nothing abnormal about the discussion. Four or five days after the marriage plaintiff came in to report a fire in his automobile. He stated that he thought it was started by a cigarette which had blown through the back window. The morning plaintiff went to Agnew he gave the witness separate bills for the damage to his car and seemed to understand the matter. He was always lucid and clear in his understanding of business matters. In the witness' opinion plaintiff had a proper understanding of marriage.

Mr. Walker, a business man, met plaintiff shortly after the marriage. His conversation was rational and normal. A fire started in a cushion and plaintiff helped put it out, acting calmly and rationally.

One Page knew plaintiff and saw him frequently after his return from Europe. He acted normally and did not mention receivers in his feet.

Defendant testified to her acquaintanceship with plaintiff, his courtship and the circumstances of the marriage and to the lack of any abnormality in his actions at any time. The Reno taxi driver who was a witness to the wedding, and who drove them from the Reno airport to Minden where the marriage took place and then back to Reno, noticed nothing unusual in plaintiff's manner, conversation or answers to the justice of the peace, nor did he appear nervous or upset. The justice of the peace who performed the ceremony and his wife, the other witness to it, saw nothing unusual in plaintiff's actions.

[2, 3] While defendant's evidence created a conflict with that of plaintiff's witnesses which would have supported a finding that plaintiff at the time of the marriage was of sound mind, it does not compel such a finding. The finding of the jury that he was then of unsound mind is a reasonable one and supported by substantial evidence. Defendant seems to contend that because no witness for plaintiff testified to seeing plaintiff on the exact day of the wedding, and witnesses for defendant did, there is no evidence of unsoundness of mind on that day. While it is plaintiff's mental condition on that day that is in issue, that condition may be determined from his condition prior and subsequent to the day. See In re Estate of Perkins, 195 Cal. 699, 703, 235 P. 45. The situation here is somewhat similar to that in Williams v. Williams, 1923, 63 Cal.App. 482, 218 P. 783, where the court upheld a judgment annulling a marriage even though no witnesses for the successful plaintiff saw him on the day of the marriage. The language of the court is particularly applicable here, 63 Cal.App. at page 486, 218 P. at page 784: "The plaintiff called four doctors who qualified as experts and testified in substance that their examination indicated that the patient was suffering from dementia praecox, that his condition was such that their opinion was that at the time of his marriage it would have been impossible for him to have appreciated the solemnity of the marriage vows, as his judgment would have been too impaired for him to understand the nature, obligations, and responsibilities of marriage. We do not deem it necessary to go further into the testimony of the experts. Suffice to say that

their conclusion, uncontradicted by any medical expert, was that Williams must have been insane at the time of his marriage. This testimony is in harmony with the conclusions already given in the testimony of the plaintiff's lay witnesses." (Emphasis added.)

[4] As said in Dunphy v. Dunphy, 161 Cal. 380, 385, 119 P. 512, 514, 38 L.R.A., N.S., 818, the law permits intimate acquaintances to give their opinions as to the mental sanity of a person and therefore, some weight "may be attributed to the opinion, over and above that which would follow, as matter of necessary inference, from the reasons assigned." As to the opinion of the three medical witnesses, "Expert witnesses may give their opinions concerning the mental condition of a person. They are not restricted to the mere declaration of an opinion that the person is or is not of sound mind, but may state the nature and extent of the deficiencies, if any, which they believe to exist." In re Estate of Schulmeyer, 171 Cal. 340, 346, 153 P. 233, 236. Defendant characterized the opinions of the medical men as mere "abstract opinions" and hence not sufficient to support the finding of mental illness. They are not such. They are opinions based upon an examination of the subject, within a few days of the marriage. One doctor saw plaintiff two days before the marriage, the second saw him two days after, and the third fifteen days after. They were not giving their opinions based upon hypothetical questions,[1] but from an actual observation of plaintiff himself.

Defendant quotes from the Dunphy case, "The mental defect or derangement must be one having a direct bearing upon the particular act which is brought in question," 161 Cal. at page 383, 119 P. at page 513, and then contends that plaintiff's delusions and hallucinations did not have a direct bearing upon the act of getting married. However, the delusions and hallucinations were merely parts of the mental defect or derangement. It was his whole mental condition, those matters included, which caused plaintiff to have the inability to comprehend the act of marriage.

The judgment is affirmed.

PETERS, P. J., and FRED B. WOOD, J., concur.



PEOPLE of the State of California, Plaintiff and Respondent,

v.

Charles Bigelow CASE, Defendant and Appellant.*

Cr. 5714.

District Court of Appeal, Second District, Division 1, California.

Jan. 8, 1957.

Hearing Granted March 5, 1957.

Defendant was convicted of grand theft. The Superior Court of Los Angeles County, Clement D. Nye, J., entered judgment, and defendant appealed. The District Court of Appeal, Fourt, J., held that where prosecuting witness claimed that she had money in her purse when she and defendant got on airplane at Anchorage, Alaska, and that she did not notice whether the money was missing while she was on the airplane, and that on arriving in Portland, Oregon, she looked in her purse at the airport and found that the money was missing, and that defendant told her that he had the money, defendant should have been charged under section of the California Penal Code providing that every person who, in another state or country steals or embezzles the property of another, or receives such property knowing it to have been stolen or embezzled, and brings

1. However, such opinions may be considered in this type of case. See Dunphy v. Dunphy, supra, 161 Cal. 380, 386, 119 P. 512.

* Opinion vacated 313 P.2d 840.

it into the state, may be convicted and punished in same manner as if such larceny, or embezzlement, or receiving had been committed in California, and should not have been charged under section of the Penal Code dealing with grand theft, on theory of a continuing trespass.

Attempted appeal from sentence dismissed, and judgment reversed.

Doran, J., dissented.

1. Criminal Law ⇐1023(10)

No appeal lay from sentence, and attempted appeal therefrom would be dismissed.

2. Larceny ⇐22

Where prosecuting witness claimed that she had money in her purse when she and defendant got on airplane at Anchorage, Alaska, and that she did not notice whether money was missing while she was on airplane, and that on arriving in Portland, Oregon, she looked in her purse at airport and found money missing, and that defendant told her that he had the money, defendant should have been charged under section of the California Penal Code providing that every person who, in another state or country, steals or embezzles the property of another, or receives such property knowing it to have been stolen or embezzled, and brings it into the state, may be convicted and punished in same manner as if such larceny, or embezzlement, or receiving had been committed in California, and should not have been charged under section of the Penal Code dealing with grand theft, on theory of a continuing trespass. West's Ann.Pen.Code, §§ 487, subd. 1, 497.

3. Larceny ⇐65

Evidence was insufficient to sustain grand theft prosecution under the theory of the legal fiction of continuing trespass. West's Ann.Pen.Code, § 487, subd. 1.

4. Larceny ⇐22

When the Legislature enacted section of the Penal Code providing that every person who, in another state or country, steals or embezzles the property of another, or receives such property knowing it to have been stolen or embezzled, and brings it into the state, may be convicted in the same manner as if such larceny, or embezzlement, or receiving, had been committed in the state, the Legislature intended to do away with the use of a legal fiction of a continuing trespass in grand theft cases. West's Ann.Pen.Code, § 487, subd. 1.

Cantillon & Cantillon, Beverly Hills, Paul M. McDonough, Los Angeles, for appellant.

Edmund G. Brown, Atty. Gen., Norman H. Sokolow, Deputy Atty. Gen., for respondent.

FOURT, Justice.

This is an appeal by the defendant from a judgment of conviction of one count of grand theft in violation of section 487, subd. 1, Penal Code.

The information filed by the District Attorney of Los Angeles County alleged that the defendant "on or about the 15th day of April, 1955, *at and in the County of Los Angeles,* State of California, *did* willfully, unlawfully and feloniously *take* Twelve Hundred Dollars ($1,200), in money, * * the personal property of Carol Louise Heide." (Emphasis added.) The defendant was further alleged to have been previously convicted of the crime of forgery, a felony, in 1940. The defendant entered a plea of not guilty, and denied the prior conviction as alleged. Trial by jury was waived, and the court adjudged the defendant guilty and found the prior conviction not true and sentenced him to the state prison.

[1] The defendant has appealed from the judgment and sentence. No appeal lies from the sentence, and therefore the attempted appeal therefrom will be dismissed. People v. Douglas, 141 Cal.App. 2d 33, 34, 296 P.2d 1.

A substantial resume of the facts is as follows: Carol Louise Heide, age twenty-three, first made the acquaintance of the appellant at the Camera Club in Anchorage, Alaska, in 1953. She was married at the time, as was the appellant. The two families became friendly and Mrs. Heide went to work coloring photographs for the appellant, in his studio and photographic supply shop. A domestic rift came into being between Mr. and Mrs. Heide and she secured a divorce from her husband on or about February 15, 1955. Prior to the securing of the divorce Mrs. Heide made reservations to leave Alaska by airplane and go to Seattle, Washington. She said that about two weeks before leaving Anchorage, Alaska, she withdrew $2,500 in cash, in fifty and twenty-dollar bills, and kept it in a box in a suitcase in her apartment. She also stated that she discussed leaving Alaska with the appellant, that he drove her to the airport, but shortly before she was to leave she became ill and he changed the tickets to a later flight—that when she came out of the restroom he told her that his mother was sick in San Francisco, and that he was going out on the same flight with her. The plane was scheduled to land in Seattle, Washington, however, due to bad weather, the plane landed at Portland, Oregon. Upon arriving in Portland, Oregon, at the airport she said she looked in her purse and found that the envelope containing the $2,500 was missing and that the appellant told her he had the money, and that if she "played along with him" she stood a chance of getting it back. Her testimony was that she had the money in an envelope when she got on the airplane at Anchorage, Alaska, and that she *"didn't notice the money was missing" on the plane.* She said further, "No, I went to sleep on the plane. It was a night flight. *And I didn't notice until after I got off.* But I had the money when I got on, and I know I had it part of the time, because in opening my purse to get a cigarette I could see the envelope was still there."

She then stated that she did not know who had taken her money until the defendant told her that he had it. She stated that she was very glad about landing in Portland because her family resided there, but she claimed that the appellant threatened her and that he would make a lot of trouble for her if she said anything. It is not clear how he could have made a lot of trouble for her, nor is it clear why she could not have secured a policeman then and there and had the appellant arrested, nor is it clear why she did not contact her folks, who apparently lived in Portland, Oregon. Nothing whatsoever appears in the record to indicate that she even called any of her family on the telephone, let alone visit with them, but to the contrary, her testimony was, "* * * we purchased tickets to Sacramento, bus tickets, and then went on to Reno."

Some place along the course of events, and it is not made certain in the record, just where it first occurred, Mrs. Heide and the appellant started to live together as husband and wife, going under the names of Marie St. Clair and Paul St. Clair. Mrs. Heide and the appellant apparently went by bus from Portland, Oregon, to Sacramento, California, and stayed in a hotel in the latter city. They then went by bus to Reno, where they resided in an apartment as husband and wife, using the assumed names.

In Reno, Nevada, she applied for and secured a social security card and secured employment as a shill in a gambling establishment in Reno, under her assumed name. She was required to secure a permit through the police department of Reno, Nevada, before she could work in a gambling hall. This necessitated the taking of her fingerprints and the giving of other information, all of which was done at the police station, and at no time did she make any complaint to anyone in the police department about anything. From time to time she gambled while they were in Reno.

Further, while in Reno, Nevada, the defendant bought an automobile and put the

title in the name of Paul and/or Marie St. Clair. Although she was there at the time of the purchase, Mrs. Heide did not make any claim to the automobile dealer who sold the car to them that the money being used to purchase the automobile was hers, nor did she object to the purchase of the car. After buying the automobile they drove it to Las Vegas, Nevada, and thence to Burbank, California, where they lived together as husband and wife from about March 1, 1955, to April 15, 1955. She secured employment under her assumed name with an investment company with offices in the Statler Hotel Building, and later went to work for a bus line company. The defendant secured employment with Kierulff Electronics. She did not contact any police officers in Los Angeles or Burbank during the period of time she was living with the defendant as husband and wife in Los Angeles county. On or about April 15, 1955, the defendant left the apartment where they were living and some time thereafter, namely in January, 1956, Mrs. Heide met the defendant on the street in downtown Los Angeles, and at that time she told him that she had a warrant out for his arrest "but if you will give me back part of the money anyway, make restitution, I'll drop the charge." She stated that after quite a walk together he jumped on the flatbed of a passing truck and went away on it.

She further stated that in their entire relationship there was no talk of love or marriage.

The defendant denied any taking of the money from Mrs. Heide and denied that he ever told her that he had taken any money from her, and stated that he never even saw any money in her purse or otherwise.

Further, the defendant stated that he had about $2,300 of his own money with him, which represented an accumulation of savings over a period of about seven years. He also stated that in Portland Mrs. Heide went to a hotel and he went to two bus stations and made arrangements for reservations and tickets; that she stayed at the hotel because "she wanted to do some * * * personal business." From there they went by bus to Sacramento, California, and from there to Reno, thence to Las Vegas, and then to Burbank.

Section 487, subd. 1 of the Penal Code reads as follows:

> "Grand theft is theft committed in any of the following cases:
>
> "1. *When the money,* labor or real or personal property *taken* is of a value *exceeding two hundred dollars ($200);* provided, that when domestic fowls, avocados, citrus or deciduous fruits, nuts and artichokes are taken of a value exceeding fifty dollars ($50); provided, further, that when the money, labor, real or personal property is taken by a servant, agent or employee from his principal or employer and aggregates two hundred dollars ($200) or more in any 12 consecutive month period, *then the same shall constitute grand theft.*" (Emphasis added.)

Section 497 of the Penal Code, enacted in 1872, and amended in 1905 by adding the references to embezzlement, reads as follows:

> "Every person who, *in another state or country steals* or embezzles the property of another, or receives such property knowing it to have been stolen or embezzled, and brings the same into this state, may be convicted and punished in the same manner as if such larceny, or embezzlement, or receiving, had been committed in this State." (Emphasis added.)

[2] In our opinion, the charge which should have been filed against the defendant was one for a violation of section 497 of the Penal Code and not one under section 487, subd. 1.

Referring first to the cases cited by the attorney general: In People v. Staples, 91 Cal. 23, 27 P. 523, decided in 1891, the opinion recites in the first paragraph thereof that the defendant was convicted of the crime of grand larceny, and later on, 91

Cal. at page 27, 27 P. at page 524, it is said:

"The information charges in plain, direct, and unequivocal terms that the defendant did, in the territory of Arizona, unlawfully, willfully, and feloniously take, steal, and carry away from the possession of one Margaret McGregor a watch and chain, of the value of $75, then and there being the personal property of said Margaret McGregor; and that, after having so unlawfully taken and stolen said watch and chain, he did bring the same into the county of Los Angeles. This states the exact offense defined in section 497 of the Penal Code, the jurisdiction of which is, by section 789, conferred upon any county of the state, into or through which the stolen property has been brought."

The facts of this case briefly were that the defendant was a porter on a through sleeping car. Mrs. McGregor was a passenger on the train travelling from Chicago to this state. A watch and chain were stolen from her berth just about the time the train crossed the Colorado River from Arizona into San Bernardino county. The evidence left it somewhat doubtful upon which side of the boundary the theft occurred and the defendant asked the court to instruct the jury to acquit him unless the jury were satisfied that the larceny was committed in Arizona. The request was refused.

The court said in 91 Cal. at page 27, 27 P. at page 524: "When goods are stolen in one jurisdiction and carried into another, in legal contemplation the crime of larceny is committed in both jurisdictions, and may be punished in either. Our statute on that point (Pen.Code, §§ 497, 786, 789) merely re-enacts the law as it was before. People v. Mellon, 40 Cal. [648] 654; State v. Brown, 8 Nev. [208] 212. Or, perhaps, it is more correct to say that our statute has adopted one of the two views upon which the courts of other states have divided in deciding upon the common-law rule."

It must be clear, therefore, that the facts as set forth in the information actually fitted the offense as is described in section 497, or, just as the court said "[t]his states the exact offense defined in section 497" and not an offense under section 487, and yet the verdict returned was, "We, the jury * * * find the defendant guilty of grand larceny and recommend him for mercy." The record seems to disclose that the case was started at 10:00 a. m., December 2, 1890, a jury was selected, the evidence submitted, the jury instructed at 2:35 p. m., and they returned with a verdict at 4:50 p. m. On December 9, 1890, the defendant was sentenced to San Quentin prison.

The court further said the the only question worthy of consideration in the Staples case was whether it was essential to prove that the original larceny was committed in Arizona, as alleged in the information. In holding that the variance was unimportant in the particular case, the opinion sets forth, 91 Cal. at page 28, 27 P. at page 524: "We do not think it was. Whether the original larceny was committed in Arizona or across the line in San Bernardino, the taking of the stolen property into Los Angeles county was equally criminal; and not only was it equally criminal, it was the same offense, punishable in the same manner, to the same extent, in the same jurisdiction, under the same law. The precise spot at which the criminal act was initiated was a mere circumstance of the offense, properly enough stated in the information, but not essential to be proven as stated. If the information had charged a larceny in Los Angeles county, proof of an original taking in San Bernardino or in Arizona would have been admissible. The only real question is whether evidence of a larcency on the west bank of a river is such a substantial variance from the charge that it was committed on the east bank as to be inadmissible. Under the circumstances of this case, where the theft occurred on a moving train in the act of crossing the river, we do not think the variance was material."

In People v. Black, 122 Cal. 73, 54 P. 385, decided in 1898, the *defendant was charged with a violation of section 497* of the Penal Code, in that he stole certain jewelry in the Dominion of Canada, and thereafter brought the articles to San Francisco. The defendant contended that the court in San Francisco had no jurisdiction to try him under the provisions of section 789 of the Penal Code. The court held that there was jurisdiction and affirmed the conviction.

The court went on to say in 122 Cal. at page 75, 54 P. at page 386:

> "Under *the great weight of authority*, if the defendant had been charged with the crime of grand larceny committed in the city and county of San Francisco, state of California, it would seem the evidence introduced at this trial showing *the commission of the larceny in the Dominion of Canada, and* the felonious bringing of the stolen property into the jurisdiction of the city and county of San Francisco, state of California, would support an indictment in said city and county charging larceny. See Bishop's New Criminal Law, sec. 136, et seq. But in the present case the form of the indictment does not justify the consideration of that somewhat interesting question." (Emphasis added.)

Obviously, the statement just quoted was not necessary to a disposition of the case because, as heretofore pointed out, the defendant was charged with violating the provisions of section 497 of the Penal Code, the proper section under the circumstances, and not section 487.

With reference to the comment, as above quoted, as to "the great weight of authority", there is some considerable doubt. The author who is cited as authority for the statement made, namely Bishop on Criminal Law, states as follows, 9th Ed., section 141, page 96:

> "§ 141. The Authorities—have not always proceeded on the principles thus stated. In an old English case, where the goods seized piratically on the ocean were carried by the thief into a county of England, the court refused to take cognizance of the larceny, and committed the offender to answer to the admiralty; because, 'the original act, namely, the taking of them, was not any offence whereof the common law taketh knowledge; and, by consequence, the bringing of them into a county could not make the same felony punishable by our law.' The doctrine has been since applied, in England, to goods stolen both in other parts of the king's dominions and in foreign countries. This doctrine has been followed by the courts of New York, New Jersey, Pennsylvania, North Carolina, Tennessee, Indiana, Louisiana, Nebraska, and Georgia. It has been discarded in Connecticut, Vermont, Maine, Mississippi, Iowa, Kentucky, Nevada, Illinois, Oregon, Maryland, and South Carolina. In Massachusetts, the court held defendants liable where the original larceny was in another of the United States; but reached a contrary conclusion where it was in one of the British provinces, a distinction which the Maine tribunal refused to recognize, deeming it without foundation. So, in Ohio, a conviction was sustained where the original taking had been in another State of the Union, but reversed where it had been in Canada. The rule which holds the offender guilty in the State to which he brings the stolen property has likewise been prescribed, by statute, in New York since the before mentioned adjudication was made; also in Alabama, Missouri, Kansas, Michigan, and some other States." In other words, where the situation was as it might well have been in the present case, that is, the theft taking place in Alaska, Canada, or on the high seas, the authorities stand eleven to eleven and there appears to be no great weight one way or the other.

In People v. Barnes, 57 Cal.App. 515, 207 P. 695, decided in 1922, the defendant stole an automobile in Tijuana, Lower California, Mexico, and brought the same into the county of San Diego. He was charged with and convicted of the *offense of violating section 497 of the Penal Code.* The court properly held, under the provisions of section 789, that the court in San Diego had jurisdiction.

In People v. McGowan, 1932, 127 Cal. App. 39, 14 P.2d 1036, the defendant was charged with and convicted of two counts of burglary in Del Norte county. The information charged, in the first count, that the defendant did on a certain date in Curry county, Oregon, unlawfully enter a building with intent to commit a theft, and did then and there transport into the county of Del Norte, California, the property stolen by means of burglary. The substance of the second count, for our purposes here, was the same as the first. The defendant appealed on the ground that the burglary was a completed offense in Oregon, and that the courts of California have no jurisdiction over the offense. True it is the court did say in 57 Cal.App. at page 42, 14 P.2d at page 1037:

> "It is unnecessary to cite authorities to the effect that the courts of this state have no jurisdiction over completed offenses committed in other states. It is only when the offense committed is a continuing offense, or one which reaches across boundary lines, that jurisdiction is given. Thus, if the one who commits the offense of burglary also commits larceny by stealing property, brings that stolen property across the boundary line, the offense of larceny is continued from the adjoining state into this state, and the superior court of any county into which the stolen property is brought may take jurisdiction of the offense committed in such county, to wit, the offense of larceny, not the offense of burglary."

It is extremely difficult to see how that language was necessary to the decision which the court made. The court, later on in the opinion sets forth subdivision 2 of section 27 of the Penal Code, and sections 497 and 789 of the same code. The court then held that there was no jurisdiction to try the defendant for the offense as charged and which was committed wholly in Oregon, and reversed the judgment.

It appears to us that the better reasoning dictates that the defendant should have been charged with a violation of section 497 in the case before us, and further that a conviction under section 487 is unwarranted and improper under the circumstances of this case.

In People v. Mills B. Sing, 1919, 42 Cal. App. 385, 183 P. 865, the defendant was convicted of grand larceny in Los Angeles county. The defendant went to Orange county and made arrangements to purchase certain potatoes. He hauled the potatoes to Los Angeles county and did not pay the owners for the same. The defendant claimed that the court in Los Angeles county had no jurisdiction, that the offense was begun, ended and consummated in Orange county.

The court held, in effect, that there was a larceny in Orange county, and further, that there was a new larceny in Los Angeles county, saying in 42 Cal.App. at pages 392–393, 183 P. at page 868: "If, after one has done what completes the theft, he continues traveling away with the goods, still intending to appropriate them to his own use, each step is a new trespass and a fresh larceny. So that the possession of goods stolen by the thief is a larceny in each county into which he carries them. The legal possession still remaining in the true owner, every moment's continuation of the trespass and felony amounts, in legal contemplation, to a new caption and asportation. 1 Bishop's New Criminal Procedure, sec. 59; 17 R.C.L., pp. 45, 46; People v. Staples, 91 Cal. [23] 27, 27 P. 523. In legal contemplation, the crime of larceny is committed in both counties, and the thief may be prosecuted and punished in either."

It is at once apparent that the Sing case is not comparable to the case at hand, and whatever the law may be as to the county-to-county situation in the same state, that is not determinative of the state-to-state or foreign country-to-state or high seas-to-state situation, which we have before us.

There is not one word of testimony which we can find as to where the *taking* occurred. That is, there is no testimony so far as we can determine as to whether the money was taken in or over the Territory of Alaska; British Columbia, Canada; the high seas; the state of Washington, or the state of Oregon.

In Stanley v. State, 1873, 24 Ohio 166, 15 Am.Rep. 604, the defendant was charged with and convicted of the crime of grand larceny and sentenced to the penitentiary. The indictment charged that the defendant, late of Cuyahoga county, Ohio, at the county aforesaid did with force and arms, then and there unlawfully steal and carry away certain silverware, of the property of George Harris. The facts, briefly, were that the goods described in the indictment belonged to Harris, they were stolen from Harris at the city of London, in the Dominion of Canada, that the goods were afterward found in the possession of the defendant in the county of Cuyahoga, Ohio. The court stated the question was —if property be stolen at a place beyond the jurisdiction of the state and of the United States and afterward brought into the state by the thief, can he be lawfully convicted of larceny in the state where he is found? Among other things the court said in deciding the case in 24 Ohio 169, 15 Am.Rep. at pages 606–607:

"We are unwilling to sanction the doctrine or to adopt the practice, whereby a crime committed in a foreign country, and in violation of the laws of that country only, may, by construction and a mere fiction, be treated as an offense committed within this State and in violation of the laws thereof. In this case the goods were stolen in Canada. They were there taken from the custody of the owner into the custody of the thief. The change of possession was complete. The goods were afterward carried by the thief from the Dominion of Canada to the State of Ohio. During the transit his possession was continuous and uninterrupted. Now, the theory upon which this conviction is sought to be sustained is, that the legal possession of the goods remained all the while in the owner. If this theory be true, it is true as a fiction of the law only. The fact was otherwise. A further theory in support of the conviction is, that as soon as the goods arrived within the State of Ohio, the thief again took them from the possession of the owner into his own possession. This theory is not supported by the facts, nor is there any presumption of law to sustain it.

"That the right of possession, as well as the right of property, remained all the time in the owner is true as matter of law. And it is also true, as a matter of fiction, that the possession of the thief, although exclusive as it must have been in order to make him a thief, is regarded as the possession of the owner, for some purposes. Thus, stolen goods, while in the possession of the thief, may be again stolen by another thief; and the latter may be charged with taking and carrying away the goods of the owner. And for the purpose of sustaining such charge, the possession of the first thief will be regarded as the possession of the true owner. This fiction, however, in no way changes the nature of the facts which constitute the crime of larceny.

"What we deny is, that a mere change of place by the thief, while he continues in the uninterrupted and exclusive possession of the stolen property, constitutes a new 'taking' of the property, either as matter of fact or of law."

The court further said in 24 Ohio 170, 15 Am.Rep. at page 608:

"We fully recognize the common-law practice, that when property is stolen in one county, and the thief is afterward found in another county with the stolen property in his possession, he may be indicted and convicted in either county, but not in both. This practice obtained, notwithstanding the general rule that every prosecution for a criminal cause must be in the county where the crime was committed. The reason for the above exception to the general rule is not certainly known, nor is it important in this case that it should be known, as it relates to the matter of venue only, and does not affect the substance of the offense. We are entirely satisfied, however, that the right to prosecute the thief in any county, wherein he was found in possession of the stolen property, was not asserted by the crown, because of the fact that a new and distinct larceny of the goods was committed whenever and wherever the thief might pass from one county into another. His exemption from more than one conviction and punishment makes this proposition clear enough. The common law provided that no person should be twice vexed for the same cause. It was through the operation of this principle that the thief, who stole property in one county and was afterward found with the fruits of his crime in another, could not be tried and convicted in each county. He was guilty of one offense only, and that offense was complete in the county where the property was first 'taken' by the thief, and removed from the place in which the owner had it in possession.

"When goods piratically seized upon the high seas were afterward carried by the thief into a county of England, the common-law judges refused to take cognizance of the larceny, 'because the original act—namely, the taking of them—was not any offense whereof the common law taketh knowledge; and by consequence, the bringing them into a county could not make the same a felony punishable by our law.'"

The court continued in 24 Ohio 172, 15 Am.Rep. at pages 610–611:

"After reviewing the cases, we think the weight of authority is against the conviction and judgment below. And in the light of principle, we have no hesitancy in holding that the court below had no jurisdiction over the offense committed by the prisoner.

"The judgment below is wrong, unless every act of the defendant, which was necessary to complete the offense was committed within the State of Ohio and in violation of the laws thereof. This proposition is not disputed. It is conceded by the prosecution that the taking, as well as the removal of the goods *animo furandi*, must have occurred within the limits of Ohio. It is also conceded that the first taking, as well as the first removal of the goods alleged in this case to have been stolen, was at a place beyond the limits of the State, and within the jurisdiction of a foreign and independent sovereignty. Now, the doctrine of all the cases is that the original 'taking' and the original asportation of the goods by the prisoner must have been under such circumstances as constituted a larceny. If the possession of the goods by the defendant before they were brought into this State was a lawful possession, there would be no pretense that the conviction was proper. The same, if his possession was merely tortious. The theory of the law, upon which the propriety of the conviction is claimed, is based on the assumption that the property was *stolen* in Canada by the the prisoner.

"By what rule shall it be determined whether the acts of the prisoner,

whereby he acquired the possession of the goods in Canada, constituted the crime of larceny? By the laws of this State? Certainly not. The criminal laws of this State have no extra-territorial operation. If the acts of the prisoner, whereby he came in possession of the property described in the indictment, were not inhibited by the laws of Canada, it is perfectly clear that he was not guilty of larceny there. It matters not that they were such as would have constituted larceny if the transaction had taken place in this State.

"Shall the question whether or not the 'taking' of the property by the prisoner was a crime in Canada be determined by the laws of that country? If this be granted, then an act, which was an essential element in the combination of the facts of which Stanley was found guilty, was in violation of the laws of Canada, but not of this State; and it was because the laws of Canada were violated that the prisoner was convicted. If the laws of that country had been different, though the conduct of the prisoner had been the same, he could not have been convicted. I can see no way to escape this conclusion, and if it be correct, it follows that the acts of the prisoner in a foreign country, as well as his acts in this State, were essential elements in his offense; therefore, no complete offense was committed in this State against the laws thereof.

"I have no doubt the legislature might make it a crime for a thief to bring into this State property stolen by him in a foreign country. And in order to convict of such crime, it would be necessary to prove the existence of foreign laws against larceny. The existence of such foreign laws would be an ingredient in the statutory offense. But that offense would not be larceny at common law, for the reason that larceny at common law contains no such element. It consists in taking and carrying away the goods of another person in violation of the rules of the *common law*, without reference to any other law or the laws of any other country."

It may be noted here that what the court in Ohio suggested is precisely what the legislature of California did in 1872 when it adopted section 497 of the Penal Code.

The judgment in the Stanley case was reversed.

In People v. Loughridge, 1867, 1 Neb. 11, the defendant was tried upon an indictment charging that in the county of Douglas, Nebraska, he did steal a pocketbook and other property to the amount of about $500. The evidence showed that the property in question was taken from one Hanson at St. Johns, in the state of Iowa, and found in the possession of the defendant in Douglas county, Nebraska, a few days subsequently. The judge, in effect, told the jury that if they found that the defendant feloniously took the property in the state of Iowa and escaped to Nebraska and was found in possession of the property in Nebraska, they might find him guilty under the indictment.

The judgment was reversed and in the opinion the court said, among other things, the following at pages 12–13:

"No case sustaining an indictment under such circumstances asserts the rights of courts of one State to entertain jurisdiction of cases where crimes were committed in other States; but they all proceed upon the assumption that the possession in the thief amounts to a larceny in every county into which he carries the goods, because the legal possession remains in the true owner, and therefore every moment's continuance of the felony amounts to a new caption and asportation. There is considerable subtlety in this principle, and it was, no doubt, suggested for the convenience of trying felons in the county where they might be taken with the goods, and to avoid their escaping punish-

ment by fleeing from one State or locality into another.

"No legislator in defining larceny, and affixing a penalty to the offence, ever contemplated such an interpretation. To allow this interpretation to hold in the case of different counties of the same State may with safety be permitted. Here the accused may have compulsory process for his witnesses, and a conviction in one county will be a bar to that in another. To extend its application to States, is to attach to the crime of larceny, penalties uncertain in their character, possibly greatly incommensurate with the offence committed, and such as do not attend any other crime. Conviction in one State is no bar to a conviction in another. For larceny committed in the State of Missouri, the thief bringing the goods here by way of Iowa, may be first tried here, under this doctrine, and sentenced for ten years; the same in Iowa, and lastly convicted and sentenced in Missouri. So from the fear that the thief might escape justice altogether, we find a warrant to inflict upon him a triple penalty. I should prefer the ultimate escape of now and then a culprit, than assume jurisdiction upon a theory which to me seems based on a fiction rather than on a clear and positive principle of law. The Constitution of the United States has provided for cases where offenders fly from the State where the offence is committed. Wherever he is found he may be secured, and sent to that State for trial from which he has fled, on demand of the executive thereof. Under this provision escape out of a State, while it may involve some inconvenience, need not defeat justice. If the legislature of this State like that of some of the States, chooses to make the possession of stolen goods an offence, it would be proper for it to do so. I am of the opinion, therefore, that the judgment of the court below, should be reversed and the prisoner discharged.

"Judgment reversed."

Apropos of what the court in Nebraska said in reference to adopting proper legislation on the subject matter, surely no legislator in California, since 1872, contemplated that a district attorney would charge a defendant with grand larceny under the theory of a "continuing trespass", under the circumstances as presented in this case, in the face of section 497 of the Penal Code, which was obviously adopted for the purpose of providing for the very situation with which we are confronted in the instant case.

At one time in California it was grand larceny to steal or take the property of another of the value of $50 or more, and was punishable by death in the discretion of the jury. Stats. 1851, Ch. 95. It was at that time petit larceny to steal the property of another under the value of $50, and was punishable by "any number of lashes not exceeding fifty upon the bare back".

There is nothing, so far as we are aware, to establish that the judgment of conviction here would be recognized in Nevada, Oregon, Washington, Canada or Alaska. True it is that we have statute 793 of the Penal Code which, in effect, would preclude a prosecution here if the defendant had been prosecuted in another state or country. However, assuming that the other states mentioned do not have such a law, would anyone contend that the defendant should be prosecuted in California, and serve a term in the penitentiary, as the defendant in this case is presently doing, then have him transported to Nevada and be prosecuted there and serve another term in the Nevada penitentiary for the offense of grand theft and the same in Oregon and Washington, and then to Canada, serve a term there and perhaps be lashed as is provided for in Canada, and then to Alaska for still another term, and if Alaska had the same law we had in 1851, put the defendant to death? Yet that is the ultimate

of the sum and substance of the argument of the attorney general.

In Morrissey v. People, 1863, 11 Mich. 327, the plaintiff in error was convicted of larceny on an information charging the larceny to have been committed in Detroit, Michigan. On the trial it appeared that the articles mentioned in the information were taken from a store that was broken into at Windsor, on the opposite side of the Detroit River in Canada, and were brought over the river into Detroit.

The statute is substantially in these words: "Every person who shall feloniously steal the property of another, in any other State or country, and shall bring the same into this State, may be convicted and punished in the same manner as if such larceny had been committed in this State; and in every such case such larceny may be charged to have been committed in any town or city into or through which such stolen property shall have been brought." Comp.Laws Mich. 1857, § 5797.

Morrissey objected to the evidence upon two grounds: (1) that the information did not charge the larceny to have been committed in Canada, and (2) that the act was unconstitutional.

The court held that the judgment should be reversed and the prisoner discharged. Campbell, J., in his opinion, said, among other things at pages 336–341:

"But a construction which involves such unjust consequences to defendants ought not to be adopted under any circumstances if *o*ny other can be safely applied.

* * * * * *

"* * * Although it is loosely said that the continued possession amounts to a new caption and asportation, yet the decisions show that this is not accurately true, for if it were the cases just referred to are incorrect. The real ground of the decisions is that the taking and subsequent felonious possession form one continuous act, which derives its character from the original taking, but which may be punished by the authority offended by such taking in any place within the realm where the offense has been kept up. No one has ever supposed, and certainly no case has ever decided, that a possession of stolen goods in different counties amounted to a succession of *separate* punishable larcenies. The decisions recognize, in all the continuing possession, but one single offense committed within the jurisdiction. It is in the power of every country to select the place of trial and punishment at its option, and the ordinary rules of locality have nothing to do with the question whether a State can punish offenses not committed within its jurisdiction.

"There are some American cases which assume that larceny in one State, followed by possession in another, is punishable in the latter at common law. So far as they purport to rest on English decisions there is no foundation for them, and they do not in general lay down any other source of authority except local usage.

* * * * * *

"A defendant who is called upon to respond to an information charging a local common law offense in Michigan, can not be said to be apprised of the charge that the offense was in fact committed in Canada, or that any inquiry is to be made into Canadian transactions. Nor is it possible for him, under an information of this form, to avail himself of the statutory defenses. The statute expressly provides that an acquittal or conviction of the same offense in Canada may be pleaded specially in bar. If the defendants had to this information charging an offense in Wayne county pleaded an acquittal in Canada, there is no process by which it could be shown that the offenses are identical. Until the trial is actually commenced the prisoners can not, and the court can not, determine whether the of-

fenses are the same. The Canada indictment would not, neither would the Canada proofs, necessarily or probably trace the goods to Detroit; and the court could not assume that the defendants were not pursued for doing what the accusation fairly implies to have been done in Michigan. The record here, instead of agreeing with the Canadian proofs and records, varies entirely from them.

* * * * * * *

"The most serious difficulties in the way of a fair trial—apart from the question of territorial jurisdiction—are not lessened by the other interpretation. Whatever view may be taken of the real meaning of the statute, it becomes necessary, upon the trial, to investigate transactions in Canada, and to determine their character under the laws of Canada. It is not within the power of the State of Michigan to compel the attendance of witnesses for the defense from another country. And, where a transaction occurs abroad, it is not only a fair but an inevitable presumption, that most of the witnesses are abroad. Where the main fact to be determined is a criminal act, committed beyond the State, the defendant is likely to be at the mercy of the prosecution. He can not produce either eye-witnesses of the transaction, or impeaching witnesses, unless they choose to present themselves. When the Constitution assures a defendant *'compulsory process for obtaining witnesses in his favor,'* it can not contemplate a trial for foreign crimes, where it is not presumable that such witnesses can be compelled to appear. It is also necessary to prove foreign laws as facts; and the foreign common law must be proved by living witnesses. Even if we could, in a criminal case, make any presumption concerning a foreign law, that presumption may be overthrown. And although it may be true that stealing is a crime punished by all nations, it is not the same thing in all nations. Some codes make no distinction between larceny and embezzlement."

In the case of Commonwealth v. Uprichard, 1855, 3 Gray, Mass., 434, 63 Am. Dec. 762, the "indictment charges that the two defendants, at Boston, on the twenty-seventh of July, 1854, the gold pieces and other coins, the property of George D. Twinning, in his possession then and there being, feloniously did steal take, and carry away." 3 Gray, Mass., 434, 63 Am.Dec. at page 762. By the facts of the case, it appeared that "Uprichard and Carey were soldiers in the service of the queen of England, at Sidney, in the province of Nova Scotia; that the coins alleged to be stolen were partly the property of George D. Twinning, a deputy commissary at the military station in Sidney, and partly the property of the queen, in the care and control of said commissary; that the property was taken from the military chest without right, said chest being in the possession of said Twinning; that the defendants deserted about the same time, with certain of said coins in their possession, and were found in this state, each having a part of the stolen property in his possession.

"Upon the evidence offered, the counsel for the defendants asked the court to rule that the indictment could not be supported by the evidence: 1. Because the law in force at Sidney was not proved; 2. Because said property, if stolen at all, was stolen at Sidney, out of the state of Massachusetts, and out of the United States; and the bringing of said stolen property into, and the possession of it in, Boston would not constitute the crime of larceny * * *." 3 Gray, Mass., at page 435, 63 Am.Dec. at page 763.

The trial court instructed the jury that if the property was stolen by the defendant at Sidney, in Nova Scotia, one of the colonies and possessions of the Queen of Great Britain, and the property so stolen and continuing in the possession of the

defendant was brought by him into Massachusetts and into Boston, the indictment charging him with stealing them, being in possession of the owner, in this county, was legally sustained and that the defendant could be convicted and punished for this offense by the laws of Massachusetts.

The court said in determining the case, among other things, the following in 3 Gray, Mass., at page 436, 63 Am.Dec. at pages 764–768:

"If the offense is committed anywhere within the realm of England, in whatever county, the same law is violated, the same punishment is due, the rules of evidence and of law governing every step of the proceedings are the same, and it is a mere question where the trial shall be had. But the trial, wherever had, is exactly the same, and the results are the same. A conviction or acquittal in any one county is a bar to any indictment in every other; so that the question as to the place of trial is comparatively immaterial. But even in England, a crime, being an offense against the laws of England, committed on the high seas, and not within the body of any county, cannot be tried in any county, but only in the courts of admiralty jurisdiction; and *a fortiori,* an offense committed in a foreign country by persons not there amenable to the laws of England could not, upon principle, be tried and punished in England; and the rule that when goods are feloniously taken and brought into a county, it may be charged and tried as an offense in that county, did not anciently extend to goods stolen in any place not within the common-law jurisdiction: * * This was within the principle that in whatever part of the same government the offense was first committed, the same law was violated, the same rule and measure of punishment attached, and with the same consequences, in whatever part of the territory of the same government the trial was had. * * *

"* * * In some of the states it is held that, according to the English rule in respect to counties, the carrying of stolen goods by the thief into another state from the one in which they were stolen is a new caption and a new asportation in the state into which they are thus carried. In other states a different rule is held.

* * * * * *

"It seems to have been considered that although the several states are, in their administration of criminal law, regarded as sovereign and independent, yet, as they were originally English colonies, and acknowledged their subjection to the common law of England, and claimed its privileges, and all equally derived their principles of criminal jurisprudence mainly from that source, and as they had been, both before and since the revolution, closely united for many purposes, there was an analogy more or less strict between the relations of these states to each other and those of counties under the same government; and therefore that the same rule might be safely adopted.

* * * * * *

"It has then been argued that the same rule ought to apply to foreign governments as to the several states of the Union, because in their respective jurisdictions, and in the laws which regulate their internal police, these are as much foreign to each other as each state is to foreign governments. * * * Laws to punish crimes are essentially local, and limited to the boundaries of the state prescribing them. Indeed, this case, and the cases cited, proceed on the ground that the goods were actually stolen in this state. The commission of the crime in Nova Scotia was not a violation of our law, and did not subject

the offender to any punishment prescribed by our law. This indictment proceeds on that ground, and alleges the crime of larceny to have been committed in violation of the laws of this commonwealth, and within the body of this county. It is only by assuming that bringing stolen goods from a foreign country into this state makes the act larceny here that this allegation can be sustained; but this involves the necessity of going to the law in force in Nova Scotia to ascertain whether the act done there was felonious, and consequently whether the goods were stolen, so that it is by the combined operation of the force of both laws that it is made felony here. Were it any other offense than that of larceny, which gives an ambulatory character to the offense by the movable character and the guilty possession of the goods stolen, there could be no doubt of the law, and no plausible pretense that our law had been violated, or the party amenable to penalties created by it. Hence the necessity, in the constitution of the United States establishing the Union, for a fundamental clause providing for the mutual surrender of fugitives from justice, and also for treaties of extradition providing for the mutual surrender by our government of persons charged with crimes in another.

* * * * * *

"* * * Here the question is one of principle, whether the defendants have violated our law. It is said that they commit a new theft by the possession of stolen goods in our jurisdiction. But what are stolen goods? Are we to look to our own law, or to the law of Nova Scotia, to determine what is a felonious taking, what is the *animus furandi,* and the like? If we look to the law of Nova Scotia, and that law is different from ours in defining and prescribing theft, then we may be called on to punish as a crime that which would be innocent here. If we look to our own law, then a taking and carrying away of goods in Nova Scotia, under circumstances which would not be criminal there, might be punishable here. Foreigners coming within our jurisdiction with goods, and complying with customary regulations, commit no offense, and commit none in removing them from place to place in the same or different counties. If they can be indicted and punished here on the ground that such goods were stolen goods when they were brought in, it is but another mode of charging that the goods were obtained by a violation of the criminal laws of another country, and our courts must necessarily take jurisdiction of the violations of the criminal laws of foreign independent governments, and punish acts as criminal here solely because they are in violation of the laws of such government, and which, but for such violation, would not be punishable here. It seems difficult to distinguish this from judicially enforcing and carrying into effect the penal laws of another government, instead of limiting our criminal jurisprudence to the execution of our own."

In New York state there is a statute comparable to our section 497 of the Penal Code, namely section 1301, New York Penal Law, McKinney's Consol. Laws, c. 40. Before the adoption of section 1301 in New York the courts there held that a person could not be charged and convicted of an offense of theft where the original taking occurred outside of the state of New York. In People v. Berger, 142 Misc. 178, 254 N.Y.S. 136, the defendant was a dealer in coupons and he unlawfully obtained premiums of a certain manufacturing company in New Jersey. He redeemed the coupons for personal property and took such property from New Jersey into New York and attempted to sell such property there. The court affirmed the conviction of the defendant who was charged with a violation of section 1301 of the Penal Law,

and in deciding the case said in 254 N.Y.S., at page 145:

"* * * we must keep in mind that *the substantive crime is the act of stealing in New Jersey.* Over this we have no jurisdiction, but when the one who is a party to that offense brings the proceeds of the larceny into this state, he may be prosecuted in our courts for a violation of section 1301 under our Penal Law." (Emphasis added.)

[3, 4] To affirm the judgment of conviction in this case it is necessary to adopt the theory of the legal fiction of a continuing trespass in grand theft cases. Even if such a theory were adopted the proof submitted in this case is, in our opinion, wholly insufficient to sustain the judgment, and in any event, we are of the opinion that the legislature, by adopting section 497 of the Penal Code, said in effect that, "We will have none of the legal fiction in California in matters of this sort, but we will adopt a statute which will spell out the crime and provide for the punishment of the very evil in question." We prefer to believe that the members of the legislature in 1872, knew of the variance of the rules in the various states and in England and elsewhere in respect to the problem of prosecutions in this state for thefts committed in other states or countries, and the property so stolen being brought into California, and they wisely adopted section 497 to cover the particular problem. The real offense here is not in taking the property, wherever that took place, but to the contrary, the real offense is in bringing it into California, and that is what the defendant should have been charged with, if anything.

The attempted appeal from the sentence is dismissed and the judgment is reversed.

WHITE, P. J., concurs.

DORAN, Justice.

I dissent.

It is argued on appeal, in effect, that appellant should have been charged with the violation of Section 497 of the Penal Code instead of 487. It is also argued that, in the circumstances, the court is without jurisdiction because the offense was committed outside the state of California.

I am in accord with respondent's contentions that, "The appellant committed a 'continuing trespass' which is expressly recognized under California case law and statutes.

"People v. Staples, 91 Cal. [23] 27, [27 P. 523]; People v. Black, 122 Cal. 73, 75, [54 P. 385]; People v. Barnes, 57 Cal.App. 515, 517–518 [207 P. 695]; People v. [Mills B.] Sing, 42 Cal.App. 385, 393 [183 P. 865]; People v. McGowan, 127 Cal.App. 39, 42 [14 P.2d 1036]; Penal Code, Section 497.

"Penal Code Section 27(2) further provides:

"'The following persons are liable to punishment under the laws of this state:

"'2. All who commit any offense without this state which, if committed within this state, would be larceny, robbery, or embezzlement under the laws of this state, and bring the property stolen or embezzled, or any part of it, or are found with it, * *.'

"In People v. Staples, supra (91 Cal. 23), at page 27 [27 P. 523], it is said:

"'* * * When goods are stolen in one jurisdiction and carried into another, in legal contemplation the crime of larceny is committed in both jurisdictions, and may be punished in either. * * *'

"The court in People v. [Mills B.] Sing, supra (42 Cal.App. 385), at pages 392–393 [183 P. 865], stated:

"'* * * If, after one has done what completes the theft, he continues traveling away with the goods, still intending to appropriate them to his own use, each step is a new trespass and a fresh larceny. * *'

"People v. McGowan, supra (127 Cal. App. 39), at page 42 [14 P.2d 1036], is equally explicit:

"'It is unnecessary to cite authorities to the effect that the courts of this state have no jurisdiction over *completed* offenses committed in other states. It is only when

the offense committed is a *continuing* offense, or one which reaches across boundary lines that jurisdiction is given. Thus, if the one who commits the offense of burglary also commits larceny by stealing property and then brings that stolen property across the boundary line, the offense of larceny is *continued* from the adjoining state into this state, and the superior court of any county into which the stolen property is brought may take jurisdiction of the offense committed in such county, to wit, the offense of larceny, * * *.' (Emphasis added.)

"Thus, the doctrine of 'continuing trespass,' as handed down from the common law, is well engrained in the case law of this state."

Appellant's argument is highly technical, but lacks support in the record and the law.

I would affirm the judgment.



147 Cal.App.2d 462

Rose NATHANSON, as Administratrix of the Estate of Joseph Nathanson, deceased, Plaintiff and Appellant,

v.

May MURPHY and Barbara Baglietto, Defendants and Respondents.

Civ. 17053.

District Court of Appeal, First District, Division 1, California.

Jan. 9, 1957.

Rehearing Denied Feb. 8, 1957.

Hearing Denied March 5, 1957.

Action for fraud. The Superior Court, City and County of San Francisco, T. L. Harris, J., entered an order directing that order denying motion for new trial be corrected nunc pro tunc so as to provide for amendment of judgment by eliminating therefrom provision for interest prior to date of judgment, and plaintiff appealed. The District Court of Appeal, Peters, P. J., held that the evidence supported implied finding that at time of hearing of motion for new trial, trial judge had and expressed intent to change the allowance of interest, and that hence failure to provide in order denying a new trial for such amendment of judgment was a clerical error which trial court had power to correct, at any time, nunc pro tunc.

Order affirmed.

1. Appeal and Error ⇐1199

An order which has been finally reversed cannot thereafter be modified.

2. Appeal and Error ⇐1199

Reversal of order, entered four days after denial of motion for new trial, modifying judgment by eliminating provision for interest prior to date of judgment did not deprive trial court of jurisdiction to thereafter direct that order modifying judgment by eliminating provision for interest prior to date of judgment be entered nunc pro tunc as of date motion for new trial was denied, since order entered nunc pro tunc was a new order made for new reasons and upon new grounds, and not the same order as the one previously reversed.

3. Appeal and Error ⇐1097(1), 1195(1)

Where court, in deciding appeal, states in its opinion a principle or rule of law, necessary to the decision, such principle or rule becomes the "law of the case", and must be adhered to throughout subsequent progress of case, both in lower court and upon subsequent appeal.

See publication Words and Phrases, for other judicial constructions and definitions of "Law of the Case".

4. Appeal and Error ⇐1195(3)

Where order modifying judgment by eliminating provision for interest prior to date of judgment was reversed on ground that record contained nothing to justify modification of judgment four days after denial of motion for new trial, "law of the case" did not preclude trial court from thereafter directing entry of order nunc

pro tunc as of date of denial of motion for new trial so as to correct clerical error by eliminating provision for interest prior to date of judgment.

5. Fraud ⇐64(1)

Under code provision for recovery of interest from date of vesting of right to recover damages certain, read with code provision vesting in jury discretion to award interest in action for breach of obligation not arising from contract, whether in action for fraud interest should be allowed from date of fraud was left to the discretion of the trier of fact to be exercised in consideration of the circumstances of the case. West's Ann.Civ.Code, §§ 3287, 3288.

6. Judgment ⇐306, 321

A court has inherent power to correct a clerical error after entry of judgment, and there is no time limitation on the exercise of such power.

7. Appeal and Error ⇐1024(5)

Conflicting averments in affidavits, filed in support of and opposition to motion for correction nunc pro tunc of order denying motion for new trial, as to whether trial judge at hearing on such motion for new trial had expressed intent to allow interest only from date of judgment and had directed that judgment be amended accordingly presented a question for trial court.

8. New Trial ⇐163(1)

On motion to correct nunc pro tunc order denying motion for new trial by providing therein for amendment of judgment so as to eliminate provision for interest prior to judgment, evidence supported implied finding that at hearing of motion for new trial, trial judge had expressed intent to modify judgment by eliminating such provision for interest.

9. New Trial ⇐163(1)

Failure to provide in order denying a new trial for amendment of judgment so as to eliminate therefrom provision for interest prior to judgment, in accordance with intent expressed by trial judge at hearing of motion for new trial, was a "clerical" and not a "judicial error", which trial court had power to correct, at any time, nunc pro tunc.

See publication Words and Phrases, for other judicial constructions and definitions of "Clerical Error" and "Judicial Error".

10. Judgment ⇐306

A provision of, or omission from, order or judgment as made or rendered, due to inadvertence or mistake of court, may be treated as a "clerical" as distinguished from a "judicial error".

Morgan V. Spicer, H. R. Whiting, San Francisco, for appellant.

William Klein, Toland McGettigan, San Francisco, for respondents.

PETERS, Presiding Justice.

On March 3, 1953, the trial court granted plaintiff a judgment for $5,000 against defendants in a fraud action, together with interest at 7 per cent from June 11, 1947, the date the court found plaintiff had parted with the money as a result of the alleged fraud. On September 30, 1955, the trial court entered its order granting defendants' motion to modify *nunc pro tunc* as of March 27, 1953, the findings of fact, conclusions and judgment in that action by providing that interest should run only from March 3, 1953, the date of the judgment. Appellant appeals.

The basic facts are not substantially in dispute and can be summarized as follows:

June 11, 1947: Plaintiff paid over to defendants $5,000 as a result of what the court found to be false representations by defendants. Plaintiff, thereafter, filed an action against defendants for fraud and deceit.

March 3, 1953: The trial court filed its judgment granting plaintiff the sum of $5,000 with interest at 7 per cent from June 11, 1947.

March 27, 1953: Defendants' motion for a new trial, that had been argued and submitted the preceding day, was denied. One of the basic disputes involved on this ap-

peal is whether, at the time of arguing the motion for a new trial, the judge expressed an intent to modify the judgment so as to allow interest only from March 3, 1953.

March 31, 1953: An order modifying the findings, conclusions and judgment by eliminating interest prior to March 3, 1953, was filed. No explanation for the making of these modifying orders was given by the trial judge.

Defendants appealed from the judgment, while the plaintiff appealed from the modifying order of March 31, 1953.

April 19, 1955: This court affirmed the judgment and reversed the modifying order of March 31, 1953. Nathanson v. Murphy, 132 Cal.App.2d 363, 282 P.2d 174. In due course, after denial of a petition for hearing, the remittitur issued.

August 5, 1955: The defendants served a notice of motion for an order directing that the order of March 31, 1953, modifying the findings, conclusions and judgment in reference to interest be entered *nunc pro tunc* as of March 27, 1953.

September 30, 1955: A minute order was entered directing "that motion of defendants to enter orders nunc pro tunc and amended judgment as specified in notice of motion be granted."

[1, 2] On the present appeal, the first contention of appellant is that the trial court had no jurisdiction to enter the challenged order, because the order appealed from is the "same" as the order previously reversed. The contention is that "the orders after reversal had no further existence and could not thereafter be entered nunc pro tunc." App.Op.Br. p. 7; citing such cases as Cowdery v. London & San Francisco Bank, 139 Cal. 298, 73 P. 196; Wickersham v. Crittenden, 103 Cal. 582, 37 P. 513; Mulford v. Estudillo, 32 Cal. 131, and Gillespie v. Andrews, 78 Cal.App. 595, 248 P. 715. Those cases stand for the proposition that once an order is finally reversed, that order cannot thereafter be modified. That is not this case. While the order of September 30, 1955, happens to be similar to the order of March 31, 1953, the September, 1955, order was not the "same" order as that of March, 1953. It was a new order, made for new reasons and upon new grounds.

Appellant also argues, for much the same reasons, that the September, 1955, order was invalidly entered *nunc pro tunc* because it is the law of the case that the order of March 31, 1953, was not entered to correct a clerical error, and so the order of September, 1955, since it is the "same" order, cannot be so entered. This argument is unsound for the same reasons that the first argument is unsound. The September, 1955, order is new and different from that of March, 1953.

It might be well to point out just what was decided in the prior appeal in reference to the March, 1953, order. In Nathanson v. Murphy, 132 Cal.App.2d 363, at page 373, 282 P.2d 174, at page 181, it is stated: "The orders were not made pursuant to the provisions of section 473, Code of Civil Procedure; to correct clerical errors or misprision in the record; or on motion for new trial pursuant to the provisions of sections 663 or 663a, Code of Civil Procedure. Section 3288, Civil Code, provides that in an action for the breach of an obligation not arising from contract and in every case of oppression, fraud or malice, interest may be given in the discretion of the *jury*. There being no jury in this case, this means the trial court, to whose discretion is left the determination of whether interest will be awarded. * * * The court exercised its discretion and awarded interest. '* * * the rule is well settled that a judgment or order once regularly entered can be modified or vacated by the court which entered it only in the manner prescribed by statute * * *.'"

[3, 4] The doctrine of the law of the case is that where on appeal the court, "in deciding the appeal, states in its opinion a principle or rule of law, necessary to the decision, that principle or rule becomes the law of the case, and must be adhered to throughout its subsequent progress, both in the lower court and upon subsequent ap-

peal." Tally v. Ganahl, 151 Cal. 418, 421, 90 P. 1049, 1050. In our former opinion, so far as the point here involved is concerned, we did not state "a principle or rule of law" within the meaning of the rule under discussion. We simply held, and so stated, that there was nothing in the record to justify the court in modifying the judgment on March 31, 1953, four days after denying the motion for a new trial. This was the fact, and this was the theory upon which the case was argued and decided. But now we are presented not with the order of March 31, 1953, for which no basis appears, but with the order of September 30, 1955, for which the court gave a reason, namely, to correct a clerical error made on March 27, 1953, at the time when the new trial was denied. Thus, the doctrine of law of the case has no application.

Appellant's counsel next urges that his client was entitled to interest as a matter of right from the date his client parted with her money under section 3287 of the Civil Code. In our former opinion we held that, when sections 3287 and 3288 of the Civil Code are read together, whether interest should be allowed from the date of the deceit or from the date of judgment was a matter to be determined by the trial court in its discretion. The argument, made on the previous appeal, that appellant was entitled to interest from the date of the fraud as a matter of right was rejected. This is so because we reversed the orders of March 31, 1953, not because the court was bound to allow interest from the date of the fraud, but because the orders modifying the interest charge were entered without authority.

This ruling on the prior appeal that in a fraud case the trial court possesses discretion as to whether or not interest shall be allowed from the date of the fraud or only from the date of judgment was clearly correct. The two pertinent Civil Code sections read as follows:

Section 3287: "Every person who is entitled to recover damages certain, or capable of being made certain by calculation, and the right to recover which is vested in him upon a particular day, is entitled also to recover interest thereon from that day, except during such time as the debtor is prevented by law, or by the act of the creditor, from paying the debt."

Section 3288: "In an action for the breach of an obligation not arising from contract, and in every case of oppression, fraud, or malice, interest may be given, in the discretion of the jury."

[5] Although section 3287 seems to provide that in every case involving "certain" damages interest should be allowed, when that section is read with section 3288 it is clear that in cases "not arising from contract" discretion as to interest is conferred on the trial court. The contrary implication found in Goodspeed v. Great Western Power Co., 33 Cal.App.2d 245, 271, 91 P.2d 623, 92 P.2d 410, is based upon the fact that the court in that case considered only section 3287 and failed to consider section 3288. When these sections are read together the proper rule is that the defrauded party may ask for damages from the date of the fraud, but "[w]hether such interest is to be awarded is left to the discretion of the trier of fact to be exercised in consideration of the circumstances of the case." Pavlovich v. Neidhardt, 128 Cal.App.2d 559, 562, 275 P.2d 836, 839[1]; see also Anderson v. Anderson, 129 Cal.App.2d 403, 276 P.2d 862; Leonard v. Huston, 122 Cal.App.2d 541, 265 P.2d 566; McCowen v. Pew, 18 Cal.App. 482, 123 P. 354.

We now come to the basic question involved on this appeal—was the trial court justified in making *nunc pro tunc* the modifying order of September 30, 1955?

[6] A court has the inherent power to correct a clerical error after entry of judgment, and there is no time limitation in the exercise of this power. In re Estate of Goldberg, 10 Cal.2d 709, 76 P.2d 508. This is not disputed. The question is, was an error committed when the trial court denied

1. In that case interest was not allowed from the date of the fraud, and this was approved by the appellate court.

the motion for a new trial, and was that error "clerical" or "judicial"? What does the record show in this regard?

The affidavit of respondents' counsel avers that at the argument on the motion for a new trial on March 26, 1953, the attention of the trial judge was called to the fact that the judgment allowed interest from June 11, 1947, the date of the fraud, and that the trial judge, in open court, declared "that it had not been his intention at any time to allow interest from the date the transaction involved took place * * * but intended that interest be allowed from the date of judgment, and directed and ordered that the findings and conclusions of law be modified and the judgment amended accordingly; that said order directing such modification and amendment was inadvertently omitted from the minutes of court on said day."

[7] Counsel for appellant filed an affidavit averring that the question of interest was not mentioned at the argument on March 26, 1953, and was first mentioned when the court made the abortive orders of March 31, 1953. This conflict was, of course, for the trial court.

The trial judge had no doubts that he had intended to modify the original judgment by deleting the provision for interest, but was somewhat uncertain as to whether he had expressed that feeling at the hearing on March 26, 1953, or first expressed it at the hearing on March 31, 1953. However, he did state in reference to the March 26, 1953, hearing: "I do recall this, that I had in my mind to allow interest only from the date of judgment."

The court reporter who was present at the hearing of the motion for a new trial on March 26, 1953, but did not take down the proceedings, testified that it was his best recollection that at the hearing of March 26, 1953, the trial judge expressed the thought "that the fraud was not of such a nature that would justify * * * [him] in dating the interest back to the time of the transaction. Therefore you would * * * correct the finding so that it would read interest from the date of the judgment"; that he was not positive about it and such statement may have been made on March 31, 1953, but his memory was "that on the proceedings on the motion for a new trial you made that statement." After reviewing the matter in his mind the reporter testified that "I believe you said it on the motion for new trial." The trial judge then stated that because the case was not a clear-cut one of fraud, he "never had in mind allowing interest from the date of the transaction because I thought that would be a penalty that ought to be assessed only with a definite case of fraud." After counsel for appellant stated that he believed the trial judge first expressed such thoughts at the hearing on March 31, 1953, the trial judge stated: "My recollection is uncertain, but I don't know just how to put it; I believe * * * it was on the motion for a new trial."

[8, 9] It is apparent from this testimony that the implied finding of the trial court that on March 26, 1953, at the hearing of the motion for a new trial, the trial judge not only had the intent to change the allowance of interest but expressed such intent, is supported by ample evidence. The failure to make such change was therefore a "clerical" mistake, and one that the court had the power to rectify, *nunc pro tunc*.

[10] In 3 Witkin on California Procedure, page 1894, the test between a clerical and judicial mistake is defined as follows: "The test is simply whether the challenged judgment was made or entered inadvertently (clerical error) or advertently (judicial error)." In Morgan v. State Board of Equalization, 89 Cal.App.2d 674, 682, 201 P.2d 859, 864, this court stated: "From these cases, it appears that the rules to be followed in determining whether an error is clerical or judicial so that the court may have the power to correct it by amendment, are as follows: (1) No serious problem is involved where the correction is to include a matter inadvertently omitted, such as the grounds for granting a new trial, or where the error is plainly clerical. (2) The serious problem arises where the

amendment is substantially different from the original order or substantially changes the rights of the parties. In such cases, if the court is purporting to correct a clerical error, it should say so, or there should be something in the record to show it. (3) Where there is conflicting evidence as to whether the error was clerical, the reviewing court will probably accept the conclusion of the trial court. [Citing Bastajian v. Brown, 19 Cal.2d 209, 120 P.2d 9.] If the record shows clearly that there was no clerical error, the recital by the trial court will not be conclusive."

The Bastajian case, cited above, illustrates how broad the powers of the trial judge are in correcting clerical errors. In that case the trial judge ordered judgment for the defendants, but, because of the illness of defendants' attorney, no findings were submitted. About a year later plaintiff's counsel prepared findings supporting the judgment but making favorable mention of the losing party. Defendants' counsel objected by letter to the findings, but they were nevertheless signed. Later they were corrected "*nunc pro tunc.*" It was held on appeal that the "trial court's finding upon conflicting evidence that a clerical error exists, and the nature thereof, is conclusive upon this court." 19 Cal.2d at page 215, 120 P.2d at page 12. The Supreme Court placed great emphasis on the trial judge's statement that the signed findings did not conform to his true but unexpressed intent, stating that such statement "cannot be wholly disregarded nor lightly brushed aside. It was a declaration of a fact that was concealed in the mind of the judge, and no one was in a better position than he to state his true intent." 19 Cal.2d at page 214, 120 P.2d at page 12.

The Bastajian case, in holding that the mere declaration of the trial judge that the final judgment did not properly state his intent is alone sufficient, states an extreme rule. It is difficult to reconcile it in that respect with In re Estate of Burnett, 11 Cal.2d 259, 79 P.2d 89, and Stevens v. Superior Court, 7 Cal.2d 110, 59 P.2d 988, in both of which the trial judge declared that he had made a clerical error, but this was held not to be conclusive. But in the instant case we are not dependent solely upon the statement of the trial judge that it was his intent not to allow interest. The judge's statement and the testimony of the reporter, reasonably interpreted, are to the effect that the judge not only had such intent, but expressed it at the hearing on March 26, 1953. In addition, there are the positive averments in the affidavit of counsel for respondent to the effect that the judge so ruled on March 26, 1953. Thus, the order of March 27, 1953, did not correctly state what the judge had expressed as his intent. This was a clerical and not a judicial error. Therefore, the court had the power, at any time, to correct it, *nunc pro tunc.*

The order appealed from is affirmed.

BRAY and FRED B. WOOD, JJ., concur.



147 Cal.App.2d 628

Thomas EISTRAT, Plaintiff and Appellant,

v.

BRUSH INDUSTRIAL LUMBER COMPANY, a corporation, and John A. Brush, Defendants and Respondents.

Civ. 21905.

District Court of Appeal, Second District, Division 2, California.

Jan. 17, 1957.

Rehearing Denied Feb. 14, 1957.

Hearing Denied March 13, 1957.

Action for damages for conversion of certain lumber and to vacate judgment in favor of defendants in an action involving the same parties and the same facts. The Superior Court of Los Angeles County, Leon T. David, J., sustained defendants' demurrer to plaintiff's third amended com-

plaint, and from ensuing judgment of dismissal, plaintiff appealed. The District Court of Appeal, Fox, J., held that complaint alleging that in prior action his then counsel refused to follow his suggestion to introduce certain available evidence that court denied motion to dismiss his then counsel and that his then counsel carelessly allowed clerk's transcript on appeal to include exhibits that were not in evidence did not allege facts showing extrinsic fraud or mistake.

Affirmed.

1. Judgment ⇐443(1)

The final judgment of a court having jurisdiction over person and subject matter can be attacked in equity after the time for appeal or other direct attack has expired only if the alleged fraud or mistake is extrinsic rather than intrinsic.

2. Judgment ⇐443(1)

Fraud or mistake is extrinsic, within rule that a final judgment can be attacked in equity after time for appeal or a direct attack has expired if alleged fraud or mistake is extrinsic rather than intrinsic, when it deprives unsuccessful party of an opportunity to present his case to the court.

3. Judgment ⇐433, 443(3)

If an unsuccessful party to an action has been kept in ignorance thereof or has been prevented from fully participating therein, there has been no true adversary proceeding and the judgment is open to attack at any time.

4. Judgment ⇐460(4)

Where complaint, seeking to recover damages for conversion of lumber and to vacate judgment in prior action between same parties involving same facts, alleged that at prior trial his then attorney refused to follow his suggestions to introduce available evidence, that court denied motion to dismiss his then counsel, and that his then counsel carelessly allowed clerk's transcript on appeal to include exhibits that were not in evidence, did not allege facts showing extrinsic fraud or mistake and did not entitle him to have prior judgment vacated.

5. Evidence ⇐43(2)

Court could take judicial notice of matters contained in record on prior appeal to court in action between same parties involving same facts.

Thomas Eistrat, appearing in pro. per.

Wendell W. Schooling, Kenneth M. Liskum, Huntington Park, for respondents.

FOX, Justice.

Plaintiff brought this action to recover damages for the conversion of certain lumber and to vacate a judgment in favor of defendants in an action between the same parties involving the same facts. The prior judgment was affirmed by this court in Eistrat v. Brush Industrial Lumber Co., 124 Cal.App.2d 42,[1] 268 P.2d 181.

Defendants' demurrer to plaintiff's third amended complaint was sustained without leave to amend. Plaintiff appeals from the ensuing judgment of dismissal.

In the instant matter, as in the prior case, plaintiff is seeking damages for the conversion of lumber that he claims belonged to him. He is, of course, met at the outset with the principle of *res judicata*. In order, however, to avoid its application, plaintiff asserts that the prior judgment was the result of extrinsic fraud or mistake.[2] In support of his contention he points to certain allegations in his third amended complaint: that at the trial he requested his attorney to (1) offer available evidence that defendants had not paid anyone for most of plaintiff's lumber; (2)

1. Reference is made to this opinion for the factual and procedural background of this litigation.

2. He relies on Westphal v. Westphal, 20 Cal.2d 393, 126 P.2d 105; Chung Gee v. Quan Wing, 103 Cal.App.2d 19, 229 P.2d 50; and Bacon v. Bacon, 150 Cal. 477, 89 P. 317.

offer in evidence the depositions of R. P. Kratz, vice president of defendant corporation, which showed defendants' defense to be sham and frivolous; (3) offer evidence that a judgment for defendants would be an unjust enrichment of them and a gross miscarriage of justice; (4) offer in evidence written opinion of United States District Court in a bankruptcy proceeding involving one of the vendees of the lumber, see Eistrat v. Brush Industrial Lumber Co., supra, 124 Cal.App.2d at pages 43, 44 and 45, 268 P.2d at pages 182 and 183, to the effect that all lumber taken and carried away from plaintiff's land to defendants was the property of plaintiff and his wife;[3] and that counsel refused to follow these suggestions. Plaintiff also alleged he made a motion in the trial court to dismiss his counsel so that he might handle the case himself. His motion, however, was denied. Plaintiff further alleges that counsel carelessly allowed the Clerk's Transcript on appeal to include exhibits that were not in evidence.

[1–4] In Westphal v. Westphal, 20 Cal. 2d 393, at page 397, 126 P.2d 105, at page 106, the court stated, that "The final judgment of a court having jurisdiction over persons and subject matter can be attacked in equity after the time for appeal or other direct attack has expired only if the alleged fraud or mistake is extrinsic rather than intrinsic. [Citations.] Fraud or mistake is extrinsic when it deprives the unsuccessful party of an opportunity to present his case to the court. [Citations.] If an unsuccessful party to an action has been kept in ignorance thereof [citations] or has been prevented from fully participating therein [citation], there has been no true adversary proceeding, and the judgment is open to attack at any time."[4] Measured by these principles, it is clear that plaintiff has not alleged facts entitling him to have the prior judgment vacated. There is no showing of extrinsic fraud or mistake within the definition of those terms by our courts. Westphal v. Westphal, supra; United States v. Throckmorton, 98 U.S. 61, 65, 25 L.Ed 93; In re Griffith's Estate, 84 Cal. 107, 112–113, 23 P. 528, 24 P. 381; Pico v. Cohn, 91 Cal. 129, 133–135, 25 P. 970, 27 P. 537, 13 L.R.A. 336.

[5] Plaintiff had full opportunity to present his case upon the prior trial, he fully participated therein by counsel, and it was truly an adversary proceeding.[5]

Plaintiff's complaint against his counsel does not warrant vacating the judgment. In Greenwood v. Greenwood, 112 Cal.App. 691, at page 696, 297 P. 589, at page 591, the court stated:

"Equity will not grant relief against a judgment at law, where such judgment was obtained in consequence of the neglect, inattention, mistake, or incompetency of the attorney, unless caused by the opposite party." There is no charge here to bring this case within the stated exception.

The judgment is affirmed

MOORE, P. J., and ASHBURN, J., concur.

Hearing denied; McCOMB, J., not participating.

3. It appears that the findings of the federal court in the bankruptcy proceedings were received in evidence. See Eistrat v. Brush Industrial Lumber Co., supra, 124 Cal.App.2d at page 45, 268 P.2d at page 183.

4. For the classic definition of "extrinsic fraud" see United States v. Throckmorton, 98 U.S. 61, 65, 25 L.Ed. 93

5. We take judicial notice of the matters contained in the record on the prior appeal to this court. Hammell v. Britton, 19 Cal.2d 72, 75, 119 P.2d 333. That record discloses that the Reporter's Transcript covers 302 pages, and that the trial consumed some four days.

147 Cal.App.2d 646

Opha Frances HARVEY, Dr. Georgiana Raymond, Nina Ronilla Graves, Otis Robert Smith, Plaintiffs and Appellants,

v.

Padie Lou SMITH and Thomas J. Fletcher, as Executor of the Last Will and Testament of Otis C. Smith, Deceased, Defendants and Respondents.

Civ. 5541.

District Court of Appeal, Fourth District, California.

Jan. 17, 1957.

Rehearing Denied Feb. 15, 1957.

Hearing Denied March 13, 1957.

Quiet title action by testatrix' children against second wife of testatrix' husband and executor of husband's will to quiet title to land, which was devised by testatrix. The Superior Court, Riverside County, Francis M. Estudillo, Judge Assigned, rendered judgment that children take nothing and that the property be quieted in heirs and devisees of husband and in executor under husband's last will and testament, and children appealed. The District Court of Appeal, Mussell, J., held that, where will provided that testatrix' husband was to have life estate in certain realty and be entitled to use the realty and keep all the revenue therefrom but not be entitled to dispose of it without written consent of testatrix' children, and will further gave husband the residue of the estate, and decree of distribution provided that there be distributed to husband a life estate, including all income, to the property involved and all other property of the estate whether described or not, husband received both a life estate and the entire remainder interest and, therefore, was vested with title in fee.

Judgment affirmed.

1. Executors and Administrators ⇐315(6)

In general and in absence of extrinsic fraud or anything akin thereto, the decree of distribution, which has become final, remains the unalterable measure of rights of all persons who may be interested in the estate even though the decree is inaccurate from standpoint of provisions of will.

2. Executors and Administrators ⇐315(5)

If language of decree of distribution is uncertain, vague, or ambiguous, it is subject to judicial explanation or interpretation, and, in such circumstances, the will itself may be used to establish the true meaning and intent of the decree.

3. Executors and Administrators ⇐315(6)

Decree of distribution, which became final and remained undisturbed, and which directed the distribution in plain and unambiguous terms, operated as an interpretation of the will and bound the parties.

4. Wills ⇐617

Where will gave testatrix' husband a life estate in named property and further provided that he should be entitled to use the property and receive revenue therefrom but should not be entitled to dispose of it without written consent of testatrix' children, the prohibition on disposition without children's consent did not divest husband of his life estate or create any future vested interest in the children but only curtailed husband's right to dispose of it.

5. Wills ⇐435, 440

Court's function is to construe a will, not to make one, and to ascertain testator's intention as expressed and, if lawful, give it effect.

6. Executors and Administrators ⇐315(5) Wills ⇐597(2)

Where will provided that testatrix' husband was to have life estate in certain realty and be entitled to use the realty and keep all the revenue therefrom but not be entitled to dispose of it without written consent of testatrix' children, and will further gave husband the residue of the estate, and the decree of distribution provided that there be distributed to husband a life estate, including all income, to the property involved and all other property of the estate whether described or not, husband received both a life estate and the entire remainder interest and, therefore, was vested with title in fee.

William J. Clark, Sr., Los Angeles, and William J. Clark, Jr., Yucaipa, for appellants.

Lacey & Cox, Hemet, for respondent Padie Lou Smith.

Best, Best & Krieger, Riverside, for respondent Thomas J. Fletcher.

MUSSELL, Justice.

This is a quiet title action brought by plaintiffs and appellants, the children by a former marriage of Otis C. Smith, deceased, against Padie Lou Smith, the widow of the decedent, and Thomas J. Fletcher, the executor of his will. Defendants in their answers alleged that the estate of Otis C. Smith and his heirs and devisees are the owners in fee simple of the property involved. The trial court rendered judgment that plaintiffs take nothing by their complaint and that the title to the property be quieted in the heirs and devisees of Otis C. Smith and Thomas J. Fletcher, as executor under his last will and testament.

The facts are set forth in an agreed statement on appeal. Alice E. Smith died October 8, 1941, and at the time of her death owned the property here involved. She left surviving her Otis C. Smith, her husband, and four children, the plaintiffs and appellants in the present action.

It was stipulated that all parties hereto obtained all their right, title and interest in and to the subject property under the will of Alice E. Smith and by reason of the decree of distribution of her estate, Riverside Probate No. 8979. It was further stipulated that "Otis C. Smith died July 25, 1955; his estate is being probated in Riverside county, No. 16710. Defendant Thomas J. Fletcher is the duly qualified and acting executor thereof. The executor included the subject property in the inventory of the estate."

The last will and testament of Alice E. Smith, executed September 4, 1941, contained, in part, the following provisions:

"Third: I give and bequeath to my beloved husband, Otis Smith a life estate in Lots 1 and 2 Block 40 Whittier Subdivision and Lot 1 and the East 13.5 feet of Lot 2 Whittier Subdivision of Block 151, Hemet, Riverside County, California. Said Otis Smith shall be entitled to use and manage said property and to receive and keep for his own use all the rent and revenue therefrom, but he shall not be entitled to sell, mortgage or dispose of the same without the written consent of our children, to wit, Opha Francis Harvey, Dr. Georgiana Raymond, Nina Ronilia Graves, and Otis Robert Smith.

"Fourth: I give and bequeath to my husband, Otis Smith all the residue of my estate, both personal real and mixed property wheresoever the same may be situated."

The order settling final account and decree of distribution in the matter of the estate of Alice E. Smith, No. 8979, dated June 8, 1942, provided, in part, that there be distributed to Otis Smith a life estate, including all income, in and to the property here involved, and "all other property of said estate whether described herein or not."

Appellants contend that under the terms of the last will and testament of Alice E. Smith, deceased, and decree of distribution in the probate of her estate, Otis C. Smith received a life estate and no more in the property involved. This contention is without merit.

[1, 2] In re Estate of Goldberg, 10 Cal. 2d 709, 713, 76 P.2d 508, 510, the rule is stated:

"In general, and in the absence of some existing and affecting condition such as extrinsic fraud, or anything akin thereto, the rule would appear to be well established that even though from a standpoint of following the specific provisions of the will, a decree of distribution of the estate is inaccurate and incorrect, nevertheless after the decree has become final, for all time thereafter, it remains the unalterable measure of the rights of all persons who may be interested in the estate. Matter of Trescony, 119 Cal. 568, 51 P. 951; Lankton v. Superior Court, 5 Cal.2d 694, 696, 55 P.2d 1170; Goad v.

Montgomery, 119 Cal. 552, 51 P. 681, 63 Am.St.Rep. 145; Moor v. Vawter, 84 Cal.App. 678, 258 P. 622; and authorities therein respectively cited. However, should the language of such a decree appear to be 'uncertain, vague or ambiguous,' it is subject to judicial explanation or interpretation, and in such circumstances, the will itself may be used to establish the true meaning and intent of the decree. Fraser v. Carmen-Ryles, 8 Cal.2d 143, 64 P.2d 397; In re Ewer, 177 Cal. 660, 171 P. 683; Horton v. Winbigler, 175 Cal. 149, 165 P. 423."

In Mitchell v. Bagot, 48 Cal.App.2d 281, 285–286, 119 P.2d 758, it was held that there is no rule of law that will permit a court setting in equity to declare a decree of distribution void because it does not conform to the provisions of the will; that the will is well settled that once the decree of distribution becomes final it becomes the measure of the rights of the beneficiary and is immune from collateral attack even though in contravention of the terms of the will; and that the will cannot be used to impeach though it may be used to interpret the decree.

In Bacon v. Kessel, 31 Cal.App.2d 245, 250, 87 P.2d 857, 861, the court, in discussing the effect of a decree of distribution, said:

"The decree of distribution from which no appeal was taken is a final judgment, and the certified copy thereof was properly admitted. Code Civ. Proc. sec. 1905. That decree is determinative of the facts presented or which might have been presented therein, and is conclusive upon the parties or their privies as to those facts when *incidentally* put in issue between them in relation to a different matter, in the same or any other court." (Citations.)

[3] In the instant case there is no allegation in the pleadings or statement in the stipulation of facts of extrinsic fraud, mistake, clerical error or jurisdictional defect regarding the decree of distribution in the estate of Alice E. Smith, deceased. That decree became final on August 7, 1942, and remains undisturbed. It was stipulated that all parties hereto obtained all their right, title and interest in and to the property involved under the will of Alice E. Smith and by reason of said decree of distribution. The decree of distribution is not ambiguous. It gives a life estate to Otis C. Smith and the reversionary interest to him under the omnibus clause of the decree by giving to him "all other property of said estate whether described herein or not." Where, as here, a decree of distribution directs distribution in plain and unambiguous terms it operates as an interpretation of the will and binds the parties. In re Estate of Tynan, 129 Cal.App.2d 364, 366, 276 P.2d 809.

[4, 5] Plaintiffs contend that in her will Alice E. Smith designated them as the holders of the reversionary interest in her estate by vesting them with the power of termination. We do not agree with this contention. The function of the court is to construe a will, not to make one; to ascertain the testator's intention as expressed and, if lawful, give it effect. In re Estate of Lefranc, 38 Cal.2d 289, 296, 239 P.2d 617. The provisions in paragraph three of the will prohibiting Otis Smith from selling, mortgaging or disposing of his life estate without the consent of the children did not operate to divest Otis Smith of his life estate. They only curtailed his right to dispose of it and did not create any future vested interest in plaintiffs in the property involved. Under the fourth paragraph of the will the residue of the estate, after a specific bequest to decedent's sister and the life estate to Otis Smith, also bequeathed to Otis Smith "all the residue of my estate, both personal real and mixed property wheresoever the same may be situated." It follows that if the will was used by the trial court in interpreting the decree the provisions thereof are not inconsistent with those of the decree and the trial court correctly determined the extent of the interest of Otis Smith in the property involved as

well as the extent of the interest of the plaintiffs therein.

[6] Plaintiffs argue that the trial court erred in finding that the remainder interest in the property involved was not specifically distributed by the decree of distribution and then concluding that the decree gave to Otis Smith "both a life estate and the entire remainder interest in the subject property and vested in him title to the subject property in fee." However, the trial court could and did conclude that this reversionary interest passed to Otis C. Smith and he was vested with title to the property in fee under the terms of the omnibus clause of the decree and under paragraph four of the will.

The judgment is affirmed.

BARNARD, P. J., and GRIFFIN, J., concur.



147 Cal.App.2d Supp. 831

PEOPLE of the State of California, Plaintiff and Respondent,

v.

William Duncan WOODWORTH, Defendant and Appellant.

Cr. A. 3546.

Appellate Department, Superior Court, Los Angeles County, California.

Dec. 17, 1956.

Defendant was prosecuted on the charge of being a "vag-lewd". Judgment of conviction in the Municipal Court for the Los Angeles Judicial District and from an order denying a new trial, Harold C. Shepherd, J., the defendant appealed. The Superior Court, Appellate Department, Bishop, P. J., held that the failure to give a cautionary instruction was prejudicial error.

Judgment and order denying a new trial reversed.

1. Criminal Law ⇐768(1), 1173(2)

In prosecution for being a "vag-lewd" where except for character witnesses, no other witness was called, not even the partner of the police officer who was in attendance at the trial, error in failing to give a cautionary instruction was prejudicial error.

2. Criminal Law ⇐768(1)

A prosecution on a charge of being a "vag-lewd", was essentially a sex case in which a cautionary instruction should have been given.

Thomas Higgins, Jr., C. V. Eberhard, Los Angeles, for appellant.

Roger Arnebergh, City Atty., Donald M. Redwine, Asst. City Atty., Philip E. Grey, Deputy City Atty., Los Angeles, for respondent.

BISHOP, Presiding Judge.

[1] The testimony of the police officer, as to the approach and conduct of the defendant upon the one occasion when the two met, was sufficient to support the jury's verdict finding him (the defendant) guilty on the charge of being a "vag-lewd", for the approach and subsequent conduct was that of a homosexual. While admitting the meeting with the police officer, the defendant, as a witness, denied the acts and conversation which the officer had related and upon which depended all proof of his character as a lewd person. Except for the character witnesses—among whom appeared the elementary administrator of the school where the defendant was a teacher, and a man who had served with him in the Navy (in whose reserved service the defendant is a Lieutenant-Commander)—there was no other witness called, not even the partner of the police officer, who was in attendance at the trial. Every circumstance held in People v. McGhee, 1954, 123 Cal.App.2d 542, 544, 266

P.2d 874, 876, to require the giving of a cautionary instruction, was present. The cautionary instruction was among those written in a series of "mandatory instructions" that were before the trial court. It was stricken. In this evenly balanced case, the error in not giving it was prejudicial.

The rule requiring that the cautionary instruction be given arose in rape cases, but it is by no means confined to them. The McGhee case, supra, was one where the charge was pimping. In it a review is made of a number of cases, including several not involving rape, where it had been held that the cautionary instruction should be given. Nor as the respondent contends, is the rule limited to cases where the prosecuting witnesses are minors. In People v. Willis, 1954, 129 Cal.App.2d 330, 276 P.2d 853, the prosecuting witnesses were two sailors, whose age evidently was considered of no importance in applying the principle of interest to us, for it was not mentioned. Under the facts of that case the conclusion was reached that the error that had been committed, in failing to give the cautionary instruction, was without prejudice, but the parenthetical comment of the court is, nevertheless, worth repeating, 129 Cal.App.2d 337, 276 P.2d 857: "(The instruction ought, however, to be given in cases of this kind instead of taking the chance that its omission might be prejudicial. The work of reviewing courts would be considerably lessened if trial courts would perform their duty in this respect.)"

[2] It is also argued that this is not a sex case, within the meaning of the rule, because the question to be answered is not, was the defendant guilty of some act involving sex? but, was he possessed of a lewd character? The weakness of this argument is that it overlooks the fact that the answer to the question as to the defendant's character is almost entirely dependent in such a case as this upon the answer to be given as to the acts by which that character is revealed. Those acts were sex acts, and this is essentially a sex case, in which a cautionary instruction should have been, but was not, given.

The judgment and order denying a new trial are reversed.

PATROSSO and SWAIN, JJ., concur.

147 Cal.App.2d 631

Alfred B. FISKE, Petitioner and Appellant,

v.

STATE PERSONNEL BOARD of the State of California, Emery Olson, Ford Chatters, Robert Gray, Benjamin Mallary and Wilmer W. Morse, members thereof, California Horse Racing Board, a department of the State of California, Dwight W. Murphy, George I. Holmes and B. W. Railey, members thereof, Robert C. Kirkwood, Charles G. Johnson, Respondents.

Civ. 8935.

District Court of Appeal
Third District, California.
Jan. 17, 1957.

Mandamus proceeding to compel State Personnel Board to annul decision sustaining petitioner's dismissal from position as secretary of State Horse Racing Board. The Superior Court, Sacramento County, Malcolm C. Glenn, J., rendered judgment adverse to petitioner, and he appealed. The District Court of Appeal, Schottky, J., held that evidence supported board's finding that petitioner had been inefficient, insubordinate, and failing in good behavior.

Judgment affirmed.

1. Officers ⇐72(2)

In view of fact that State Personnel Board is a constitutional agency, its decision after hearing will be sustained on review by Superior Court when there is substantial evidence in light of whole record to sustain it. West's Ann.Code Civ.Proc., § 1094.5(c); West's Ann.Gov.Code, § 19572 (c, f, s).

2. Appeal and Error ⇐989

Power of appellate court begins and ends with determination as to whether there is any substantial evidence to support trial court.

3. Administrative Law and Procedure ⇐786, 789
Officers ⇐72(2)

In reviewing evidence before State Personnel Board, all conflicts must be resolved in favor of findings of board and all legitimate and reasonable inferences indulged to uphold its decision. West's Ann.Gov.Code, § 19572(c, f, s).

4. Officers ⇐72(1)

In proceeding for discharge of secretary of horse racing board from his civil service position, evidence sustained board's findings that secretary had been inefficient, insubordinate and failing of good behavior. West's Ann.Bus. & Prof.Code, § 19400 et seq.; West's Ann.Code Civ.Proc., § 1094.5 (c); West's Ann.Gov.Code, § 19572(c, f, s).

5. Officers ⇐72(1)

In proceeding for discharge from civil service position as secretary of horse racing board, evidence sustained finding of board that secretary had been guilty of misconduct in drinking while on duty in contravention of racing board rules. West's Ann. Bus. & Prof.Code, § 19400 et seq.; West's Ann.Gov.Code, § 19572(c, f, s).

James H. Phillips, Sacramento, for appellant.

Edmund G. Brown, Atty. Gen., Howard S. Goldin, Deputy Atty. Gen., for respondents.

SCHOTTKY, Justice.

The California Horse Racing Board took punitive action against petitioner and appellant, Alfred B. Fiske, dismissing him from his civil service position as secretary of said board. The amended notice of punitive action stated the causes for appellant's dismissal as:

(1) His inefficiency;

(2) His insubordination; and

(3) Failure of good behavior or acts during duty hours which are incompatible with or inimical to the public service within the meaning of Government Code Section 19572, subdivisions (c), (f) and (s).

Appellant filed with the State Personnel Board an answer and request for hearing on the dismissal, and following a hearing the Personnel Board rendered its findings

of fact and decision sustaining the punitive action taken by the Racing Board. Thereafter appellant filed in the Superior Court a petition for a writ of mandate to compel the State Personnel Board to annul its decision sustaining his dismissal and to reinstate petitioner to his former civil service position. The Superior Court sustained the action of the Personnel Board upholding the dismissal of petitioner, and petitioner has appealed from the judgment denying said writ.

Appellant attacks all of the findings of fact of the Personnel Board, contending that said findings of fact constitute an abuse of discretion in that there is no substantial evidence to support any of them.

[1] Preliminarily, certain well settled rules should be stated. The State Personnel Board is a constitutional agency, and as such its decisions, after hearing, will be sustained on review by the Superior Court when there is substantial evidence in the light of the whole record to sustain such decision. Code Civ.Proc., sec. 1094.5 (c); Boren v. State Personnel Board, 37 Cal.2d 634, 637–638, 234 P.2d 981; Genser v. State Personnel Board, 112 Cal.App.2d 77, 80, 245 P.2d 1090; Nelson v. Department of Corrections, 110 Cal.App.2d 331, 336, 242 P.2d 906.

[2, 3] On appeal, the power of the appellate court begins and ends with a determination as to whether there is any substantial evidence to support the trial court. Moran v. Board of Medical Examiners, 32 Cal.2d 301, 308–309, 196 P.2d 20; Genser v. State Personnel Board, 112 Cal.App.2d 77, 81, 245 P.2d 1090. As stated in Genser v. State Personnel Board, supra, 112 Cal. App.2d 77, 87, 245 P.2d 1090, in reviewing the evidence before the Personnel Board all conflicts must be resolved in favor of the findings of the board and all legitimate and reasonable inferences indulged in to uphold their decision.

[4] The first finding attacked by appellant is as follows:

"That on or about December 11, 1952, Alfred B. Fiske did attend and was present at a regularly scheduled Executive Session meeting of the California Horse Racing Board; that each and all of the then Commissioners of the California Horse Racing Board, namely, Dwight Murphy, John H. Sattler and Fred W. Pabst, were present at said Executive Session meeting; that in the course of said Executive Session meeting Alfred B. Fiske openly and orally stated in substance as follows:

"'* * * I have no respect for a certain member of this Board. Change that "certain" to John H. Sattler, here, who is prejudiced in mind and in thought, and in my personal opinion, (emphasize "personal") does not belong on this Board, or to represent any honorable organization entrusted with the will and the welfare of the people of the State.'

"That at said time and place, said John H. Sattler did in substance state that he (Sattler) did not intend to reply to any alcoholic who would make such remarks.

"That immediately thereafter, at said time and place, said Alfred B. Fiske did continue to talk, and did say about said John H. Sattler, as follows:

"'The man is incompetent; he relies on third-rate information from prejudiced sources; he is a detriment to racing; and in my opinion, I can prove by organizations identified with the track that he's been nothing but a trouble maker, a disturber and a malcontent ever since he's been on this Board.'"

Appellant did not deny that the foregoing occurred at the board meeting but endeavored to show provocation by claiming that Mr. Sattler had on prior occasions made remarks highly detrimental to appellant, but Mr. Sattler denied having made any such statements.

There can be no question as to the sufficiency of the evidence to support the finding that the said actions and conduct of ap-

pellant constituted "failure of good behavior and acts during the duty hours which are incompatible and inimical to the public service within the meaning of Government Code Section 19572, subdivision (s)."

Also attacked by appellant is the finding:

"That Alfred B. Fiske prepared, or caused to be prepared, the 1953–54 budget for the California Horse Racing Board, which budget was submitted to the Department of Finance on about October 24, 1952, and in which budget Alfred B. Fiske inserted, or caused to be inserted, a request for the addition of three new positions as Race Track Investigators to the Board's then existent staff of four Race Track Investigators. Said Budget also provided for the continuance of three positions classified as 'Photographer-Identifier' for 1953–54.

"On or about December 11, 1952, the California Horse Racing Board met and unanimously decided to abandon and discontinue the service of identification of horses and the position for classification of the Photographer-Identifier not later than the close of the 1952–53 fiscal year.

"Also, on or about December 11, 1952, during an Executive Session meeting of the California Horse Racing Board, at which time Alfred B. Fiske was present in his official capacity as Secretary thereof, Chairman Dwight Murphy of said Board announced substantially as follows: That the Board wished to have of record that Chief Investigator Ford was to have under his jurisdiction, in addition to himself, not more than four investigators; and that additional investigators, if any, were to be dispensed with as of June 30, 1953, or sooner. That on or about January 22, 1953, during an Executive Session of the California Horse Racing Board, at which time Alfred B. Fiske was present in his official capacity as Secretary thereof, said Board duly adopted a resolution providing for continued operation of said Board's staff of four investigators under the supervision and direction of the Board's Chief Investigator, to-wit: Mr. Ford."

Said finding then goes on to state that on February 2, 1953, appellant as secretary of the Racing Board made a voluntary appearance before an Assembly committee and without authority from the Racing Board, and contrary to the express policy of the Board to continue its staff of investigators, suggested and advocated the elimination of investigators. Said finding states further:

"Thereafter, on or about March 19, 1953, at a hearing on the revised budget of the California Horse Racing Board before the Sub-Committee of the Senate Committee on Finance, while Alfred B. Fiske was present, Dwight Murphy, in his official capacity as Chairman of the California Horse Racing Board, did testify before such Senate Sub-Committee substantially as follows:

"That the California Horse Racing Board desired to eliminate the horse identification service; that such horse identification was an obligation which should be borne by the licensed racing associations; that the cost of horse identification service was an unnecessary State expense and was not required by the Racing Act [Business and Professions Code, § 19400 et seq.]. That the Board did not need three additional Race Track Investigators; that the California Horse Racing Board believed that the retention of its present staff of Race Track Investigators was absolutely necessary.

"That immediately after Chairman Murphy testified, Alfred B. Fiske did testify before said Senate Sub-Committee in substance as follows:

"That no Race Track Investigators at all were needed by the California Horse Racing Board; and that the

Rules of Racing had been changed to require racing associations to police their tracks.

"That such statement as to the Rules of Racing having been changed to require the racing associations to police their tracks was false and misleading when made and was known by Mr. Fiske to have been false and misleading when made; that in truth and in fact the Rules of Racing ever since 1943 to date hereof have required licensed racing associations to properly police their grounds."

Said finding then states other instances when appellant testified before the legislative committee in opposition to the established policy of the Racing Board.

There is ample evidence to support the above finding and the further finding that said acts and conduct of appellant "constituted and do constitute inefficiency, insubordination and failure of good behavior and acts which are incompatible with and inimical to the public service within the meaning of Government Code Section 19572, subdivisions (c), (f) and (s)."

There were a number of other findings made by the Personnel Board and by the court detailing other acts and conduct of appellant in not only failing to observe and carry out the policies adopted by the board but openly opposing said policies. There is ample evidence in the record to support said findings.

[5] The final finding attacked by appellant states:

"That during the horse race meeting conducted at Del Mar Race Track in 1952, from on or about July 22, 1952, through September 6, 1952, both dates inclusive, and at the 1952–53 horse race meeting at Santa Anita Race Track, from on or about December 26, 1952 through March 7, 1953, both dates inclusive, and at each of said meetings, Alfred B. Fiske frequently and repeatedly did drink and consume intoxicating liquor during the duty hours.

"That the State Personnel Board found, and this Court now finds that the actions and conduct of Alfred B. Fiske hereinabove found to be true constituted and do constitute failure of good behavior and acts during the duty hours which are incompatible with and inimical to the public service within the meaning of Government Code Section 19572, subdivision (s)."

This finding is supported by the testimony of Raymond Gill, a bartender, who testified that at both of these race meetings appellant visited the bar two or three times per week and that during both of these race meetings, appellant would visit the bar once, twice, three times per day and on each visit he would take from two to four drinks of Scotch and perhaps more, depending on how long appellant stayed there. This drinking took place during the afternoon while the races actually were being conducted. This evidence was corroborated by other testimony.

By rule of the State Personnel Board, Title 4, Section 172 of the California Administrative Code, it is provided:

"All * * * employees in the State civil service * * * shall possess the general qualifications of * * sobriety, * * *"

In the case of American Cigar Co. v. Fabacher, 156 La. 182, 100 So. 299, 300, the word "sober" was held to mean moderate in, or abstinent from, the use of intoxicating liquor, and it was said that "The synonyms for 'sober' are abstemious, abstinent, temperate, unintoxicated."

Also, in Title 4, Section 1463, Rules of the California Horse Racing Board, it is provided:

"Drinking of intoxicating liquor, by any racing official, or track employee, licensed by the board, while on duty, is prohibited. Any person violating this rule shall be summarily relieved of his duties by the stewards and a full report made to the board, which may, in its discretion, revoke the license of such person * * *"

It would not appear unreasonable to hold the Secretary of the Racing Board, while on duty, to the same standard of conduct required of racing officials or track employees licensed by the Board. Here, there is not involved just an isolated drink but a course of conduct during duty hours, and appellant is not charged with drunkenness on duty, but with frequently and repeatedly drinking during duty hours.

Appellant's defense that he possessed the power to place himself off duty, do his drinking, and then return to duty would seem to be without merit. How could the public, which comes in contact with the Secretary, know in which capacity he was doing his drinking, as a civil servant on or off duty? It would appear that the acts in this finding would also constitute failure of good behavior.

The California Horse Racing Board has jurisdiction and supervision over horse racing in California and appoints a secretary whose duties are to "keep a full and true record of all proceedings of the board, preserve at the general office all books, documents and papers of the board, prepare for service such notices and other papers as may be required of him by the board, and perform such other duties as the board may prescribe."

It is apparent from the record that appellant misconceived the scope of his authority as secretary of the board and that he, in effect, attempted to place himself above the authority of the Racing Board. It is impossible to conceive how any board can function properly and fulfill the duties assigned to it by law if its secretary can be permitted to pursue the course of conduct that the record shows that appellant pursued. Such conduct cannot be justified by either reason or authority and fully supports the conclusion that the conduct of appellant "constituted inefficiency, insubordination, and failure of good behavior and acts during duty hours which are incompatible with and inimical to the public service."

No other points raised require discussion.

In view of the foregoing we conclude that the respondent State Personnel Board did not act arbitrarily, unreasonably or excessively, and did not commit any abuse of discretion in its decision; that said board's decision is supported by substantial evidence in the light of the whole record before said board; that said board did not exceed its jurisdiction; said board proceeded in the manner required by law, and that said board's decision is supported by the findings, and the findings are supported by the evidence; that throughout the entire proceedings the petitioner was afforded a full and fair hearing.

The judgment is affirmed.

VAN DYKE, P. J., and PEEK, J., concur.



147 Cal.App.2d 515

Herbert L. SINGER, Mrs. Herbert L. Singer, and Sharon Singer, by and through her guardian ad litem, Herbert L. Singer, Plaintiffs and Appellants,

v.

David BOGEN et al., Defendants,

Judge William B. McKesson and Judge William B. Neeley, Defendants and Respondents.

Civ. 22026.

District Court of Appeal, Second District, Division 1, California.

Jan. 11, 1957.

Action by a minor and her parents against two superior court judges for her alleged false imprisonment in Juvenile Hall during proceeding to declare her a ward of juvenile court and pursuant to district attorney's request for her detention as a material witness for the People in

prosecution of her grandfather for violation of Pen.Code, § 288. From a judgment of the Superior Court of Los Angeles County, Leon T. David, J., dismissing the action, plaintiffs appealed. The District Court of Appeal, Fourt, J., held that plaintiffs' amended complaint was demurrable as merely claiming procedural irregularities in that petition for minor's detention as juvenile court ward and citation of her parents to appear at pre-detention hearing were not timely filed and that grounds on which district attorney sought her detention did not warrant it.

Judgment affirmed.

See also 134 Cal.App.2d 547, 285 P.2d 955.

1. Courts ⇐175
Infants ⇐16.4

The juvenile court is merely part of superior court, which is court of general jurisdiction, judge of which, when sitting as juvenile court judge, sits as superior court judge exercising part of such court's general jurisdiction.

2. Judges ⇐36

Great care must be taken not to restrict absolution of judge performing or purporting to perform his official functions from civil liability for damages, as for false imprisonment, and care should be taken in limiting such immunity to situations in which judge has jurisdiction.

3. Judges ⇐36

The test of judicial officer's immunity from civil suit for damages because of his judicial acts is not whether he committed an error of judgment, but whether act complained of was within general scope of his judicial powers and done in honest belief that he was legally warranted in doing it.

4. False Imprisonment ⇐20(1)

In action against two superior court judges for false imprisonment of minor in Juvenile Hall during proceedings to declare her a juvenile court ward and pursuant to district attorney's request for her detention as material witness for People in prosecution of her grandfather for violation of Pen.Code, § 288, plaintiffs' amended complaint was demurrable as merely claiming certain procedural irregularities in that petition for minor's detention as court's ward and citation of her parents to appear at predetention hearing were not timely filed and that grounds on which district attorney sought her detention did not warrant it, as judges acted within scope of general subject matter over which they were given power. West's Ann.Pen.Code, § 288.

5. Habeas Corpus ⇐117(2)

A decision of District Court of Appeal, granting writ of habeas corpus for minor's release from custody of Juvenile Hall's superintendent under superior court judges' orders for her detention therein as juvenile court ward and material witness for People in prosecution of her grandfather for violation of Penal Code, § 288, was not a determination that judges acted beyond their jurisdiction in such sense as to deprive them of immunity from civil liability for false imprisonment of minor. West's Ann.Pen.Code, § 288.

Randolph Weltner, C. A. Weltner, Los Angeles, for appellants.

Harold W. Kennedy, County Counsel, Wm. E. Lamoreaux, Asst. County Counsel, Isaac Pacht, Los Angeles, for respondents.

FOURT, Justice.

This is an appeal by the plaintiffs from a judgment of dismissal made and entered in favor of the respondents and against the plaintiffs.

The plaintiff Sharon Singer, a minor, and her father and mother, Mr. and Mrs. Herbert L. Singer, filed an action for false imprisonment against respondents Judge William B. McKesson and Judge William B. Neeley, judges of the superior court of the State of California in and for the County of Los Angeles. The trial court ordered a dismissal of the action after having sustained the demurrer of the respondents to the amended complaint.

Substantially, the allegations of the amended complaint are as follows: That Judge William B. McKesson and Judge William B. Neeley are sued in their official capacities as judges of the superior court. As to Judge William B. McKesson, it is alleged that on June 29, 1955, after a petition was filed to have Sharon Singer declared a ward of the juvenile court, Judge McKesson, without any hearing, ordered Sharon detained in Juvenile Hall and that on June 30, 1955, he conducted a pre-detention hearing in regard to Sharon, but that no citation with reference to the hearing was served upon Sharon's parents; that at the pre-detention hearing Judge McKesson ordered the continued detention of Sharon in Juvenile Hall, and on July 1, 1955, ordered her transferred to a boarding home where she was kept until she was returned to Juvenile Hall on July 6, 1955, on the further order of Judge McKesson. It is not alleged that Sharon's parents were not present at the hearing held on June 30, 1955.

It is then alleged that the petition to declare Sharon a ward of the juvenile court was finally terminated by Judge McKesson in favor of Sharon.

It is further alleged, on information and belief, that after the defendant David Bogen, Superintendent of Juvenile Hall, had been served with an order issued by the District Court of Appeal, District Two, Division Three, to release Sharon, he conferred with Judge McKesson, who instructed the defendant Bogen to disregard the order and that one hour expired before Sharon was released.

As to Judge William B. Neeley, it is alleged that on June 24, 1955, he signed an order to detain Sharon in Juvenile Hall, pursuant to a written request of the district attorney, a copy of which was attached to the complaint, and is as follows:

"In the Superior Court of the County of Los Angeles, State of California, Sitting in Separate Session in the Exercise of Jurisdiction as Juvenile Court

"In the Matter of S/ Sharon Singer A person under the age of twenty-one years	Petition No. 183 213 Request for Order Detaining Material Witness

"In the Matter of the above mentioned minor person, it is respectfully submitted as follows:

"That a petition has been filed in the Juvenile Court of the County of Los Angeles; that said above mentioned person is residing within said county, and is a person alleged to come within the provisions of the 'Juvenile Court Law,' of the State of California; that said person is of the age of 8 years, and should be detained, as a material witness for the People of the State of California pending the trial of People of the State of California vs. S/David Eli Singer Dist. Atty's No. 211 526, on a charge of 288 of the Penal Code.

"In the interests of justice because of pending charge against said adult and for the welfare and protection of said minor person it is necessary that said witness be not interviewed or allowed any visitors except on consent of the District Attorney or under conditions prescribed by the court which will insure that the minor witness will not be improperly influenced or intimidated. The reasons for requesting that said witness be so held are as follows: Defendant is grandfather of victim and parents do not wish to have him prosecuted. Case came to attention of police through neighbors who had observed defendant's actions.

"The District Attorney hereby agrees to notify the Probation Department when said minor is no longer needed as a material witness in the above entitled action.

"Wherefore, your petitioner respectfully requests that said minor be detained in Juvenile Hall or other suitable place until no longer needed as a witness in the above entitled action.

"Dated this 24 day of June, 1955
"District Attorney
"By Florence E. Linn
"S/ Deputy District Attorney

"For the welfare and protection of said minor, and in the interest of justice, it is hereby ordered that said minor be detained in Juvenile Hall as a material witness for the People of the State of California for the reasons above set forth, without visitation as above requested, except with the approval of the District Attorney or by order of this court.

"Dated: This 24 day of June, 1955
"William B. Neely
"S/ Judge of the Juvenile Court"

The judge signed the order to detain the child as is set forth on the Exhibit above. The complaint then alleges that at the time of the order no petition had been filed and none was filed until June 29, 1955.

It is at once apparent that the two judges involved were acting in their official capacities as judges of the juvenile court of the State of California, in and for the County of Los Angeles.

The appellants contend that the judges of the juvenile court had no jurisdiction to incarcerate or detain the minor for use as a witness and that the judges, acting without jurisdiction, are now subject to an action for false imprisonment.

The appellants rely heavily upon the case of De Courcey v. Cox, 94 Cal. 665, 30 P. 95, which was an action for false imprisonment. The judgment in that case went in favor of the defendant on the pleadings, the plaintiff appealed, and the judgment was reversed. The complaint set forth that upon a complaint made before the defendant, a justice of the peace, charging plaintiff with refusing to return the sum of $20, alleged to have been overpaid the plaintiff by mistake by the El Cajon Vineyard Company, the defendant issued a warrant of arrest, upon which the plaintiff was arrested and brought before the defendant and required to and did plead to the charge, and after trial the defendant rendered judgment that the plaintiff restore the amount of $20 or be committed to jail for twenty days; that pursuant to the judgment, the defendant issued a commitment and placed it in the hands of an officer who executed it by imprisoning the plaintiff in the county jail for three days. The court stated, 94 Cal. at page 668, 30 P. at page 95: "Defendant proceeded upon the charge as he might have done had it constituted a crime, which it clearly did not."

In Platz v. Marion, 35 Cal.App. 241, 169 P. 697, it was held that a justice of the peace was not liable for damages for false imprisonment in issuing a warrant for and causing the arrest of an attorney at law upon a complaint filed with him which attempted to charge, but was wholly insufficient to charge the attorney with the crime of common barratry, in the absence of any claim that the justice was actuated by malice or corrupt motives, his action being based upon an erroneous determination as to the sufficiency of the complaint. The De Courcey case is well analyzed in the Platz case, the court stating, 35 Cal.App. at page 251, 169 P. at page 701:

"* * * The Supreme Court held that the complaint stated a cause of action in favor of the plaintiff and against the defendant (the justice of the peace) for damages for false imprisonment. But readily it will be observed that absolutely no public offense whatever under the law was stated in the so-called complaint filed with the justice against the plaintiff. The justice had no jurisdiction of the subject-matter of the complaint, so far as a criminal charge was concerned. The complaint merely alleged that the plaintiff, by a mistake, had been overpaid, and there was no pretense, so far as the complaint disclosed, that he obtained or even retained the amount overpaid through any criminal act on his part. If the so-called complaint disclosed anything at all, it was merely a civil action for money had and received, and obviously the proceeding taken by the justice under the complaint was wholly and entirely *coram non judice*. It was not a case which called for the arrest of the person of the plaintiff. It was, as before suggested, in no sense a criminal case or a proceeding in which the plaintiff was accused of committing a public of-

fense. The facts pleaded by the plaintiff in his action against the justice of the peace might therefore be held sufficient to raise the implication that malice characterized the acts of the justice of the peace in issuing the warrant for the arrest of and in committing the plaintiff to imprisonment."

The court in the Platz case went on further to say, 35 Cal.App. at pages 248–249, 169 P. at page 700: "The early case of Grove v. Van Duyn, 44 N.J.L. 654, 42 Am. Rep. 648, holds to this view. In that case, which, in its general aspect, resembles the case at bar, a justice of the peace had authorized the arrest of the plaintiff and held him to bail for unlawfully carrying away bundles of cornstalks, 'under a statute which came no nearer to specifying such an offense than carrying away a stack of corn.' It was held that the justice was not civilly liable. So much is said in the opinion in that case that is instructive and enlightening upon the question involved in the case before us that we feel justified in quoting therefrom *in extenso*. The court said:

" 'Most of the general principles of law pertaining to that branch of this controversy which relates to the alleged liability of the defendant in this suit, who was a justice of the peace, are so completely settled as not to be open to discussion. The doctrine that an action will not lie against a judge for wrongful commitment, or for an erroneous judgment, or for any other act, made or done by him in his judicial capacity, is as thoroughly established as are any other of the primary maxims of the law. Such an exemption is absolutely essential to the very existence, in any valuable form, of the judicial office itself, for a judge could not be either respected or independent if his motives for his official actions or his conclusions, no matter how erroneous, could be put in question at the instance of every malignant or disappointed suitor. Hence we find this judicial immunity has been conferred by the laws of every civilized people. That it exists in this state in its fullest extent has been repeatedly declared by our own courts. Such was pronounced by the Supreme Court to be the admitted principle in the cases of Little v. Moore, 4 N.J.L. 74, 75, * * *; Taylor v. Doremus, 16 N.J.L. 473, 476; Mangold v. Thorpe, 33 N.J.L. 134, 137; and by this court in Loftus v. Fraz, 43 N.J.L. 667. To this extent there is no uncertainty or difficulty whatever in the subject.

" 'But the embarrassment arises where an attempt is made to express, with perfect definiteness, when it is that acts done by a judge, and which purport to be judicial acts, are such within the meaning of the rule to which reference has just been made. It is said everywhere in the text-books and decisions that the officer, in order to entitle himself to claim the immunity that belongs to judicial conduct, must restrict his action within the bounds of his jurisdiction, and jurisdiction has been defined to be "the authority of the law to act officially in the particular matter in hand": Cooley on Torts, 417. But these maxims, although true in a general way, are not sufficiently broad to embrace the principle of immunity that appertains to a court or judge exercising a general authority. Their defect is that they leave out of the account all those cases in which the officer, in the discharge of his public duty, is bound to decide whether or not a particular case, under the circumstances as presented to him, is within his jurisdiction, and he falls into error in arriving at his conclusion. In such instances the judge, in point of fact and law, has no jurisdiction, according to the definition just given, over "the particular matter in hand," and yet, in my opinion plainly he is not responsible for the results that wait upon his mistake. And it is upon this precise point that we find confusion in the decisions.

" 'There are certainly cases which hold that, if a magistrate, in the regular discharge of his functions, causes an arrest to be made under his warrant on a complaint which does not contain the charge of a crime cognizable by him, he is answerable in an action for the injury that has ensued. But I think these cases are deflections from the correct rule, (in that) they make no allowance for matters of

doubt and difficulty. If the facts presented for the decision of the justice are of uncertain signification with respect to their legal effect, and he decides one way, and exercises a cognizance over the case, if the superior court in which the question arises in a suit against the justice differs with him on this close legal question, is he open by reason of his error to an attack by action? If the officer's exemption from liability is to depend on the question whether he had jurisdiction over the particular case, it is clear that such officer is often triable under such conditions, because the higher court, in deciding a doubtful point of law, may have declared that some element was wanting in the complaint which was essential to bring the case within the judicial competency of the magistrate.'"

A petition to have the Platz case heard in the Supreme Court was denied.

In the case of Perry v. Meikle, 102 Cal. App.2d 602, 228 P.2d 17, the plaintiff brought an action against several defendants, among them being a superior court judge. The general charge of the complaint was that the plaintiff had been falsely imprisoned under a contempt order made by the judge. A demurrer was sustained without leave to amend and the appeal taken. The court, in determining the case said, among other things, this, 102 Cal.App. 2d at pages 605–606, 228 P.2d at page 19:

"Notwithstanding the apparent effort of plaintiff to keep from alleging that defendant Twain Michelsen was a judge of the superior court and was acting as such in the proceeding complained of, it is clear from the complaint and the exhibits that Judge Michelsen was acting as superior judge in a matter over which he had jurisdiction, that the proceeding was regular in all respects, and that there would be no basis for any action against him, even if he were not entitled to immunity from civil liability under the well-established and sound rule of public policy so well expressed by Justice Brewer of the U. S. Supreme Court, sitting as a circuit justice, in Cooke v. Bangs, C.C., 31 F. 640, 642, as follows: 'With respect to all judicial officers,—justices of the peace, as well as judges of the higher courts,—the settled law of the supreme court of the United States, and I think the plain intimation of the supreme court of this state, is that, where they act within their jurisdiction, they are not amenable to any civil action for damages. No matter what their motives may be, they cannot be inquired into.'

"And in Turpen v. Booth, 56 Cal. 65, 69 [38 Am.Rep. 48], our Supreme Court quoted with approval the following language of Justice Field in Bradley v. Fisher, 13 Wall. 335, 20 L.Ed. 646: '[*J*]*udges of courts of record of superior or general jurisdiction are not liable to civil actions for their judicial acts, even when such acts are in excess of their jurisdiction,* and are alleged to have been done maliciously and corruptly. * * *'" (Emphasis added.)

In Pearson v. Reed, 6 Cal.App.2d 277, 44 P.2d 592, the defendant Johnson was the city prosecutor of Los Angeles. The plaintiffs were arrested and charged with petty theft, imprisoned for a short time, released on their recognizance, tried and found not guilty. The plaintiffs thereafter brought an action for malicious prosecution and false arrest against Johnson and others. On the appeal the verdict for the plaintiffs was reversed. The court said in its decision, 6 Cal.App.2d at pages 280–282, 44 P. 2d at page 594:

"Principles of public policy declared and expounded by courts which have given the subject exhaustive consideration lead irresistibly to the conclusion that no such liability exists. No policy has been declared and maintained more firmly than the one which preserves the independence and freedom of action of judicial and *quasi*-judicial officers acting in official capacity. The exemption runs as to liability for damages resulting from official acts, although they be done without probable cause and with malice. There are but few cases in which the courts have been called upon to decide whether the immunity is extended to a prosecuting officer. The latter question has not been decided in California. In approaching a consideration of the question,

it will be helpful to review briefly the principles underlying the rule.

"In Bradley v. Fisher, 13 Wall. 335, 337, 80 U.S. 335, 337, 20 L.Ed. 646, 647, Justice Field used the following language: 'For it is a general principle of the highest importance to the proper administration of justice that a judicial officer, in exercising the authority vested in him, shall be free to act upon his own convictions, without apprehension of personal consequence to himself. Liability to answer to everyone who might feel himself aggrieved by the action of the judge, would be inconsistent with the possession of this freedom, and would destroy that independence without which no judiciary can be either respectable or useful. As observed by a distinguished English judge, it would establish the weakness of judicial authority in a degrading responsibility. (Taaffe v. Downes, 3 Moore, P.C. 41 n.) The principle, therefore, which exempts judges of courts of superior or general authority from liability in a civil action for acts done by them in the exercise of their judicial functions, obtains in all countries where there is any well-ordered system of jurisprudence. It has been the settled doctrine of the English courts for many centuries, and has never been denied, that we are aware, of in the courts of this country. * * * The allegation of malicious or corrupt motives could always be made, and if the motives could be inquired into judges would be subjected to the same vexatious litigation upon such allegations, whether the motives had or had not any real existence. Against the consequences of their erroneous or irregular action, from whatever motives proceeding, the law has provided for private parties numerous remedies, and to those remedies they must, in such cases, resort. But for malice or corruption in their action whilst exercising their judicial functions within the general scope of their jurisdiction, the judges of these courts can only be reached by public prosecution in the form of impeachment, or in such other form as may be specially prescribed.'

"In Cooley on Torts, (3d Ed.) vol. 2, p. 795, the author says: 'Whenever, therefore, the State confers judicial powers upon an individual, it confers them with full immunity from private suits. In effect the State says to the officer that these duties are confided to his judgment; that he is to exercise his judgment fully, freely and without favor and he may exercise it without fear; that the duties concern individuals but they concern more especially the welfare of the State and the peace and happiness of society; that if he shall fail in the faithful discharge of them, he shall be called to account as a criminal, but that in order that he may not be annoyed, disturbed, and impeded in the performance of these high functions, a dissatisfied individual shall not be suffered to call in question his official action in a suit for damages. This is what the State, speaking by the mouth of the common law, says to the judicial officer. The rule thus laid down applies to large classes of offices, embracing some, the powers attached to which are very extensive and others whose authority is exceedingly limited.'" A petition for a hearing in the Supreme Court in the Pearson case was denied.

[1] The superior court is a court of general jurisdiction, and the juvenile court is but a part thereof. True it is that there are special procedures and rules adopted for proceedings in the juvenile court. However, when a judge sits as a judge of the juvenile court, he is sitting as a judge of the superior court, exercising a part of the general jurisdiction conferred by the law in such cases, and is referred to as a judge of the juvenile court.

[2] Great care must be taken not to restrict the absolution from liability where the judge performs, or purports to perform his official functions, and care should be taken in limiting the immunity only to situations where the judge has jurisdiction, if jurisdiction is to have a restricted and limited meaning, for, as counsel for the respondents point out, "there is a danger of

becoming ensnared in the conceptual labyrinth which surrounds the term jurisdiction".

[3] This court, in the case of Frazier v. Moffatt, 108 Cal.App.2d 379, 386, 239 P.2d 123, 127, speaking through Mr. Presiding Justice White, appropriately said: "From a review of the cases we are persuaded that the test of immunity from a civil suit for damages on the part of a judicial officer is not whether he committed an error of judgment in acting as he did, but the question of judicial immunity must be determined on the basis of whether the act in question was within the general scope of the officer's judicial powers and whether he acted in an honest belief that he was legally warranted in doing it."

The reasons for such a rule are obviously not to protect or throw a shield around a misbehaving judge, but rather to preserve and maintain an efficient and independent judiciary who will not have to be continuously worried and concerned over annoying suits for damages.

[4] It is apparent in the instant case that appellants merely claim certain procedural irregularities in connection with the detention of the minor child, in that a petition and citation were not timely filed, and that the grounds upon which the district attorney sought the detention did not warrant the same. Appellants, necessarily, must admit that respondents had the authority to entertain the proceedings for detention, and that, if the petition and citation had been timely filed, there would not be even a semblance of a valid claim. In other words, the judges in the instant case acted within the scope of the general subject matter over which they were given power, even though there might have been some procedural error.

[5] The appellant vigorously contends that the District Court of Appeal, in the case of In re Singer, 134 Cal.App.2d 547, 285 P.2d 955 (habeas corpus), has already determined that the judges in question acted beyond their jurisdiction and that such a ruling must necessarily prevail here.

In our opinion, the decision in the habeas corpus matter, In re Singer, supra, does not amount to a finding that the respondents were acting without jurisdiction in the sense that it would take them out of the immunity rules. One standard will be recognized for obtaining relief from imprisonment on habeas corpus, and another standard for obtaining damages from public officials in a civil suit.

In the case of Vallindras v. Massachusetts, etc., Ins. Co., 42 Cal.2d 149, 265 P.2d 907, the sheriff had imprisoned the plaintiff under a contempt order of the superior court. The plaintiff was thereafter discharged from imprisonment by a writ of habeas corpus issued by the Supreme Court. The civil action was brought by the plaintiff against the sheriff and his surety for false imprisonment. General demurrers were sustained without leave to amend, and the appeal was taken from the judgment. The Supreme Court in its opinion, in determining the case, said, among other things, the following, 42 Cal.2d at pages 151–152, 265 P.2d at page 909:

"The allegations that the order of commitment was 'void upon its face' and that the sheriff 'did unlawfully imprison plaintiff' are conclusions of law and add nothing to the substantive averments of the complaint. [Citing cases.]

"It is plaintiff's theory that our holding in the habeas corpus proceeding, In re Vallindras 1950, supra, 35 Cal.2d 594, 596, 220 P.2d 1, 2, that he was entitled to be released because 'regardless of the court's failure to file [with the clerk] these judgments [the orders adjudicating contempt] and other deficiencies in the procedure leading to the imprisonment of Vallindras, the order of April 10th does not meet the law's requirements', establishes as a matter of law that his arrest and detention were unlawful not only as being vulnerable to the attack on habeas corpus but also as establishing civil liability of the sheriff in this damage action. But this theory is not tenable.

"From time immemorial our law has recognized differences between criminal proceedings and civil proceedings. The fact that a man is held to be entitled to release on habeas corpus does not mean that his custodian must answer in damages for the previous detention. Generally speaking, the right to release from custody is determined by the rules of criminal law while the right to recover damages for false imprisonment depends on the rules of civil law. By the light of the civil law, therefore, we must examine the factual allegations of the complaint to ascertain whether the sheriff was justified in imprisoning plaintiff pursuant to the order of the superior court and prior to the ruling of this court."

In our opinion the demurrers in the instant case were properly sustained.

Judgment affirmed.

WHITE, P. J., and DORAN, J., concur.



147 Cal.App.2d 809

Jesus FABELA, Plaintiff and Appellant, Industrial Indemnity Co., a corporation, Plaintiff in Intervention and Appellant,

v.

W. H. HARGIS and First Doe, Individually and doing business as A. D. H. Company, Second Doe and Third Doe, Defendants and Respondents.

Civ. 16990.

District Court of Appeal, First District, Division 2, California.

Jan. 25, 1957.

Hearing Denied March 20, 1957.

Action for injuries sustained by plaintiff a dishwasher in a restaurant when he fell through an open trap door which had been left open by the employee of a plumbing concern, wherein a complaint in intervention was filed by the workmen's compensation carrier of the plaintiff's employer. From an adverse judgment in the Superior Court, County of Monterey, Stanley Lawson, J., the plaintiff appeals. The District Court of Appeal, Kaufman, J., held that the instructions were not prejudicially erroneous.

Judgment affirmed.

1. Negligence ⇐141(3)

In action for injuries sustained by dishwasher employed in a restaurant when he fell through an open trapdoor which had been left open by a plumber's employee, instruction was not erroneous as suggesting an absolute duty on plaintiff's part to avoid falling where it indicated that duty of ordinary care required reasonable and ordinary use of plaintiff's sight to avoid dangers in his path and that respondents might rely on plaintiff's thus conducting himself.

2. Negligence ⇐139(7)

In action for injuries sustained by dishwasher when he fell through an open trapdoor in a restaurant which had been left open by employee of a plumber, instruction which left it to the jury to determine whether because of conditions existing in the area of the trapdoor and known to the plumber or discoverable by him by reasonable care, he was bound to provide more effective notice of the opening than he did, was not erroneous.

3. Negligence ⇐141(4)

In action for injuries sustained by dishwasher in restaurant who fell through an open trapdoor which had been left open by an employee of a plumber, instruction respecting general human experience to see an object which a person is looking at was not erroneous on ground that there was a legitimate evidentiary dispute as to visibility of open trapdoor.

4. Trial ⇐240

In action for injuries sustained by dishwasher in restaurant who fell through an open trapdoor in the restaurant which had been left open by an employee of a plumber, instruction respecting human ex-

perience that one sees an object when he looks in the direction of the object clearly visible, was not erroneous on ground that it was argumentative and placed trial judge in position of an advocate, and that it ignored factor of ordinary care.

James F. Boccardo, San Jose, Edward J. Niland, San Jose, of counsel, for appellant Jesus Fabela.

Bardin, Cunningham & Leach, Salinas, for appellant Industrial Indem. Co.

Garth V. Lacey, Salinas, for respondent.

KAUFMAN, Justice.

This is an appeal from a judgment in favor of defendants in an action brought by plaintiff to recover for personal injuries sustained when he fell through an open trap door in the floor of a restaurant where he was employed as dishwasher. Defendants and respondents were engaged in the plumbing business in King City, and had been called in by Mr. Keefer, the owner of Keefer's Restaurant and appellant's employer, to repair the plumbing. The trap door was opened by Glenn Monroe, one of the defendants and the agent and employee of W. H. Hargis, the other defendant.

A complaint in intervention was filed by the Industrial Indemnity Co., the workmen's compensation carrier of plaintiff's employer, charging defendants with negligence, and setting forth the payment to plaintiff by it of the sum of $9,628.47 in compensation.

The accident occurred on October 12, 1953. Glenn Monroe came to the restaurant in response to a call by Mr. Keefer, to try to find the source of an offensive odor which appellant had reported to Mr. Keefer. Monroe decided that it would be necessary to go to the basement to locate the source of the trouble. Monroe was familiar with the restaurant, having performed plumbing services there on prior occasions, and knew that the basement had to be reached by the stairs under the trap door in the restaurant floor. The trap door was situated in a small area which served both as a working space and as a passageway between the lunch room counter and rooms located toward the rear of the restaurant. The trap door, 44" by 30", was located between a sink on one side and an ice cream freezer and work table on the other side. There was a space of about 14 inches between the doorway to the lunch room and the trap door. At the other end of the trap door there was a space of about three feet to the end of a work table and about four feet to a refrigerator. The end of the work table and the refrigerator were but eighteen inches apart. In leaving the kitchen area it was necessary to make a turn of approximately forty-five degrees to pass between them into the area containing the trap door.

Respondent Monroe placed a chair at the end of the trap door nearest the lunch room, because he knew the opening would constitute a hazard, and he informed the two waitresses that he was opening the stairwell. He knew that there was a cook and dishwasher on duty, but placed no chair at the other end because persons approaching the door from that side had a greater area to traverse and they would be approaching the head of the basement stairs.

Appellant was not on duty when Monroe arrived at the restaurant, but came in about 10:00 a. m. to transact some business with his employer, and drew an advance on his next week's pay. Monroe was then working in the basement. As appellant started to leave the restaurant, he had his money in one hand and wallet in the other. He began to put the money in his wallet as he was walking. He entered the passageway leading to the area in which the trap door was located. He testified that he did not know that the plumber was on the premises. He stated that on prior occasions during the six years in which he had been employed in this restaurant he had seen the trap door open, but on such occasions chairs had been placed on both sides of the opening.

As he approached the space between the refrigerator and work table, he saw Mrs. Sherman, one of the waitresses, working at

the sink, which was at the opposite end of this area, near the lunch room door. He could just see her head, or a little below her head. He looked at the floor just before entering the space between table and refrigerator, but at this point could not see the area near the trap door. He had to be careful not to hit the refrigerator in passing through because of the narrowness of the space. He was still looking at his wallet, and at the same time ahead at Mrs. Sherman and toward the outside. He had nearly finished putting his money away when he fell into the opening. The last thing he saw before the accident was Mrs. Sherman. He had not seen the chair at the other end of the opening.

Until the accident occurred, Mr. Keefer had not known that Monroe had gone into the basement. He was sure that he had instructed Monroe to place chairs on each side of the opening. On prior occasions he said that Monroe had done so. The trap door area was primarily the salad room, but was regularly used by employees as a passageway between the kitchen and lunch room. Mr. Keefer testified that the salad room was well lighted by two fluorescent lights directly over the sink. The basement was lighted with a 250 or 300 watt bulb.

The waitress, Mrs. Sherman, who was working at the sink near the opposite end of the area glanced up as she saw appellant near the refrigerator. She did not notice where he was looking, and did not notice him again until she heard the crash. His arm was bleeding, and Mr. Keefer came and rushed him to the hospital.

As a result of the accident, appellant's right arm was partially paralyzed, and his two fingers could not be straightened. He is right-handed and his grip has become too poor for employment as a dishwasher.

Appellant contends that the court committed reversible error in the giving of three instructions, the first of which given at defendant's request, is as follows:

"The plaintiff was at all times under the duty to exercise ordinary care for his own safety, and this means that he must make reasonable and ordinary use of his eyes to see that he does not stumble or slip or be otherwise caused to fall.

"You are further instructed that the defendant had the right to rely on the plaintiff's fulfilling this duty, and to expect that the plaintiff would use his senses of sight for his own protection."

[1] Appellant argues that this being a specific instruction, would limit the other general instructions given which purported to submit to the jury the question of respondent's negligence. Nickell v. Rosenfield, 82 Cal.App. 369, 377, 255 P. 760. He says that the aforesaid instruction cannot be justified as a proper charge relating to contributory negligence and that the first paragraph imposed upon plaintiff an absolute duty to see that he did not fall, citing Stickel v. San Diego Elec. Ry. Co., 32 Cal. 2d 157, 167, 195 P.2d 416, 422, that since he did fall, the jury could conclude that there was no negligence on the part of respondents, hence they would never reach the issue of contributory negligence. We cannot agree with appellant that the language of this instruction suggests that there is an absolute duty on appellant's part to avoid falling. The instruction plainly indicates that the duty of ordinary care requires the reasonable and ordinary use of appellant's sight to avoid dangers that may be in his path, and that respondent might rely on appellant's thus conducting himself. In Stickel v. San Diego Elec. Ry. Co., supra, the instruction given was that "It is the duty of the driver * * * to exercise ordinary care at all times to avoid placing himself or others in danger and to avoid a collision." The court stated that the instruction was susceptible to the construction that it imposed an absolute duty "to avoid a collision", since because of the structure of the sentence the qualifying words "to exercise ordinary care" might be understood to relate only to the duty "to avoid placing himself or others in danger" and not to the duty "to avoid a collision." In the present case the jury could reasonably get no other

meaning from the language used but that appellant must use ordinary care for his own protection.

It is next urged that the court by instructing that an invitor has no duty to give an invitee notice of an obvious danger aggravated the error which appellant contends existed in the instruction previously discussed. We have heretofore determined, however, that the first instruction criticized was not prejudicially erroneous. The instruction attacked, given at respondents' request, reads as follows:

"Toward an invitee, he who extended the invitation, express or implied, is obliged to refrain from active negligence and to exercise ordinary care to keep the premises in a condition reasonably safe for the invitee in the reasonable pursuit of a purpose embraced within the invitation.

"But the responsibility of one having control of the premises is not absolute; it is not that of an insurer. If there is danger attending upon the entry, or upon the work which the invitee is to do on the premises, and if such danger arises from conditions not readily apparent to the senses, and if the owner (occupant) has actual knowledge of them, or if they are discoverable by him in the exercise of ordinary care, it is his duty to give reasonable warning of such danger to the invitee. The owner (occupant) is not bound to discover defects which reasonable inspection would not disclose, and he is entitled to assume that the invitee will perceive that which would be obvious to him upon the ordinary use of his own senses. In brief, there is no duty to give the invitee notice of an *obvious* danger.

"In the absence of appearances that caution him, or would caution a reasonably prudent person in like position, to the contrary, the invitee has a right to assume that the premises he was invited to enter are reasonably safe for the purposes for which the invitation was extended, and to act on that assumption.

"Each, the invitee and the invitor, so long as he is exercising ordinary care and no circumstance exists that either causes him or would cause a reasonable prudent person in his position to think differently, has a right to assume that the other is or will be possessed of normal faculties of sight and hearing and will exercise ordinary care, and has the right to rely on that assumption."

The above quoted instruction is the same as B.A.J.I. 213–C, which has been given and approved by the courts of this state. Seedborg v. Lakewood Gardens Civic Ass'n, 105 Cal.App.2d 449, 456, 233 P.2d 943.

[2] Appellant maintains that neither the fact that a dangerous condition obviously exists nor the fact that a particular condition is obviously dangerous eliminates any duty on the part of a defendant who was responsible for the condition, and it is for the jury to determine, as a question of fact, whether or not ordinary care required giving of some notice or warning to an invitee exposed to the condition. Appellant says that the danger here involved, an unguarded open trap door, is in one sense an obvious danger, but that it does not necessarily follow that the *existence* of such dangerous condition is obvious, since the trap door was located around the corner from appellant, in a dark colored floor, and the evidence was conflicting as to the adequacy of the lighting. Furthermore, appellant's attention was reasonably distracted by the necessity of passing through the narrow passageway, and by the presence of the waitress standing on the other side of the trap door. The instruction states that the invitor is bound to give warning of conditions not readily apparent to the senses and give reasonable warning of such danger to the invitee. Thus it was left to the jury to determine whether or not the open trap door was readily apparent to any person approaching the area from the passageway used by appellant. Under the instruction given the jury were in effect told that respondent Monroe was bound to consider whether or not the danger was readily apparent and obvious to *any* invitee who might approach from *any* of the possible entries, and not just the fact

of whether or not the danger was obvious from respondent's viewpoint. It was clearly left to the jury under this instruction to determine whether because of the conditions existing in the area of the trap door, and known to respondent Monroe or discoverable by him in the exercise of reasonable care, he was bound to provide more effective notice than he had done by placing the one chair at the end of the trap door opposite the basement stairs. No case is cited by appellant where the instruction given here was criticized adversely or held to be error in this type of case.

[3] Finally, appellant claims that prejudicial error was committed in giving the following instruction:

"General human experience justifies the inference that when one looks in the direction of an object clearly visible, he sees it, and that when he listens, he hears that which is clearly audible. When there is evidence to the effect that one did look, but did not see that which was in plain sight, or that he listened, but did not hear that which he could have heard in the exercise of ordinary care, it follows that either there is an irreconcilable conflict in such evidence or the person was negligently inattentive."

Appellant maintains that the instruction should never be given when there is a legitimate evidentiary dispute as to the visibility *to the person looking*, of the object or condition involved in the action. While superficially, appellant says, the instruction may be only an unnecessary declaration of the obvious, on careful analysis it is shown to be filled with prejudicial errors. It assumes that the object is in plain sight, for while the jury is left free to believe or disbelieve the evidence that one did look, the clear visibility of the object is taken for granted. Furthermore, a person may look *in the direction* of an object which is clearly visible to others in a different position, but because of intervening objects or distracting circumstances he may not see it.

We do not believe that the average juror would make such a refined analysis of this instruction. The first sentence stating that general human experience shows that a person looking in the direction of an object clearly visible sees it, must certainly mean to most people that the object is in such position as to be clearly visible to *him*. For general human experience does not warrant the inference that if one looks in the direction of an object visible to others, but separated from him by intervening obstacles, he sees it. And the language in the following sentence "that which was in plain sight" can be sensibly interpreted only as meaning that which was in plain sight of the person looking.

[4] It is urged that the instruction concludes with only two possibilities, either that there is an irreconcilable conflict in such evidence or that the person was negligently inattentive, that it is argumentative and places the trial judge in the position of an advocate, and that it ignores the factor of ordinary care. Appellant quotes Tuttle v. Crawford, 8 Cal.2d 126, 131–132, 63 P.2d 1128, 1130, wherein the "to look is to see" doctrine is referred to as an *argument*, and noted that while it was applied in the cases of persons walking into moving trains and automobiles and into open elevator shafts, it could not be applied with equal force to a case where a person walked onto a discolored area of cement floor in a market, for cement was susceptible to stains and hence the discoloration held out no sign of danger. In the case now before the court, appellant did not walk into a discolored area, but into an open trap door leading to the basement stairs on premises where he had worked for six years. Furthermore, a chair stood just beyond the opening directly in the path which he was traversing. Although appellant says that there is no evidence that he looked, and the instruction is thus inapplicable to the evidence, he testified that after he passed the refrigerator, he wasn't looking at his

wallet alone, "I was looking toward the outside, too." He stated that he wasn't looking at the floor, but he was looking ahead and at his wallet at the same time.

In Schwenger v. Gaither, 87 Cal.App.2d 913, 198 P.2d 108, 109, cited by appellant, this court upheld the trial court's refusal to give such an instruction. The court held that it was not error to refuse it, quoting the following from Cooper v. Smith, 209 Cal. 562, 289 P. 614, "The proposed instruction is a mere commonplace, within the knowledge of all the jurors, and is argumentative, rather than a statement of law." And in Callahan v. Theodore, 145 Cal.App.2d 336, 302 P.2d 333, where it was held not error to refuse a substantially similar instruction, the court referred to the instruction as a truism, and stated that it was argumentative and conducive to misunderstanding since the jury might view it as a suggestion of the court's impressions. And, see, Laursen v. Tidewater Assoc. Oil Co., 123 Cal.App.2d 813, 818, 268 P.2d 104. The instruction has been approved in La Branch v. Scott, 82 Cal.App.2d 1, 185 P.2d 823. In Bischell v. State, 68 Cal.App.2d 557, 563, 157 P.2d 41, 44, in which the Supreme Court denied a petition for hearing, the court answered some of the same objections to this instruction which appellant has made herein, but concluded that while the instruction is "not happily worded", it left the questions of fact for the jury to determine, hence there was no prejudicial error. And, see, Curland v. Los Angeles County Fair Ass'n, 118 Cal.App.2d 691, 258 P.2d 1063; Gilbert v. Pessin Grocery Co., 132 Cal. App.2d 212, 282 P.2d 148.

In view of the determination that no prejudicial error was committed in the giving of the instructions objected to by appellant, it is unnecessary to discuss respondents' contention that the instructions were more than favorable to appellant, basing their argument on the claim that appellant was in the position of a mere licensee, and, not an invitee, in relation to respondents. Respondents apparently did not believe that the evidence as a matter of law established that appellant was not an invitee, since they offered the instruction which was given on that subject.

No prejudicial error appearing in the record before us, the judgment must be affirmed.

Judgment affirmed.

DOOLING, Acting P. J., and DRAPER, J. pro tem.

Hearing denied; CARTER, J., dissenting.



Harold Edward COOPER, Jr., a minor, and Carolyn Joan Cooper, a minor, by Vera P. Alves, their guardian ad litem, Plaintiffs and Respondents,

v.

Ida COOPER, individually, and Ida Cooper, as Executrix of the Estate of Harold E. Cooper, deceased, Defendants and Appellants.*

Civ. 17125.

District Court of Appeal, First District, Division 1, California.

Jan. 16, 1957.

Rehearing Denied Feb. 15, 1957.

Hearing Granted March 13, 1957.

Suit to establish that children were equitable owners of certain life policies assigned by father to mother in property settlement agreement executed incident to divorce. The Superior Court, County of San Mateo, A. R. Cotton, J., rendered judgment for plaintiffs, and defendants appealed. The District Court of Appeal, Bray, J., held, in part, that under property settlement agreement providing that husband thereby assigned to wife certain life policies, and that husband would execute appropriate instruments, as required, to provide that wife and another would act as joint trustees to administer proceeds for support of wife and minor children, agreement created effective trust, notwithstanding failure of husband to execute required instruments, and that husband violated trust

* Opinion vacated 314 P.2d 1.

when he substituted second wife as beneficiary.

Judgment affirmed.

1. Trusts ⇐37

Under property settlement agreement incident to divorce, providing that husband thereby assigned to wife certain life policies, and that husband would execute appropriate instruments, as required, to provide that wife and another would act as joint trustees to administer proceeds for support of wife and minor children, agreement created effective trust, notwithstanding failure of husband to execute required instruments, and husband violated trust when he substituted second wife as beneficiary.

2. Insurance ⇐213

Where in certain paragraph of property settlement agreement executed incident to divorce, husband made complete assignment to wife of certain life policies for benefit of wife and minor children, he thereby created in her and them vested interest subject only to divestment, under its terms, upon children reaching majority.

3. Insurance ⇐586

Where, while husband did not assign certain life policy to wife in property settlement agreement executed incident to divorce, husband did agree to maintain policy in full force for wife and children until children reached majority, and agreement was accepted by wife, agreement gave wife and children henceforth equitable interest in policy of which neither she nor they could be divested by mere act of husband in changing name of beneficiary.

4. Insurance ⇐586, 587

An insured may by contract waive right to change beneficiary and convert what is usually contingent interest of beneficiary into a vested equitable interest.

5. Insurance ⇐668(1)

Defendant, second wife of decedent, who had violated trust by making her beneficiary of life policy which he had assigned to first wife in latter's divorce, was not improperly denied nonsuit in suit after husband's death by children for proceeds of policy, where, because court found that she personally had no interest in trust property, no money judgment was rendered against her.

6. Trusts ⇐371(3)

Where complaint set forth agreement in haec verba and alleged change of beneficiary by husband in violation of assignment of life policy to first wife incident to divorce, and in prayer asked that policies and their proceeds be impressed with trust in favor of plaintiffs, complaint properly pleaded facts and trust theory, despite contentions that complaint merely pleaded violation of contract, rather than violation of trust.

7. Limitation of Actions ⇐46(5)

Cause of action based on violation by husband of property settlement agreement whereby he assigned life policies to wife, arose, within statute of limitations, when husband died without policies being left in effect, not when husband broke promise to enter into agreement appointing wife and another as joint trustees to administer proceeds of policies.

8. Trusts ⇐365(3)

In view of fact that cause of action, based on violation by husband of property settlement agreement whereby he had assigned life policies to wife, arose when husband died without policies being in effect, laches would not bar relief where action was filed within twelve days after husband's death.

9. Trusts ⇐61(3)

In suit to establish that children were equitable owners of certain life policies assigned by father to mother in property settlement agreement executed incident to divorce, evidence warranted finding that there had been no abandonment of agreement which created trust of policies.

Raymond B. Haizlip, San Francisco, for appellants.

Sullivan & West, San Mateo, James B. O'Grady, Redwood City, for respondents.

BRAY, Justice.

Defendants appeal from an adverse decision adjudging that plaintiffs were the equitable owners of certain life insurance policies and entitled to the proceeds thereof.

Questions Presented.

1. The effect of the property settlement agreement with regard to whether the insurance trusts were created or merely agreed to be created.

2. Statutes of limitation and laches.

3. Was there an abandonment?

Record.

Harold E. Cooper, deceased, and Vera Cooper Alves were formerly husband and wife, being married in 1933. They had two children, plaintiffs Harold E. Cooper Jr. and Carolyn J. Cooper. An interlocutory decree of divorce in favor of Vera was entered February 28, 1949, and a final decree, March 6, 1950. Both parties remarried, Vera to her present husband Alves, Harold to defendant Ida Cooper. Harold died September 17, 1954. During the marriage Harold had in force several life insurance policies. May 21, 1948, Harold and Vera entered into an agreement of separation and settlement of property rights (the agreement involved here). Concerning this agreement the interlocutory decree of divorce stated: "* * * said agreement has been fully consummated." No mention of the agreement appears in the final decree of divorce. After Harold remarried he, in disregard of the agreement, surrendered for cash the three Northwestern policies referred to in paragraph eighth of the agreement,[1] and changed the beneficiary of the Equitable life insurance policy (referred to in paragraph ninth of the agreement) to defendant Ida.[2]

Plaintiffs sued to recover from the Equitable the amount of its policy, joining defendants. That company deposited that amount, $12,000, in court. Plaintiffs also sought to recover from defendant Ida as

1. Paragraph eighth provided: "Eighth: The husband shall and does hereby release, transfer, sell, assign and set over to the wife, all right, title and interest in and to three certain life insurance policies written in the Northwestern Mutual Life Insurance Company of Milwaukee, Wisconsin, in the total principal sum of $7,500, wherein the wife now appears as beneficiary and the husband as insured; the husband shall execute appropriate instrument as required by said insurance company and the American Trust Company, to provide that the wife and said American Trust Company shall act as joint trustees to administer the proceeds of said life insurance policies for the support and maintenance of the wife and said minor children, in the event of husband's death." It further provided that Harold shall pay all premiums on said policies as they became due and maintain the policies in force and not do anything to diminish the cash surrender value. "When the youngest of the said two minor children shall have reached majority, the wife's rights in and to said life insurance policies shall cease, and the husband shall have the right to designate a new beneficiary or cancel or otherwise dispose of said policies as he may desire."

2. Paragraph ninth provided: "Ninth: The husband agrees to pay all premiums and to keep and maintain in full force and effect until the younger of the two minor children shall have reached majority, group life insurance in the present approximate principal amount of $7,500 written in the Equitable Life Assurance Society, which the husband now carries as an employee of the American Trust Company and in which the wife is named as beneficiary. It is understood and agreed that such group insurance is mandatory so long as husband is employed by said American Trust Company, and that the principal amount and premiums vary from time to time depending on loss experience of the insuring company.

"The husband shall execute appropriate instrument to provide that the wife and said American Trust Company shall act as joint trustees, to administer the proceeds of said life insurance policy for the support and maintenance of the wife and said minor children, in the event of husband's death. When the younger of said two minor children shall have reached majority, the wife's rights in and to said policy shall cease, and the husband shall have the right to designate a new beneficiary or cancel or otherwise dispose of said policy as he may desire."

executrix of Harold's estate the value of the Northwestern policies which Harold had cashed. The court adjudged that the $12,000 be paid to plaintiffs, less $4,000 attorneys' fees, and that defendant executrix pay during the course of administration $7,500 (the surrendered value of the Northwestern policies) plus interest. Defendants' motion for new trial was denied.

Effect of the Agreement.

[1] Defendants' main contention is that the agreement was merely an agreement to enter into a trust agreement in the future and therefore the rule of such cases as Kerr Glass Mfg. Corp. v. Elizabeth Arden Sales Corp., 61 Cal.App.2d 55, 141 P.2d 938; Warson v. Talpey-Arnold Syndicate, 202 Cal. 656, 262 P. 716; and Clifford v. Utt, 62 Cal. App. 460, 216 P. 972, applies. We deem it unnecessary to discuss whether the rule of those and the other cases cited by defendants is as broad as defendants contend, namely, that no agreement to enter into an agreement is enforceable,[3] for the reason that this agreement in itself has all the elements of an effective trust. There is a present transfer of the Northwestern policies, and a definite placing of the proceeds to come from the Equitable policy into the trust. The terms of the trust are clearly set forth, namely, that in the event of Harold's death prior to the majority of the youngest child, the proceeds of all policies shall be used for the support and maintenance of Vera and the minor children; upon the attaining of majority by the youngest child by taining of majority by the youngest child any right of the wife in the trust will cease, and Harold has the right thereafter to terminate the trust by designating a new beneficiary or otherwise disposing of the policies. Harold agrees to keep the policies in full force and the trustees are designated. Nothing further was required. The agreement to sign a separate instrument appointing the named trustees added nothing to the declaration of the trust contained in the instrument. "The mere fact that the settlor contemplates the subsequent execution of a formal trust instrument does not necessarily negative the present creation of a trust, if its terms are sufficiently indicated." (Scott on Trusts, vol. 1, p. 164, § 26.) Moreover, Harold agreed that he alone would execute the instrument designating the already named trustees. This he failed to do. "An insured cannot defeat the equitable right of a beneficiary by failing to act. He could not, in equity, be allowed to take advantage of his own wrong in breaching the property settlement agreement, and his estate is in no better position." Waxman v. Citizens Nat. Trust & Sav. Bank, 123 Cal.App.2d 145, 149, 266 P.2d 48, 50. When Harold changed the beneficiary in one policy and cashed the others he violated the trust which by contract had been created.

[2] In paragraph eighth Harold made a complete assignment to his wife of the Northwestern policies for the benefit of herself and the children, thereby creating in her and them a vested interest subject only to a condition subsequent which never arose.

[3] As said in Waxman v. Citizens Nat. Trust & Sav. Bank, supra, 123 Cal.App.2d at page 148, 266 P.2d at page 50: "An insured by contract may waive the right to change a beneficiary and may convert what is usually the contingent interest of a beneficiary of a policy of life insurance into a vested equitable interest." While Harold did not assign the Equitable policy he did agree to maintain it in full force for the wife and children, again subject to the condition subsequent. This agreement, being accepted by the wife, gave her and the children thenceforth an equitable interest in the policy of which she and they could not be divested by the mere act of the insured in changing the name of the beneficiary. See Shoudy v. Shoudy, 55 Cal.App. 344, 345, 203 P. 433; Mutual Life Ins. Co. of New York v. Franck, 9 Cal.App.2d 528, 534, 50 P.2d 480; Chilwell v. Chilwell, 40 Cal.App.2d 550, 553, 105 P.2d 122.

3. The cases cited all involved contracts to make a contract, the essential terms of which were yet to be agreed.

[4] Cook v. Cook, 17 Cal.2d 639, 644, 111 P.2d 322 holding that where the insured reserves the right to change the beneficiary in an ordinary life insurance policy the beneficiary has no vested right therein prior to the insured's death as will prevent a change of beneficiary by the insured, has no application here. As hereinbefore pointed out, an insured may by contract waive the right to change the beneficiary and convert what is usually the contingent interest of a beneficiary into a vested equitable interest. Waxman v. Citizens Nat. Trust & Sav. Bank, supra, 123 Cal.App.2d at page 148, 266 P.2d at page 49. This Harold did here.

[5] Defendant Ida individually objects to the denial of her motion for nonsuit. She had filed with Equitable a claim for the proceeds of that policy. Plaintiffs' complaint alleged that Harold in violation of his agreement had made her the beneficiary of the policies and that the companies were going to pay her the proceeds. In her answer Ida claimed to be the owner of the $12,000 deposited in court by Equitable. The motion was properly denied as the court found and adjudged that she personally had no interest in the trust property. There is no money judgment against her.

[6] Defendants claim that the second amended complaint (the complaint upon which the case was tried) did not plead the violation of a trust, and merely pleaded a violation of a contract. It did, however, set forth the agreement in haec verba and alleged a change of beneficiary by Harold in violation thereof and in the prayer asked that the policies and their proceeds be impressed with a trust in favor of plaintiffs. Thus it pleaded the facts and the trust theory was definitely before the court.

2. Statutes of Limitation and Laches.

[7, 8] Neither apply. Defendants' contention that the time when the cause of action accrued was when Harold broke his promise to enter into an agreement appointing the trustee, is unfounded. In cases of this kind the cause of action accrues and the statute first commences to run when the decedent dies without the policies being left in effect. Waxman v. Citizens Nat. Trust & Sav. Bank, supra, 123 Cal.App.2d 145, 266 P.2d 48; Mutual Life Ins. Co. of New York v. Franck, 9 Cal.App.2d 528, 50 P.2d 480. For the same reason laches would not apply as the action was filed within 12 days after Harold's death.

3. Abandonment.

[9] After the execution of the agreement and before Vera obtained the interlocutory decree of divorce, some other trust agreement was shown to her and she apparently signed it. However, it was not signed by Harold. Thereafter the interlocutory decree was obtained. It provided support of $100 per month for the two chidren, whereas the agreement in question here provided for only $90 per month, which sum plaintiff Vera had been receiving prior to obtaining the decree. No action was taken thereafter by Vera to get Harold to execute the instrument mentioned in the trust agreement. From these circumstances plus the language in that decree that the "agreement has been fully consummated," defendants contend that the agreement was abandoned. The trial court found that there was no abandonment. The circumstances mentioned do not compel a finding that there was. Particularly is this so in view of a letter from Harold's attorney to Vera's attorney written January 4, 1949, suggesting that the latter immediately file a complaint for divorce on behalf of Vera and stating, "Since they have worked out their property settlement agreement, it would appear that the complaint need only provide for a divorce and custody of the children."

The judgment is affirmed.

PETERS, P. J., and FRED B. WOOD, J., concur.

147 Cal.App.2d 582

Frank Angel BLUE and Doc Blue Realty, a Partnership, Petitioners and Appellants,

v.

D. D. WATSON, State Real Estate Commissioner, Respondent.

No. 17272.

District Court of Appeal, First District, Division 2, California.

Jan. 15, 1957.

Hearing Denied March 13, 1957.

Proceeding upon petition for writ of mandate to set aside State Real Estate Commissioner's order revoking real estate and opportunity brokers' licenses issued to one of the two petitioners. The Superior Court, County of Contra Costa, Wakefield Taylor, J., entered judgment denying petition, and petitioners appealed. The District Court of Appeal, Kaufman, J., held that evidence, by which complaining witness sought to show that one petitioner had withheld $1,000 of purchase price of property sold by petitioner on behalf of complaining witness and had appropriated such sum to petitioner's own use, was sufficient to sustain judgment denying petition.

Judgment affirmed.

1. Trial ⇐404(1)

Findings are to be construed to uphold the judgment if findings are reasonably susceptible of such a construction. West's Ann.Code Civ.Proc., § 1094.5.

2. Mandamus ⇐187(9)

In proceeding on petition for writ of mandate to set aside State Real Estate Commissioner's order revoking real estate and opportunity broker's licenses, trial judge had to make decision as to weight of evidence, but the district Court of Appeal had only to inquire whether there was substantial evidence for the trial judge's decision. West's Ann.Code Civ.Proc., § 1094.5.

3. Mandamus ⇐168(4)

In proceeding upon petition for writ of mandate to set aside State Real Estate Commissioner's order revoking real estate and opportunity brokers' licenses which had been issued to one petitioner, evidence, by which complaining witness sought to show that petitioner had withheld $1,000 of purchase price of property sold by petitioner on behalf of complaining witness and had appropriated such sum to petitioner's own use, was sufficient to sustain judgment denying petition. West's Ann.Bus. & Prof.Code, §§ 10142, 10302(d–f), 10176(e, i); West's Ann.Code Civ.Proc., § 1094.5.

4. Mandamus ⇐187(9)

Upon appeal from Superior Court's denial of petition for writ of mandate to set aside State Real Estate Commissioner's order revoking real estate and opportunity broker's licenses issued to petitioner, the District Court of Appeal could not make a new determination as to which of the witnesses who gave conflicting testimony were most worthy of belief. West's Ann. Bus. & Prof.Code, §§ 10142, 10302(d–f), 10176(e, i); West's Ann.Code Civ.Proc., § 1094.5.

Roy G. Hollingshead, Hayward, Robert H. Kroninger, Oakland, for appellants.

Edmund G. Brown, Atty. Gen., Carl W. Wynkoop, C. Hugh Friedman, Deputies Atty. Gen., for respondent.

KAUFMAN, Justice.

This is an appeal from a judgment of the Superior Court of Contra Costa County, denying appellants' petition for a writ of mandate to set aside the State Real Estate Commissioner's order revoking real estate and opportunity broker's licenses issued to appellant.

An accusation was filed with respondent Real Estate Commissioner on January 24, 1955, alleging that appellant, Frank Angel Blue, as a partner in the Doc Blue Realty, on or about December 14, 1954, received an offer for the purchase of a parcel of property together with $1,000, which sum he did not deliver to the seller and owner

of the property, but commingled said sum with his own moneys and appropriated it to his own use. It was further alleged that appellant had seller's instructions prepared and delivered to the escrow holder which did not account for the down payment of $1,000, and informed the escrow holder, without the knowledge of the seller, that said sum had been paid outside the escrow, thereby causing the escrow to be closed, and an incorrect closing statement to be issued to the seller. On December 15, 1954, it was alleged, appellants obtained the signature of the seller to a deposit receipt for said sale, and did not deliver a copy thereof to the seller.

The accusation alleged that the conduct set forth above constituted violations of sections 10176(e) and (i), 10177(d), 10302 (d), (e) and (f) and 10142 of the Business and Professions Code of California, and Rules 2830, 2831 and 2832 of the Rules and Regulations of the Real Estate Commissioner, Title 10, California Administrative Code. After proper notice, hearing was held before a hearing officer. The Commissioner adopted the decision of the hearing officer, which found the allegations of the accusation to be true and recommended revocation of the licenses. After denial of a petition for reconsideration a petition for writ of mandate was filed. An alternative writ issued. The transcript of the proceedings and the exhibits offered and received in evidence at the administrative hearing were received in evidence. No further evidence was introduced. The trial court found that the decision of the Commissioner was "not harsh, arbitrary or unreasonable, and was justified and sustained by the weight of the evidence and is not contrary to law." The petition was therefore denied.

It is the contention of appellants on this appeal, that the Findings of Fact of the Superior Court are insufficient to support the judgment denying the writ of mandate, and that the evidence is insufficient to support the findings of the court and the decision rendered by the Commissioner.

The complaining witness was James M. Fritchman who described himself as a "marine engineer and divine healer." He had known appellant, Frank Angel Blue (also known as Doc Blue) for about three years prior to December 14, 1954, the date on which appellant called him to tell him he had a cash deal on his house for $9,000. He called at the office and learned that a $500 deposit had been made. However, he demanded a $1,000 deposit. He signed the deposit receipt in appellants' office. Subsequently the $500 was changed to $1,000. When he asked for a copy of the deposit receipt, he was told that he did not get one. A few days later appellant Blue called to ask him if he needed an advance. He went to appellants' office, signed a receipt and received $150, but did not get a copy. This was the first money which he had ever received from Blue. He received another advance of $250 before Christmas, 1954, and signed another receipt. His wife was not present at this time. On January 12, 1955, appellant came to his house, and they went to the bank where he received $5,016.74. Appellant had another check for Fritchman in the sum of $730 from another transaction. Blue produced a typewritten receipt which Fritchman signed. The receipt recited that complainant had received of Blue all moneys due him from the sale of his corner property. It stated further "I have also reimbursed Dr. Frank A. Blue the sum of $400.00 borrowed by me during the sale of said piece of property. Said loans were in the sum of $250.00 and $150.00". The next paragraph reading, "I make no further claims for money due me on this transaction, having received all monies due me", complainant said, was then not on the receipt. Later, on January 13, he added in handwriting, "This is $730 check from the title co. & $5.076.76 check." The check for $730, he said, was made out to appellant, who indorsed it. It was cashed, the $400 owing for the advances was deducted, and he received $330. When he asked appellant for a closing statement he

was told that appellant had not received one.

Shortly thereafter, complainant realizing that he was $1,100 short on the deal, went to the title company, where he learned that according to their records that $1,000 had been paid outside the escrow. He demanded the $1,000 from Blue, who claimed that he had already given it to him in cash. Appellant then offered to sell a parcel of property for the witness without a commission. When appellant said he intended to do nothing about payment of the $1,000 complainant brought charges against him.

Fritchman also testified that he had added the handwritten sentence to the receipt because "I knew this other was a phoney deal, and I assumed that all this is the money from the escrow when I signed that."

On cross-examination Fritchman denied that he told Dermody, the deputy Real Estate Commissioner, that there had been no indication of down payment on the deposit receipt when it was presented to him. (Mr. Dermody had testified that complainant had stated to him that "there was nothing there at the time he signed.") He stated that if he had received the $1,000 he would not have accepted the advances of $400. After he realized that he was $1,100 short he went to the title company, then called on appellant who told him that he had put the $1,000 in complainant's pocket. He first saw the added typed sentence on the receipt when it was shown to him at the office of the Real Estate Commissioner.

Ted Lowen, manager of the title company, testified that the $1,000 showed on the buyer's instructions, and that the title company was advised by appellant that said sum had been deposited with the broker. The title company was informed by appellant's office that the $1,000 had been paid to the seller. Such notations were made on the buyer's instructions on January 10, 1955. Seller's instructions showed a commission of $900 paid to appellant, and $1,000 paid to seller. The person in the title company making up the closing statement had noted the shortage of $1,000, and was then informed by appellant that this had been paid to the seller outside of the escrow. A week after closing, complainant came to see the files. The witness called appellant, who said he had paid complainant, that complainant had accepted the check and had made no complaint. He had had several dealings with appellant whom he knew only through business. His reputation was good, and he would not question his word.

Appellant Blue, testifying in his own behalf stated that complainant was always secretive about his real estate transactions trying to keep the information from his wife. Appellant had made several sales of real property for him prior to this transaction. On the day following the $1,000 deposit by the buyers, complainant wanted an advance. Although the transaction was not closed, he said that he paid the $1,000 to him, and it was paid in cash at his request in the presence of complainant's wife and Mr. Anderson, a salesman in the office. No receipt was made out by appellant. Complainant had asked Blue not to let his wife see the transfer of the funds when he handed him ten one-hundred dollar bills.

On cross-examination Blue testified that the deposit receipt was changed to $1,000 when he presented it to the buyers before they signed it and gave him the check. When Fritchman called him, he had the buyer's check on his desk, but Fritchman said he wanted cash. He informed him that the proper procedure was to put the money in a trustee account, then draw a check. He went to the bank, cashed the check, and when he returned, Mrs. Fritchman was in the office. He handed the money to complainant while his wife was talking with some one else. He asked him to count it, but complainant grabbed it and put it in his pocket. It would have made it too obvious if he had made out a receipt. Appellant knew of Fritchman's reputation as a healer and his

bad financial reputation but had no reason to distrust him. Although the salesman, Anderson, was in the office at the time, he didn't think it important to get him as a witness.

In answer to questions by the hearing officer, appellant said that he kept no records of the $1,000. He did mention it to his partner, but she made no record of it. Although he admitted that it would have been good business for him to have made a record of the receipt of this sum, he did not because of Fritchman's secretiveness. He had forgotten about Anderson's presence in the office at the time of the transactions and was surprised when Anderson reminded him that he was present. He remembered a notation about the $1,000 he had made for his file, but didn't mention it at the meeting in the Commissioner's office.

A continuance was granted so that appellant might subpoena other witnesses.

Complainant was again examined at the second hearing. He stated that no loans had been made to him by appellant Blue except those for $150 and $250, which his wife knew about. The only thing he didn't want her to know about was the foreclosure of their home. He did not tell appellant not to tell his wife about the loan. The only time his wife had been in the real estate office was the occasion when the seller's instructions were signed.

Appellant brought a notation which he had made concerning the $1,000 to the hearing. He said it had been in the Fritchman-Combra file immediately after he had given Fritchman the $1,000. A letter from his partner was introduced (Ex. D) showing that the usual office procedure was to issue a duplicate receipt when a deposit from a buyer was received, deposit the money in a trust account where it would be held until the deal was consummated. There was nothing in the records showing a receipt to the purchasers for the $1,000. Although his partner was absent from the office between December 8, 1954 and January 2, 1955, and although he did deposit money and give receipts for other accounts, he did not in this case because he expected her back momentarily.

The salesman, Anderson, testified that he knew about the deal. He saw Blue give Fritchman money in the office, but could not say if it was $1,000. Fritchman came into the office three times, once getting $150 and another time $250. He thought those loans were before the sale. His desk was in front of appellant's, but he was standing at the filing cabinet when the money was exchanged. He saw one hundred dollar bills, the top bill was $100, but he couldn't say whether the total was $200 or $1,000. He was four or five feet from them and Fritchman's back was toward him. He had not seen the $1,000 check. Appellant only discussed the matter of the $1,000 with Anderson after the complaint had been made. Anderson had seen receipts for the $150 and $250 loans, and said they were written on title company paper. One of them, Exhibit "B", was on cardboard with no title company heading. Anderson then thought he had better change his testimony, that these things were none of his business.

Inspector Stoffel of the Contra Costa Sheriff's Office called by complainant, testified that when he called on appellant he told him that when he advised Fritchman of the $1,000 deposit, Fritchman wanted it in cash. Appellant went to the bank, cashed the checks, and handed the money to Fritchman. At a later time appellant and Fritchman went to the bank when the checks for $5,076.76 and $730 were cashed. There Fritchman paid off the $400 owed on the loans. Testifying from his recollection and notes he had taken at the time, he stated that he had never heard that the $1,000 was paid to Fritchman by appellant in his office.

The trial court found that the allegations of Paragraphs I through XIII, and XV and and XVI of the petition were true. These allegations recited the steps that had been taken in the administrative proceedings,

the preparation of the record, and such matters. The court found that Paragraph XIV was true (that petitioners have no plain, speedy and adequate remedy at law) except that the decision rendered by the respondent "is not harsh, arbitrary or unreasonable, and was justified and sustained by the weight of the evidence and is not contrary to law." Paragraphs XVII, XVIII, XX, XXI and XXII were found to be untrue. These Paragraphs alleged that the evidence was insufficient to sustain a conviction under certain sections of the Business and Professions Code and the Rules and Regulations of the State Real Estate Commissioner (the sections mentioned in the Accusation); that petitioners were denied due process in that respondent made his decision on evidence not presented at the hearing; that appellants will suffer irreparable injury; that respondent's act was arbitrary, capricious and an abuse of discretion; that there is no substantial evidence to support the findings of respondent Commissioner numbered V, VI, VII and which were quoted in Paragraph XX of the petition. Paragraph XIX was found to be untrue except that it is true that petitioners cannot carry on their business as real estate or business opportunity brokers without licenses.

It is to be noted that appellants offered no further evidence in the Superior Court in proof of the above allegations. There was no proof that the Commissioner had relied on evidence outside the record. Section 1094.5, Code of Civil Procedure provides that where it is contended "that the findings are not supported by the evidence, in cases in which the court is authorized by law to exercise its independent judgment on the evidence, abuse of discretion is established if the court determines that the findings are not supported by the weight of the evidence."

The case of Cooper v. State Board of Medical Examiners, 35 Cal.2d 242, 217 P.2d 630, 18 A.L.R.2d 593, a case involving the revocation of a license by the Board of Medical Examiners, is of interest because the findings in that case appear to have been drafted in a similar manner to those herein. The review by the trial court in that case required the court to exercise its independent judgment and determine whether the findings of the board were supported by the weight of the evidence. The opinion therein recites, 35 Cal.2d at page 244, 217 P.2d at page 632, that "The superior court, after a hearing but with no other evidence than the transcript and record of the proceedings before the board, found and concluded that the 'findings and order of respondent Board revoking petitioner's license as a drugless practitioner were * * * supported by the findings of respondent Board; that the findings of respondent Board were, and are, based upon and supported by the weight of the evidence,' and that the proceedings before the board were within its jurisdiction and were conducted 'without procedural or prejudicial error or abuse of discretion of any kind'". There is no attack in this case upon the form of the findings, and the court was able to conclude from them that the trial court had exercised its independent judgment and had in effect adopted the board's findings. The findings herein that the decision of the respondent is justified and sustained by the weight of the evidence certainly demonstrates that the trial court has exercised its independent judgment, and has itself weighed the evidence; otherwise, it could not have made this determination. In the cases of Davis v. State Board of Optometry, 35 Cal.App.2d 428, 433, 95 P.2d 959, and Beloin v. Blankenhorn, 97 Cal.App.2d 662, 664, 218 P.2d 552, cited by appellants, no findings whatever were made by the trial court.

[1] Appellants attack the findings that the allegations of Paragraphs XVII, XVIII, XX, XXI, and XXII are untrue as constituting negative pregnants and argue that such findings have been criticized as inadequate. In the case of Mardesich v. C. J. Hendry Company, 51 Cal. App.2d 567, 575, 125 P.2d 595, from which appellants quote, the finding that certain

allegations were untrue left it uncertain whether or not the plaintiff might have been contributorily negligent for the court found an affirmative defense untrue which alleged that the accident was proximately caused by the negligence of plaintiff, which could mean that it was not proximately caused solely by plaintiff's negligence. The court there stated, however, that such finding would not be fatal to the judgment if there had been a finding on the ultimate fact negating the existence of negligence on the part of plaintiff which contributed as a proximate cause of his injury. In the instant case the court's findings that the allegations are untrue which state that the respondent Commissioner's findings set forth therein are not supported by substantial evidence, leave no uncertainty as to what the trial court found in regard to them, for if the allegations are untrue, then said findings are supported by substantial evidence. It has been held that the criticism that such a finding constitutes a negative pregnant is without merit, for that rule applies to "pleading, not to findings, which are to be construed so as to uphold the judgment if they are reasonably susceptible of such a construction." McAuliffe v. McAuliffe, 53 Cal.App. 352, 355, 199 P. 1071, 1072; and, see, Johndrow v. Thomas, 31 Cal.2d 202, 208–209, 187 P.2d 681; Stevens v. Stevens, 215 Cal. 702, 705, 12 P.2d 432; Tobola v. Wholey, 75 Cal. App.2d 351, 358, 170 P.2d 952.

[2] It has been held in Moran v. Board of Medical Examiners, 32 Cal.2d 301, 308, that when the appellate court reviews this type of decision by the Superior Court, the usual rule on appeal applies, that is, all conflicts are to be resolved in favor of respondent, and all legitimate inferences indulged in favor of the judgment. The only question to be decided is whether or not there is substantial evidence to support the decision of the trial court. Therefore, even though the trial judge in such a case must decide as to the weight of the evidence, this court only inquires whether there is substantial evidence for his decision.

[3, 4] The question here, was chiefly one of credibility. If the trial court believed the testimony of the complainant then it could conclude, as it did, that the weight of the evidence supported the decision. There is substantial evidence in the record to support such a belief. A reading of the testimony set forth above convinces us that the testimony of the complainant is not inherently incredible, and that there are serious inconsistencies in the testimony of appellant Blue and his witness Anderson. This court cannot make a new determination as to which witnesses were most worthy of belief. See, Whitcomb v. Emerson, 46 Cal.App.2d 263, 270, 115 P.2d 892.

In view of the foregoing, the judgment must be affirmed.

Judgment affirmed.

DOOLING, Acting P. J., and DRAPER, J. pro tem., concur.



147 Cal.App.2d 788

Pasquale N. PIETRO, Plaintiff and Appellant,

v.

Madeline Hunter PIETRO, Defendant and Respondent.

Civ. 21685.

District Court of Appeal, Second District, Division 2, California.

Jan. 24, 1957.

Husband's suit to have divorce decree set aside. From a judgment of the Superior Court of Los Angeles County, Maurice C. Sparling, J., dismissing the case, the plaintiff appealed. The District Court of Appeal, Fox, J., held that the plaintiff had alleged no such extrinsic fraud as would justify granting the relief sought.

Affirmed.

1. Evidence ⇐43(2)

Court in which suit was brought to set aside divorce decree was warranted in taking judicial notice of file in divorce suit.

2. Judgment ⇐443(1)

The fraud which will justify setting aside of final judgment by equity court must be of such character as to have prevented trial of issues presented to court for determination.

3. Judgment ⇐443(1)

Fraud which is collateral to and outside of court and such that party is, because thereof, effectively prevented from presenting his case or all of his defense, is "extrinsic fraud" against which equity will give relief by setting aside judgment.

See publication Words and Phrases, for other judicial constructions and definitions of "Extrinsic Fraud".

4. Judgment ⇐443(1)

Some representation or concealment by one party which prevented other from having his day in court is necessary to constitute "extrinsic fraud" against which court will grant relief.

5. Judgment ⇐443(1)

Concealment by party of evidence which, if disclosed, would tend to overthrow his case, is not extrinsic fraud, and therefore is not ground for suit to set aside judgment.

6. Divorce ⇐165(3)

If, as alleged, wife's attorney had retained two written agreements proving husband's ownership of property husband could have enforced production of those documents by subpoena duces tecum directed to her counsel, or by an appropriate demand in open court, and such alleged retention of those agreements did not constitute such fraud as would entitle husband to have divorce decree set aside.

7. Divorce ⇐165(3)

Where issue as to whether wife held property in trust for husband had been litigated in divorce action adversely to husband, he could not successfully contend, as basis for having divorce decree set aside, that wife had fraudulently substituted deeds so that pre-divorce conveyance did not show that she held property in trust for husband.

8. Divorce ⇐165(3)

If husband believed that there was any impropriety in wife's being represented in divorce action by attorney who had previously handled legal matters for husband, he should have drawn matter to attention of divorce court, and he could not successfully urge such matter as basis for having divorce decree set aside.

9. Evidence ⇐52

An allegation of complaint out of harmony with fact of which court takes judicial notice must be disregarded.

10. Divorce ⇐184(12)

Any technical procedural error in considering divorce suit file, in holding insufficient husband's complaint to have divorce decree set aside, could not have been prejudicial, where that file demonstrated lack of merit in husband's case.

Pasquale N. Pietro appearing in pro. per.

Minsky & Garber, Los Angeles, for respondent.

FOX, Justice.

By his third amended complaint plaintiff seeks to set aside the divorce decree awarded to his wife and to compel her to convey to him certain real property (and to account for the income therefrom) involved in that suit. In his pleading plaintiff gave the title of the divorce action, the date on which it was filed (April 14, 1953), its file number in the Clerk's Office, the department of the Superior Court in which the case was tried, and the date the judgment was entered. He then alleged that he was denied recovery of the real property here in question in that action. His motion for a new trial was denied, as was his motion under section 473, Code of Civil Procedure, to set aside the judgment on the ground of asserted fraud.

He appealed from the judgment in the divorce case but later abandoned his appeal.

In the instant action plaintiff alleged that the property was owned by him and that Madeline held it in trust for him.

As a basis for setting aside the former judgment, plaintiff alleged (1) that Madeline's attorney in the divorce case retained two written agreements which prevented him from proving the ownership of the property; (2) that her attorney had handled certain legal matters for plaintiff which disqualified him from acting as attorney for her in the divorce action; (3) that Madeline and her attorney had informed plaintiff that they would return the property in question to him if he did not contest the divorce suit, and that, relying on that representation, he did not contest the divorce suit; and (4) that when the property was conveyed to Madeline on December 10, 1952, by plaintiff's former wife, Madeline fraudulently substituted deeds so that the conveyance did not show that she held the property in trust for plaintiff.

[1] When this case came on for trial, the file in the divorce suit was presented to the judge. He examined it, as he was permitted to do in view of its specific identification, the references to the case in plaintiff's complaint, and the nature of the relief he sought. This was sufficient to warrant the court in taking judicial notice of it. In re Estate of Wilson, 116 Cal.App. 2d 523, 527, 253 P.2d 1011; Christiana v. Rose, 100 Cal.App.2d 46, 52, 222 P.2d 891; Hammell v. Britton, 19 Cal.2d 72, 73, 75, 119 P.2d 333. Plaintiff did not object to this procedure. Perusal of the file disclosed, in accordance with plaintiff's allegation, that the ownership of the property in controversy had been litigated in the divorce suit and decided adversely to plaintiff herein. The file also revealed that the divorce decree had not been by default but that there had been a four-day trial in which plaintiff herein had been represented by counsel and during which a number of witnesses had testified and various documents were received in evidence.

With the pleadings in this condition, counsel for defendant objected to the introduction of further evidence on the ground that the complaint did not state facts sufficient to constitute a cause of action, i. e., facts that would justify setting aside the portion of the judgment in the divorce decree that denied him any interest in the real property in controversy. This objection was sustained and the case was dismissed. It is from the judgment of dismissal* that plaintiff prosecutes this appeal.

Plaintiff's theory is that the judgment in the divorce case was induced by extrinsic fraud. Defendant insists that no extrinsic fraud is shown.

[2–4] As stated in Gale v. Witt, 31 Cal. 2d 362, 365, 188 P.2d 755, 757: "The fraud which will justify the setting aside of a final judgment by a court of equity must be of such character as prevents a trial of the issues presented to the court for determination. [Citations.] Where the fraud practiced is collateral to and outside of court so that a party is, because of such fraud or concealment, effectively deprived of presenting his case or all of his defense, it is extrinsic and equity will give relief." The court further pointed out, 31 Cal.2d on page 366, 188 P.2d on page 757, that "to constitute extrinsic fraud, there must have been some representation or concealment by the defendant which prevented the plaintiff from having his day in court * * *." To the same effect: Westphal v. Westphal, 20 Cal.2d 393, 397, 126 P.2d 105; United States v. Throckmorton, 98 U.S. 61, 65, 25 L.Ed. 93; In re Griffith's Estate, 84 Cal. 107, 112–113, 23 P. 528, 24 P. 381; Pico v. Cohn, 91 Cal. 129, 133–135, 25 P. 970, 27 P. 537, 13 L.R.A. 336.

Measured by these principles, it is clear that plaintiff's allegations do not show extrinsic fraud.

* Although two other persons are named as defendants, neither of them is involved in this appeal.

[5, 6] Plaintiff's first charge is that Madeline's attorney retained two written agreements which prevented him from proving his ownership of the property. Plaintiff could have forced the production of these documents by a subpoena duces tecum directed to her counsel, or by an appropriate demand in open court. Concealment by a party of evidence which, if disclosed, would tend to overthrow his case, is not extrinsic fraud and therefore is not ground for a suit to set aside a judgment. Hogan v. Hogan, 131 Cal.App. 2d 281, 283–284, 280 P.2d 64; In re Griffith's Estate, supra; Pico v. Cohn, supra; Burch v. Hibernia Bank, 146 Cal. App.2d 422, 304 P.2d 212.

[7] Plaintiff's allegation that when the property was conveyed to Madeline she substituted deeds and thereby received a deed showing title in her as grantee instead of a deed conveying it to her as trustee for plaintiff in accordance with their agreement, does not show extrinsic fraud. The deed in question was acknowledged on December 10, 1952, and recorded the next day. This was four months before Madeline filed her complaint for divorce. Furthermore, it appears from the divorce file that plaintiff herein filed a cross-complaint in the divorce action in which he alleged that Madeline held the property in trust for him. The court held against him on this question. It is thus apparent that the issue was litigated and decided in the prior action and that plaintiff's allegation does not amount to extrinsic fraud. Hanley v. Hanley, 114 Cal. 690, 693, 46 P. 736; Gale v. Witt, supra; Burch v. Hibernia Bank, supra.

[8] Plaintiff's allegation that Madeline's attorney had been employed by him in connection with the refinancing of the property and to recover for him and his former wife certain other property, and that he thus obtained information that Madeline held this property in trust for him, is not an allegation of fraud, extrinsic or otherwise. If plaintiff believed there was any impropriety in counsel's representing Madeline in the divorce action he should have drawn the matter to the attention of the trial court, for he was then in possession of all the facts. It does not appear that he made any such suggestion.

[9] Plaintiff alleged that Madeline and her attorney represented to him that they would return the property in question to him if he did not contest the divorce suit, otherwise they would force the property into foreclosure and it would be lost to him; that he relied on the representation; and that the fear of losing the property "caused him not to contest the divorce suit." Considered by itself, this allegation would be impressive but when supplemented by the file in the divorce suit, of which the court was entitled to take judicial notice, Weil v. Barthel, 45 Cal.2d 835, 837, 291 P.2d 30; Hammell v. Britton, supra; In re Estate of Wilson, supra; Christiana v. Rose, supra, it loses its significance. For it then becomes apparent that plaintiff did not rely on the alleged representation, but did, in fact, contest the divorce case throughout a four-day trial in which he was represented by counsel and during which many witnesses testified and numerous documents were received in evidence. An allegation of a complaint out of harmony with a fact of which a court takes judicial notice must be disregarded. Young v. Boy Scouts of America, 9 Cal.App.2d 760, 764, 51 P.2d 191; Bell v. Southern Pacific Co., 189 Cal. 421, 425, 208 P. 970; French v. Senate, 146 Cal. 604, 607–608, 80 P. 1031, 69 L.R.A. 556. Thus the allegation relied on fails to establish a foundation for setting aside the former judgment or any portion thereof.

[10] If, perchance, there was any technical procedural error in considering the file in ruling on defendant's objection to the further introduction of evidence it was obviously not prejudicial, for that file demonstrated the lack of merit in plaintiff's case.

Plaintiff suggests that the trial judge was biased in favor of defendant. There is no

support whatever in the record for this suggestion.

Other arguments made by plaintiff are not of sufficient substantiality to require consideration.

Judgment affirmed.

MOORE, P. J., and ASHBURN, J., concur.



148 Cal.App.2d 8

In the Matter of the ESTATE of Mary Ethel CUNNINGHAM, Deceased.

Rhoda ATKINS, Petitioner and Appellant,

v.

Bezotra BARNETT, Contestant and Respondent.

Civ. No. 22013.

District Court of Appeal, Second District, Division 3, California.

Jan. 25, 1957.

The Superior Court of Los Angeles County, Clyde C. Triplett, J., entered an order approving and confirming report of inheritance tax appraiser and fixing inheritance tax, and administratrix appealed. The District Court of Appeal, Vallée, J., held that administratrix was precluded from challenging order by reason of her failure to object to report in any fashion in probate court.

Affirmed.

1. Executors and Administrators ⇐75

Executor or administrator must defend estate from all unjust and illegal attacks made upon it which affect the interests of heirs, devisees, legatees or creditors.

2. Appeal and Error ⇐151(3)

Where claim may diminish estate to be finally distributed, or may make fund from which creditors are to be paid insufficient for that purpose, administrator or executor is interested, and, in event of adverse ruling, is an "aggrieved party" who may appeal.

3. Appeal and Error ⇐151(3)

Administratrix was party aggrieved and had right to appeal from order approving and confirming report of inheritance tax appraiser and fixing inheritance tax. West's Ann.Rev. & Tax.Code, § 14506.

4. Taxation ⇐900(5)

Administratrix was precluded, on appeal, from challenging order approving and confirming report of inheritance tax appraiser and fixing inheritance tax, where she had failed to object to report in any fashion in probate court. West's Ann.Rev. & Tax.Code, § 14671.

5. Appeal and Error ⇐169

Issues and questions not raised or presented to trial court will not be considered by reviewing court.

Marshall Denton, Jr., Los Angeles, for appellant.

Schifferman & Schifferman, Arthur E. Schifferman, and Robert P. Schifferman, Los Angeles, for respondent.

VALLÉE, Justice.

Appeal from an order approving and confirming the report of an inheritance tax appraiser and fixing the inheritance tax.

Mary Ethel Cunningham died testate on March 19, 1955. Appellant Rhoda Atkins, a sister of the deceased, is administratrix with-the-will-annexed. The deceased was a sister of respondent Bezotra Barnett. Eva E. George, another sister, predeceased Mary Ethel. Estella Cooper was a stranger to the deceased. Appellant's claim is that the order confirming the report of the inheritance tax appraiser and fixing the tax is predicated on an erroneous construction of the will of the deceased.

The material parts of the will read:

"Second. I give and bequeath to my sister, Eva E. George, all real

estate in the City of Los Angeles, State of California; and in the County of Madera, State of California; and all other personal belongings.

"Third. If my sister, Eva E. George, precedes me in death, bequeath all of my real estate and personal belongings heretofore mentioned, to my sister Bezotra Barnett.

"Fourth. I also provide a shelter in my home for Estella Cooper, for the rest of her life, free of any charge whatsoever.

"Fifth. I have no children. If there are any bona fide relatives, I give and bequeath to them one ($1.00) dollar each.

"Lastly, I hereby nominate and appoint my sisters, Eva E. George and Bezotra Barnett of Los Angeles, State of California, to serve as my Executrices without bond, of this my Last Will and Testament, and I do hereby revoke all former Wills, bequests, or designations of beneficiaries whatsoever."

An inheritance tax appraiser filed a report in which he valued the property bequeathed and devised to Bezotra at $7,254.64 and computed the inheritance tax thereon at $262.73. Bezotra filed objections to the report. Rhoda, as administratrix with-the-will-annexed, filed a "Reply" to the objections. After a hearing the court made findings,[1] sustained the objections, and ordered the inheritance tax appraiser to prepare and file a new report and to apportion therein the inheritance tax liability in accordance with the findings. In the findings the court concluded that the interest devised to Estella Cooper by paragraph Fourth of the will constitutes an equitable charge or servitude on the realty and "nothing more"; and that paragraphs Second and Third constitute a residuary clause whereby the deceased gave to Bezotra all real and personal property not otherwise disposed of by the will.

1. "The Court draws the following conclusions as to the proper construction and interpretation of the Will of said decedent, and hence as to the proper apportionment of inheritance tax liability:

"(a) The interest created in favor of Estella Cooper by paragraph Fourth of the Will of the decedent is not one conferring the right of exclusive occupancy of the premises upon Estella Cooper, and does not constitute an estate for life in said property, contrary to the determination of the Inheritance Tax Appraiser to that effect; the interest created in favor of Estella Cooper by said paragraph constitutes an equitable charge or servitude upon said real property, and nothing more.

"(b) The language of paragraphs Second and Third of the Will of said decedent disposing of 'all other personal belongings' and real estate to the decedent's sister, objector herein, does not constitute a bequest of furniture, contrary to the determination of the Inheritance Tax Appraiser to that effect; said language constitutes a residuary clause in the Will of said decedent whereby the decedent intended to give to her sister, objector herein, all real and personal property owned by the decedent at her death, wheresoever located, not otherwise disposed of by the terms of said Will; accordingly, since said Will shows an intent on the part of said decedent to dispose of her entire estate, and to avoid intestacy, the determination by the Inheritance Tax Appraiser that decedent died intestate as to the cash comprising part of her estate, as well as the parcel of real property located in Riverside County, California, is erroneous; the determination of inheritance tax should be made by said Appraiser upon the basis that an equitable charge is imposed upon the parcel of real property located in Los Angeles County in favor of Estella Cooper, and that all of the rest, residue and remainder of the property comprising the estate of the decedent, whether real property, personal property, or mixed, and wheresoever located, should be taxed as being distributable to objector, Bezotra Barnett.

"(c) The language of paragraph Fifth of the Will of said decedent: 'If there are any bona fide relatives, I give and bequeath to them one ($1.00) dollar each.' was intended by the decedent to be a provision against contest of her Will, does not constitute a specific bequest or bequests, and should be ignored by the Inheritance Tax Appraiser in determining the tax liability."

Pursuant to the order the inheritance tax appraiser filed a new report in which he valued the interest bequeathed and devised to Bezotra at $18,523.45 and computed the tax thereon at $826.17. Thereafter the court made an order approving and confirming the new report as presented and fixing the tax. The order recites "no objections thereto [the new report] having been filed herein." Rhoda, as administratrix with-the-will-annexed and as "an heir and legatee," appeals from the latter order.

[1–3] The first question is whether Rhoda has a right to appeal. Respondent Bezotra says she has no such right since she is not aggrieved by the order either in her representative capacity or as an heir or legatee. We think the point is not tenable. The first report of the inheritance tax appraiser set the amount of the tax due and payable on all transfers, Rev. & Tax.Code, § 14506, as $389.77; the new report, as $865.66, a difference of $475.89.

It is the duty of Rhoda, as administratrix, to " 'defend the estate from all unjust and illegal attacks made upon it which affect the interests of heirs, devisees, legatees or creditors.' [Citations.] Consequently, if a claim 'may diminish the estate to be finally distributed, or may make the fund from which the creditors are to be paid insufficient for that purpose, the administrator is interested, and, in the event of an adverse ruling, is a party aggrieved.' [Citations.] 'To say that an administrator is not aggrieved and therefore has no right of appeal from a decree which he deems to be unjust, unwarranted, and detrimental to the estate which has been confided to his care, would be to deny him the performance of a plain duty devolving upon him through his appointment and his acceptance of the trust.' [Citation.] It has accordingly been held that an executor or administrator may appeal from a decree of partial distribution, because the assets of the estate may not be sufficient to discharge the claims of creditors [citations] or because the status of the assets may be so highly uncertain that such an order may be embarrassing to the proper administration of the estate. [Citation.] An executor or administrator may appeal from an order awarding a family allowance to the widow or children of the decedent, since he is an aggrieved party by virtue of his duty to protect the estate from depletion from an extravagant family allowance [citations]; and an executor may also appeal from an order setting aside a probate homestead for the use of the surviving wife of the decedent." In re Estate of Kessler, 32 Cal.2d 367, 369, 196 P.2d 559, 561. Applying this law it is patent that Rhoda, as administratrix, is a party aggrieved and has a right of appeal.

[4, 5] Respondent contends Rhoda waived her right to appeal by not filing objections to the new report. She did not waive her right to appeal. Rev. & Tax. Code, § 14671. The correct question is: Is she precluded on appeal from challenging the order by reason of her failure to file objections or object to the report in any fashion in the probate court?

On filing of the report of the inheritance tax appraiser the clerk must give notice of the filing by posting and by mailing a copy to the Controller and to each person chargeable with any tax who has appeared in the probate proceeding. Rev. & Tax.Code, § 14508.[2] At any time prior to the making of the order on the report any person interested may file a "written objection" to the report. Rev. & Tax.Code, § 14510. If an objection is filed the clerk must fix a time "for a hearing on the objection" and give notice of the hearing by posting and by mailing a copy of the objection and of the notice to "the Controller, executor, administrator, and the inheritance tax appraiser."

2. Section 14508: "On the day that the report is filed, or on the next succeeding judicial day, the clerk of the superior court shall give notice of the filing to all persons interested by causing a notice to be posted at the courthouse in the county where the court holds its sessions, and shall mail a copy of the notice to the Controller and to each person chargeable with any tax in the report who has appeared in the probate proceeding."

Rev. & Tax.Code, § 14511.[3] Section 14512 reads:

"For the purpose of the hearing the report of the inheritance tax appraiser is presumed to be correct, and at the hearing it is the duty of the objector to proceed in support of his objection."

On the completion of the hearing the court may make such order as it may deem appropriate. Rev. & Tax.Code, § 14513. Section 14509 reads:

"If no objection to the report is filed prior to the expiration of 10 days from and after the posting and mailing of the notice, the superior court, a judge of the court, or, if the court is located in a county or city and county having a population of 900,000 or more, a court commissioner appointed by the court may, without further notice, make an order confirming the report and fixing the tax in accordance therewith."

An order fixing the inheritance tax has the force and effect of a judgment in a civil action. Rev. & Tax.Code, § 14672.

It appears evident from a study of the statutes that they provide for an adversary proceeding. Notice of the filing of the report was given to appellant. If she had any objection to the report she had the privilege of filing a "written objection." It is only when a "written objection" is filed that the clerk must set the report for hearing, and the hearing is "on the objection." At the hearing the objector must proceed in support of his objection. If no objection is filed an order may be made confirming the report and fixing the tax. Failure to file a "written objection" is in effect a confession that the report is correct—a default. The explicit provision that if no objection to the report is filed the court may without further notice make an order confirming the report and fixing the tax in accordance therewith indicates an intent by the Legislature that an interested person must, to preserve a right to question the report, file a "written objection" thereto. Since appellant failed to file any objection to the report there was no issue of fact framed, and the court was empowered to make the order in accordance with section 14509.

It is fundamental that issues or questions not raised or presented to the trial court will not be considered in the reviewing court. See cases cited 5 West's Cal.Dig., Appeal and Error, ⚿169, p. 191. Not having filed an objection to the report in the probate court, Rhoda may not attack it on appeal.

Affirmed.

SHINN, P. J., and PARKER WOOD, J., concur.

3. Section 14511: "If an objection is filed, the clerk of the superior court shall fix a time, not less than 10 days after the filing, for a hearing on the objection, and shall give notice of the hearing by posting a notice of hearing at the courthouse in the county where the court holds its sessions, and by forthwith mailing a copy to [of] the objection and of the notice to the Controller, executor, administrator, and the inheritance tax appraiser."



147 Cal.App.2d 798

The PEOPLE of the State of California, Plaintiff and Respondent,

v.

Oliver Gardner RUSHING, Defendant and Appellant.

Cr. 5787.

District Court of Appeal, Second District, Division 3, California.

Jan. 24, 1957.

Rehearing Denied Feb. 20, 1957.

Hearing Denied March 25, 1957.

Defendant was convicted on plea of guilty of violating section of the Vehicle Code making the driving or taking of a motor vehicle without the owner's consent a felony. Thereafter the defendant filed a petition for writ of error coram nobis.

The Superior Court of Los Angeles County, Herbert V. Walker, J., entered an order denying the motion, and the defendant appealed. The District Court of Appeal, Vallée, J., held that showing made was manifestly insufficient to justify vacating the judgment.

Affirmed.

1. Criminal Law ⇐997(6)

In order to present a meritorious application for vacation of judgment on petition for writ of error coram nobis, there must be a strong showing of the existence of some fact which was unknown to defendant at time of trial, and which could not have been ascertained by him in exercise of reasonable diligence, and fact must be one which, if it had been known, would have prevented rendition of the judgment.

2. Criminal Law ⇐997(15)

On motion for writ of error coram nobis by defendant, who had been convicted on plea of guilty for violation of section of the Vehicle Code making the driving or taking of a motor vehicle without the owner's consent a felony, showing made by defendant was insufficient to justify vacation of judgment of conviction. West's Ann. Vehicle Code, § 503.

3. Criminal Law ⇐997(2)

If Adult Authority, in fixing term of imprisonment, considered or would consider improperly that defendant had admitted two prior convictions, remedy of defendant was not a writ of error coram nobis but to have sentence fixed or refixed when he served his lawful term, and, if dissatisfied, to review the matter on habeas corpus at that time.

Oliver Gardner Rushing in pro. per.

Edmund G. Brown, Atty. Gen., and William E. James, Deputy Atty. Gen., for respondent.

VALLÉE, Justice.

Appeal from an order denying defendant's motion to vacate a judgment.

On April 27, 1956, an information was filed charging defendant in two counts with grand theft and a violation of section 503 of the Vehicle Code. The information alleged that prior to the commission of the offenses charged defendant had been convicted of two felonies and had served terms of imprisonment therefor. At defendant's arraignment the public defender was appointed his counsel. On May 4, 1956, his counsel being present, defendant pleaded guilty to the offense charged in Count II—violation of section 503 of the Vehicle Code—and admitted the prior convictions. A probation report was ordered.

On May 25, 1956, defendant being present with his counsel, probation was denied, the admission of the prior convictions was withdrawn, the prior convictions were denied, defendant waived a jury trial as to the prior convictions and no finding was made with respect to them, Count I was dismissed, and defendant was sentenced to state prison on Count II. No appeal was taken from the judgment.

On August 20, 1956, defendant filed with the clerk of the superior court a document titled "Motion to Vacate, Annull Quash and Set Aside Judgment, the Judgment is Void on the Face of the Judgment Roll." On August 28, 1956, an order was made denying the motion. Defendant appealed.

The grounds stated in the motion were: 1. The "judgment is void on the face of the judgment roll, and is repugnant to the 1st, 4th, 5th, 6th, 8th and 14th amendments of the United States Constitution." 2. The court was not authorized to punish defendant twice "for the same pretended offense," which defendant calls "double jeopardy." 3. "Numerous grounds but only one ground needs to be proved." 4. "The verdict is contrary to law; unwarranted, unfounded." 5. The judgment is "barred by the statutes of limitations for over (755) years since the signing of the Magna Charta."

[1, 2] The proceeding is in the nature of a petition for a writ of error *coram nobis* and is of limited scope. As we said in

People v. Suarez, 142 Cal.App.2d 719, 298 P.2d 895, 896:

"In order to present a meritorious application for vacation of a judgment there must be a strong showing of the existence of some fact which was unknown to the petitioner at the time of trial and which could not have been ascertained by him in the exercise of reasonable diligence and the fact must be one which, if it had been known, would have prevented the rendition of the judgment. (12 Cal.Jur.2d, Coram Nobis, p. 550.)"

The showing made in defendant's motion was manifestly insufficient. People v. Washington, 142 Cal.App.2d 720, 298 P.2d 879; People v. Lempia, 144 Cal.App.2d 393, 301 P.2d 40; People v. Mendez, 144 Cal.App.2d 500, 301 P.2d 295; People v. Larsen, 144 Cal.App.2d 504, 301 P.2d 298; People v. Gamboa, 144 Cal.App.2d 588, 301 P.2d 390; People v. Blair, 146 Cal.App.2d 299, 303 P.2d 597. In view of what is said in these recent cases elaboration is unnecessary. The action was not barred by the statute of limitations. There was no verdict in the case; defendant pleaded guilty. There was no "double jeopardy." Defendant pleaded guilty to, was convicted of, and was sentenced for one offense only—violation of section 503 of the Vehicle Code.

[3] As we understand him, defendant contends that the Adult Authority, in fixing the term of his imprisonment, has considered or will consider that he has admitted the two prior convictions charged. If defendant has a just complaint on that score his remedy is not a writ of error *coram nobis*. A somewhat similar contention was made in People v. Larsen, 144 Cal.App.2d 504, 301 P.2d 298. Mr. Justice Ashburn wrote, 144 Cal.App.2d at page 508, 301 P.2d at page 301:

"The punishment for first degree burglary is fixed at not less than five years with no maximum specified. Pen. Code § 461, subd. 1. Appellant's remedy is to have his sentence fixed or refixed when he has served the lawful term, whatever that may be, and if dissatisfied to review the matter on habeas corpus at that time. In re Seeley, 29 Cal.2d 294, at page 302, 176 P.2d 24, at page 29, says: 'The rule is settled in this state in accord with the weight of authority that "where a court has jurisdiction of the person and of the crime, the imposition of a sentence in excess of what the law permits does not render the legal or authorized portion of the sentence void, but leaves only such portion of the sentence as may be in excess open to question and attack. In other words, the sentence is legal in so far as it is within the provisions of law and the jurisdiction of the court over the person and offense, and only void as to the excess when such excess is separate and may be dealt with without disturbing the valid portion of the sentence."' 29 Cal.2d at page 303, 176 P.2d at page 30: 'No difficulty is likely to arise in ascertaining the lawful portion of the sentence which should have been imposed upon the petitioner. Section 461 of the Penal Code fixes the punishment for first degree burglary as imprisonment in the state prison for not less than five years. Since no maximum is there prescribed the petitioner has failed to show that he is entitled to his release at this time. The proper course to pursue is for the constituted authority to refix the sentence of the petitioner in accordance with the declaration of his rights as stated in this opinion.' This is but one of a consistent line of cases announcing and applying the same rule. In re Morck, 180 Cal. 384, 181 P. 657; In re Rosencrantz, 205 Cal. 534, 541, 271 P. 902; In re Seeley, supra, 29 Cal.2d 294, 302, 176 P.2d 24; In re Bramble, 31 Cal.2d 43, 53, 187 P.2d 411; In re Drake, 38 Cal.2d 195, 197–198, 238 P.2d 566; In

re Spaulding, 8 Cal.App.2d 497, 498, 48 P.2d 133."

Defendant is not entitled to writ of error *coram nobis*.

Affirmed.

SHINN, P. J., and PARKER WOOD, J., concur.



147 Cal.App.2d 723

The PEOPLE of the State of California, Plaintiff and Respondent,

v.

Anthony Thomas LANCELLOTTI, Defendant and Appellant.

Cr. 1097.

District Court of Appeal, Fourth District, California.

Jan. 21, 1957.

Hearing Denied March 22, 1957.

Prosecution for grand theft and receiving stolen property. The Superior Court, San Diego County, Edgar B. Hervey, J. pro tem., entered judgment of conviction and denied new trial, and defendant appealed from the order denying a new trial. The District Court of Appeal, Griffin, J., held that evidence sustained convictions.

Judgment and order denying a new trial affirmed.

1. Criminal Law ⇐369(5, 9)

In prosecution for grand theft and feloniously receiving stolen property, trial court properly refused proffered evidence that on an occasion approximately three years prior to the date of the theft for which defendant was being prosecuted defendant and another person were caught shoplifting in a store other than the store in which the theft for which he was being prosecuted occurred. West's Ann.Pen. Code, §§ 484, 487, 496.

2. Indictment and Information ⇐10.2(8, 11)

In prosecution for grand theft, and receiving stolen property, evidence presented to Magistrate was sufficient to allow district attorney to charge defendant not only with receiving stolen property, but in the alternative with grand theft of the same property. West's Ann.Pen.Code, §§ 484, 487, 496.

3. Judgment ⇐648

Where defendant presented question of sufficiency of evidence to show probable cause for commission of crimes charged, to a Superior Court, on a motion to dismiss the information, and such question was fully considered and denied, and the question was again presented on a writ of prohibition to the District Court of Appeal and denied, such judgment became final and such question was not subject to review on the subsequent appeal from an order denying a new trial or from a judgment of conviction.

4. Larceny ⇐65

Receiving Stolen Goods ⇐8(3)

Evidence sustained convictions for grand theft and for receiving stolen property. West's Ann.Pen.Code, §§ 484, 487, 496.

5. Criminal Law ⇐1159(2)

Larceny ⇐64(7)

While mere possession of stolen property and an opportunity to steal it is not alone sufficient to justify a conviction for theft, such opportunity, with coexisting inculpatory circumstances, such as guilty conduct, and giving false account of possession of stolen property soon thereafter, may be sufficient to sustain a conviction for theft, and although the additional connecting evidence may be slight, if it exists, decision of a jury finding a defendant guilty will not be disturbed on appeal. West's Ann.Pen.Code, §§ 484, 487, 496.

6. Witnesses ⇐246(2)

In a criminal proceeding, if a judge desires to be further informed on certain

points mentioned in the testimony it is entirely proper for him to ask proper questions for the purpose of developing all the facts in regard to them, and considerable latitude will be allowed the judge in such respect as long as a fair trial is indicated both to the accused and to the state.

7. Criminal Law ⇐633(1)

Courts are established to discover where lies the truth when issues are contested, and the final responsibility to see that justice is done rests with the trial judge.

8. Criminal Law ⇐1166½(12)

In prosecution for grand theft and receiving stolen property, where jury was specifically instructed that it was the sole and exclusive judge of the credibility of the witnesses and the weight of the evidence notwithstanding any belief entertained or comments made by the trial judge on the subject, no prejudicial error occurred through judge's cross-examination of defendant. West's Ann.Pen.Code, §§ 484, 487, 496.

9. Criminal Law ⇐656(2)

A trial judge should not examine a defendant on trial for a crime in such a manner as to give the jury the impression that he thinks the accused is guilty of the charge and should be convicted, since such conduct would nullify defendant's right of trial by jury.

10. Criminal Law ⇐1166½(12)

In prosecution for grand theft, and receiving stolen property, comments of trial judge as to his belief of defendant's guilt, made on a motion for a new trial, although unfortunate, could not have affected the verdict of the jury in any manner, and were therefore not prejudicial. West's Ann.Pen.Code, §§ 484, 487, 496.

11. Criminal Law ⇐1172(1)

In prosecution for grand theft and receiving stolen property, no prejudicial error resulted in giving an instruction on right of jury to find defendant guilty of petit theft, since petit theft is an included offense of grand theft. West's Ann.Pen. Code, §§ 484, 487, 496.

Edward L. Bracklow, San Diego, for appellant.

Edmund G. Brown, Atty. Gen., William E. James and Bonnie Lee Hansen, Deputy Attys. Gen., for respondent.

GRIFFIN, Justice.

Defendant and appellant was originally charged in a criminal complaint with grand theft in violation of Penal Code, §§ 484 and 487, in that on March 16, 1956, he feloniously took personal property of Jordan Marsh Company, consisting of a pastel mink stole valued at $235. He was arraigned on the charge in the Municipal Court. Evidence was received and the committing magistrate held the defendant to answer on the charge of receiving stolen property as defined by section 496 of the Penal Code.

The information was filed in the Superior Court on May 9, 1956, charging defendant in count one with grand theft, as originally charged in the complaint. In count two he was charged with feloniously receiving the same property for which he was held to answer. In a third count it was charged that on March 16, 1956, he violated section 496 of the Penal Code by feloniously receiving stolen property, to wit, one dark grey plaid suit and one blue suit, the personal property of Walker Scott Corporation.

A motion was made before a judge other than this trial judge to dismiss the information and particularly count three, on the basis that there was no evidence before the committing magistrate to substantiate the charges. The motion was denied. Subsequently, a writ of prohibition under section 999a of the Penal Code alleging defendant was committed without reasonable or probable cause, was denied by this court on June 6, 1956, and this order became final. Just before the trial, counsel for defendant again

raised the same question by a similar motion, and after considerable discussion, it was denied. On this appeal defendant again questions this ruling as well as the former ruling. After receipt of the prosecution's evidence defendant moved for an advised verdict or for dismissal of each count. The motion was denied.

A trial by jury resulted in a conviction on the first and third counts. Subsequently, the trial court dismissed the second count. Defendant was sentenced to state's prison, sentences to run concurrently.

On March 16, 1956, the Gardena police officers received a telephone call from one of their informers that two men, one resembling this defendant, were attempting to sell some clothing at a certain club in that city. They went there and saw defendant and his partner, Pastore. One Thompson, manager of the club, had purchased from defendant two suits of clothes and two pairs of slacks for $80 in cash. Defendant denied such a sale and he was searched. A set of car keys was found. Defendant stated he had no car since he left it at home and the keys were then returned to him. Shortly thereafter, the officers found these same keys, partially exposed but hidden in a sand-filled ash tray. Search was made on an adjoining lot and a Buick car was found. The keys fitted it. Defendant was taken to the car and several boxes of clothing, a hanger labeled "Dutch Smith" and a mink stole were found in the trunk. After questioning, defendant changed his story and said he had acquired these articles in a trade with another unknown peddler near Los Angeles. He later changed the place and indicated it was Long Beach. The trousers and slacks purchased by the manager were found in a club locker in a separate bundle. Defendant then admitted to the officers he had brought these articles into the club and had been in San Diego the week before, but later, when he was told of the thefts in San Diego that particular week he changed his story and claimed it was the week before that he was in San Diego.

The manager of the Jordan Marsh Company sufficiently identified the mink stole marked No. 515 as being one of two found missing from his store in La Jolla on March 16, 1956. He also identified two pairs of new uncuffed pants which bore the label "Macgregor" in them, a brand carried by his store, and also the tan slacks with the label "Kentkraft", which articles were exclusively handled by this store in that area. (The next closest store was Eugene, Oregon.) He testified that his store carried trousers of the description of those found in defendant's car; that they carried the label "Jordan Marsh" written on them and that at that time he could not tell whether these particular slacks and pants were stolen or were sold from his store, but it was unlikely that they were sold because it was an unusual thing to sell a pair of uncuffed pants.

Another witness, Smith, testified he was in business in La Jolla under the name of "Dutch Smith". He testified that a certain camel's hair jacket, size 40, found in defendant's car on a hanger labeled "Dutch Smith, La Jolla, California" was one which he had received in a shipment to his store on March 15, and which he found to be missing.

A buyer for Walker Scott Company testified that on March 19 he went to Gardena and identified certain items found there, including a new grey pin-striped suit with uncuffed pants, carrying the Walker Scott label on it; that at that time his store carried suits of that make, model, style and size; that it is a rare occasion when uncuffed pants like those are sold in that condition. Another blue suit was similarly identified. He testified he did not know of his own knowledge that these exact pants were stolen from his store but they carried the store's label and it would be an unusual occasion to sell uncuffed pants from his store.

[1] The prosecution offered testimony of a store detective from Bullock's indicating that on August 11, 1953, defendant and

one other person were caught shoplifting and carrying a large paper bag and were removing a coat from that store. The court properly refused the proffered evidence. (8 Cal.Jur. p. 58, sec. 167.)

Defendant testified he was a peddler who purchased merchandise at wholesale and sold it at retail from his car; that although he was in San Diego one or two weeks before March 16th, he did not know where the Jordan Marsh, Walker Scott, or Dutch Smith stores were located, and that he had not been inside those stores; that he acquired all these articles described from an unknown peddler by trade in Gardena; that each told the other he had acquired the respective articles through a mistake in the order from the house with which they did business and did not want to take them back. The defendant said this was just sales talk, and if he could steal from his employer "so can I", because he had a license to steal because he had a peddler's license; and that he did not believe the "stuff" was stolen although he did see the Walker Scott store label on some of the articles.

On this appeal from the judgment of conviction he first contends that the trial court erred in denying his motion to dismiss counts one and three of the information because the evidence taken at the preliminary examination did not show reasonable or probable cause to justify the district attorney filing an information on the offenses charged; that since defendant was originally charged with grand theft of the mink stole and he was held to answer on the charge of receiving stolen property, the district attorney was unauthorized to again charge grand theft, and that the evidence taken at the preliminary examination did not support the charge of receiving stolen property set forth in the third count since the two suits alleged therein were not received in evidence at the preliminary examination but were returned to the district attorney for disposition after being marked only for identification, and that the several charges were not shown to be so connected in their commission as to be chargeable in separate counts in one information

[2, 3] We see no merit to this argument. The committing magistrate heard the testimony of the witnesses pertaining to the charge in the third count and they properly identified the exhibits which were marked for identification, although they were not received in evidence. That testimony was not stricken and remained in the transcript. The district attorney was authorized to include this offense in the information. Penal Code, § 739. The charge of grand theft was not expressly dismissed as was done in Parks v. Superior Court, 38 Cal.2d 609, 241 P.2d 521, upon which case defendant relies. The evidence was sufficient to allow the district attorney to not only charge defendant with receiving stolen property, but, in the alternative, to charge him with grand theft of the same property. People v. Bird, 212 Cal. 632, 300 P. 23; Bompensiero v. Superior Court, 44 Cal.2d 178, 183, 281 P.2d 250. Defendant was found in possession of all of the property charged in the information in the same place and it was adequately shown that all of the charges were sufficiently related or connected with the transaction which was the basis for the committing order and the charges alleged and would authorize their inclusion in one information. Penal Code, § 739; Parks v. Superior Court, supra; People v. Bird, 212 Cal. 632, 300 P. 23, and cases cited. Irrespective of this conclusion, defendant presented the question of the sufficiency of the evidence to show probable cause for the commission of the crimes charged to the Superior Court on a motion to dismiss the information. It was fully considered and denied. It was again presented on a writ of prohibition to this court under Section 999a of the Penal Code and denied. This judgment became final and the question should not again be made subject to review on an appeal from the order denying the new trial or from the judgment of conviction. People v. Dutton, 27 Cal.App. 2d 364, 80 P.2d 1003; 14 Cal.Jur. 78, sec.

60; 7 Cal.Jur. p. 968, sec. 107; 8 Cal.Jur. p. 492, sec. 508. The trial court had jurisdiction to try the defendant upon the charges set forth in the information. In re Basham, 24 Cal.App.2d 285, 286, 74 P.2d 781.

[4, 5] The next claim is that the evidence is insufficient to support defendant's convictions on counts one and three. It sufficiently shows that the mink stole in evidence was taken from the Jordan Marsh Company store without consent on the date charged. It is true there is no direct evidence that anyone saw this defendant take it. This is not a necessity. People v. Alexander, 92 Cal.App.2d 230, 234, 206 P. 2d 657. While mere possession of stolen property and an opportunity to steal it is not alone sufficient to justify a conviction for theft, such opportunity, with coexisting inculpatory circumstances such as guilty conduct and giving false account of possession of stolen property soon thereafter may be sufficient to sustain a conviction for theft. Although the additional connecting evidence may be slight, if it exists, the decision of the jury will not be disturbed on appeal. People v. Crotty, 70 Cal.App. 515, 518, 233 P. 395; People v. Cheaney, 111 Cal.App. 55, 59, 295 P. 84; People v. Holland, 82 Cal.App.2d 310, 312, 186 P.2d 58; People v. Howard, 58 Cal. App. 340, 343, 208 P. 1022; People v. Scott, 66 Cal.App. 200, 203, 225 P. 767; People v. Carroll, 79 Cal.App.2d 146, 148, 179 P.2d 75; People v. Kross, 112 Cal.App.2d 602, 609, 247 P.2d 44; People v. Viets, 79 Cal. App. 576, 589, 250 P. 588; People v. Smith, 43 Cal.App.2d 110, 115, 110 P.2d 472.

As to the third count, defendant was found in possession of the property there charged. It was sufficiently identified as coming from the Walker Scott store. When defendant was arrested he was with one who seemed to know about the possession of these articles and assisted, to some extent, in their disposition. The illegitimate source from which these suits were claimed to have been obtained, the inadequate price paid for the loot, and the unexplained or improbable explanation of defendant's possession of them, were facts to be considered by the jury. Under the conditions described, it may well be inferred that this store had been the owner of this property and it was taken from the store other than by legitimate sale and without the consent of the owner, by someone, and later received by defendant in San Diego County knowing it to have been stolen.

[6–8] It is next claimed that the trial judge was guilty of prejudicial misconduct during the trial in that he unduly cross-examined the defendant, and by such cross-examination indicated his belief that the defendant was not telling the truth. After defendant testified, the trial judge proceeded to cross-examine him in some detail respecting his direct testimony. At the conclusion of this cross-examination counsel for defendant made some ineffective objections to this procedure as follows:

> "If the court please, I, for the purpose of the record, wish to make an objection to the questions that the Court has just asked and his responses thereto. I presume it is going to be overruled of course."

The prosecution then completed the cross-examination of defendant. Without quoting the many pages of this cross-examination by the court, suffice it to say that it was quite apparent from the testimony of the defendant that he was evasive in his answers, inclined to quibble, his answers were ambiguous, nonresponsive, and it was quite apparent to the trial judge that he was not telling the whole truth. While the better practice would have been to allow full cross-examination of witnesses by respective counsel before cross-examination by the judge, it has been repeatedly held that if a judge desires to be further informed on certain points mentioned in the testimony it is entirely proper for him to ask proper questions for the purpose of developing all the facts in regard to them. Considerable latitude is allowed the judge

in this respect as long as a fair trial is indicated both to the accused and to the People. Courts are established to discover where lies the truth when issues are contested, and the final responsibility to see that justice is done rests with the judge. No timely objections were interposed to the cross-examination. The jury was specifically instructed that it was the sole and exclusive judge of the credibility of the witnesses and the weight of the evidence notwithstanding any belief entertained or comments made by the trial judge on the subject. Under the circumstances no prejudicial error affirmatively appears. People v. Miller, 41 Cal.App.2d 252, 258, 106 P.2d 239; People v. Corrigan, Cal. App., 302 P.2d 371; People v. Golsh, 63 Cal.App. 609, 614, 219 P. 456; People v. Miller, 112 Cal.App. 535, 537, 297 P. 40; People v. Hill, 116 Cal.App.2d 212, 255 P.2d 54; People v. Howe, 1 Cal.App.2d 518, 36 P.2d 820.

[9] Counsel for defendant sets forth considerable reported argument between the trial judge and counsel on the hearing of defendant's motion for new trial. The trial judge, at that time, quite forcefully told counsel for defendant he did not believe the testimony of the defendant, and the jury had the right to the same thought. He proceeded to review the testimony and concluded that the evidence was sufficient to warrant the conviction on each count as charged. Criticism was made in reference to the trial judge's cross-examination of the defendant, as indicated. He replied that he was asking the questions for the purpose of exposing, to the jury, what he thought were lies of the defendant. Some unfortunate statements were made at that time by the judge indicating that he thought he had the right to tell the jury that he believed the defendant was guilty and that was what he was trying to do although he did not believe his conduct so indicated. A judge should not examine a defendant on trial for a crime in such a manner as to give the jury the impression that he thinks the accused is guilty of the charge and should be convicted. It is apparent that such conduct would nullify the right of trial by jury. People v. Butterfield, 40 Cal.App.2d 725, 734, 105 P.2d 628. As said by this court in People v. Huff, 134 Cal.App.2d 182, 285 P.2d 17, a judge should be careful not to throw the weight of his judicial position either for or against the defendant.

[10] The record of the testimony before the jurors does not affirmatively show that the trial court believed the defendant guilty, although the questions propounded well indicate that the defendant was falsifying his testimony and the trial judge, as well as the jurors, were justified in so believing. Under Article VI, § 19 of the Constitution the court may make such comment on the evidence and the testimony and credibility of any witness as in its opinion is necessary for the proper determination of the case, but it shall inform the jury in all cases that the jurors are the exclusive judges of all questions of fact submitted to them and of the credibility of the witnesses. In the instant case the jury was so instructed. The comments, unfortunately made on the motion for new trial, could not necessarily have been said to have affected the verdict of the jury in any manner. No prejudicial error appears. Art. VI, § 4½, of the Constitution.

[11] The remaining question involves an instruction given by the court involving the form of verdicts. According to the reporter's transcript, the court gave an instruction that if the jury entertained a reasonable doubt as to whether or not defendant was guilty of either the offense of grand theft or petit theft, it should find him guilty of grand theft. The reporter, by affidavit, corrected the transcript and said that in truth and fact the jury was not so instructed, that there was an error in transcription, and the instruction as given, read in the concluding words "*not* guilty of grand theft". Upon the record as thus corrected, under Rule 12a, Rules on Appeal, no error appears. The undisputed evidence shows the value of the mink stole exceeded

the sum of $200. No prejudicial error resulted in giving an instruction which defendant contends was confusing to the jury but which does not appear so to us. It involved the right of the jury to find the defendant guilty of petit theft, an included offense.

Judgment and order denying a new trial affirmed.

BARNARD, P. J., and MUSSELL, J., concur.

Hearing denied; SHENK, CARTER and SCHAUER, JJ., dissenting.



147 Cal.App.2d 793

The PEOPLE of the State of California, Plaintiff and Respondent,

v.

Milford Jay PERKINS, Defendant and Appellant.

Cr. 5751.

District Court of Appeal, Second District, Division 3, California.

Jan. 24, 1957.

Defendant was charged with violation of Penal Code, § 288. The Superior Court, Los Angeles County, Allen T. Lynch, J., tried case without jury, and defendant was convicted of contributing to delinquency of minor, and he appealed. The District Court of Appeal, Vallée, J., held that evidence was sufficient to support conviction for contributing to delinquency of minor.

Affirmed.

1. Criminal Law ⇐193½
Indictment and Information ⇐191

The offense of contributing to delinquency of a minor is necessarily included in violation of Penal Code, § 288, and conviction of contributing to delinquency of minor is an acquittal of crime of child molesting. West's Ann.Pen.Code, § 288.

2. Infants ⇐20

Evidence was sufficient to sustain conviction of contributing to delinquency of minor. West's Ann.Pen.Code, § 288; West's Ann.Welfare & Inst.Code, §§ 700 (k), 702.

3. Infants ⇐20

To establish violation of section 288, there must be proof of a specific intent to arouse, appeal to, or gratify the lust or passions or sexual desires of defendant or of the child, but proof of such specific intent is not necessary to establish the commission of offense commonly called contributing to delinquency of minor. West's Ann.Pen.Code, § 288; West's Ann.Welfare & Inst.Code, §§ 700(k), 702.

4. Criminal Law ⇐199

Defendant's acquittal of violation of section 288, is not bar to his conviction of contributing to delinquency of minor. West's Ann.Pen.Code, § 288; West's Ann. Welfare & Inst.Code, §§ 700(k), 702.

5. Criminal Law ⇐1182

Judgment in a criminal action is the sentence, and affirmance of judgment carries with it affirmance of the sentence.

Forno & Umann, Harry M. Umann, Joseph T. Forno and Burton Marks, Los Angeles, for appellant.

Edmund G. Brown, Atty. Gen., and James C. Maupin, Deputy Atty. Gen., for respondent.

VALLÉE, Justice.

By information defendant was charged with a violation of section 288 of the Penal Code.[1] In a trial by the court without a jury he was convicted of contributing to

1. Section 288: "Any person who shall wilfully and lewdly commit any lewd or lascivious act including any of the acts constituting other crimes provided for in part one of this code upon or with the body, or any part or member thereof, of a

the delinquency of a minor, a violation of section 702 of the Welfare and Institutions Code.[2] The cause was submitted on the transcript of the preliminary examination and evidence presented by defendant.

Janice, a 7-year-old girl, testified that on August 15, 1955, while she was in defendant's car, he put his hand under her dress; he put it on top of her panties and not under them; when he did so, he in effect told her that when girls grow up men have sexual intercourse with them; he also touched her leg on the lower part above the knee and touched her with his little finger on the place where she went to the bathroom; he also kissed her. Defendant admitted to a police officer that he had put his hand on Janice's leg and that he had kissed her once.

The only contention is that "In light of the acquittal of the defendant of the charge of child molesting, there is no evidence to sustain a conviction of the charge of contributing to the delinquency of a minor."

[1] The offense of contributing to the delinquency of a minor is necessarily included in the offense defined in section 288 of the Penal Code, and a conviction of contributing to the delinquency of a minor is an acquittal of a violation of section 288. People v. Greer, 30 Cal.2d 589, 598, 184 P.2d 512. In People v. Lopez, 46 Cal.App. 2d 857, 117 P.2d 10, cited with apparent approval in People v. Greer, supra, the defendant was charged with aiding and abetting her codefendant in the commission of statutory rape. The question as stated by the court was: "'Where a defendant is charged in one count with the violation of section 261 of the Penal Code, can such defendant be found guilty of contributing to the delinquency of a minor (Section 702, Welfare and Institutions Code, St.1937 P. 1033), a misdemeanor, where no such crime is charged or alleged in the information or complaint?'" The court held, 46 Cal. App.2d at page 858, 117 P.2d at page 11:

> "The minor prosecutrix testified that her clothing was removed against her will by appellant and that appellant then placed said minor on the bed and held her down while the act of intercourse was accomplished. * * *
>
> "There was sufficient evidence introduced to justify the trial court in finding appellant guilty as charged in the information. However, it is apparent that the trial judge discounted a great deal of the testimony and disbelieved some portions of it, but the evidence was sufficient to support his finding that appellant committed the offense of which he found her guilty.
>
> "The only question raised which is worthy of discussion is, whether the court was justified as a matter of law in rendering the judgment which it did. There is some slight conflict in the decisions as to the law on this subject, but it is the better rule to hold that, where the acts committed tended to show the commission of the acts charged and where such acts in themselves actually constituted the lesser offense, i. e., contributing to the delinquency of the minor, a conviction had of the lesser offense should be sustained. The judgment rendered

child under the age of fourteen years, with the intent of arousing, appealing to, or gratifying the lust or passions or sexual desires of such person or of such child, shall be guilty of a felony and shall be imprisoned in the State prison for a term of from one year to life."

2. Welfare and Institutions Code, section 702: "Any person who commits any act or omits the performance of any duty, which act or omission causes or tends to cause or encourage any person under the age of 21 years to come within the provisions of any of the subdivisions of Section 700 or which act or omission contributes thereto, * * * is guilty of a misdemeanor * * *."

Welfare and Institutions Code, section 700: "The jurisdiction of the juvenile court extends to any person under the age of 21 years who comes within any of the following descriptions: * * *

"(k) Who is leading, or from any cause is in danger of leading, an idle, dissolute, lewd, or immoral life."

would prevent the retrial of appellant upon the original charge, for the reason that it amounted to an acquittal of the greater crime, to-wit: aiding and abetting in the commission of the crime of statutory rape, which is a felony, while the lesser offense, of which appellant was found guilty, is a misdemeanor."

In Rodriguez v. Superior Court, 27 Cal. 2d 500, 165 P.2d 1, the same contention was made as defendant makes here. The court answered, 27 Cal.2d at page 502, 165 P.2d at page 2:

"While it is true that acts constituting statutory rape or attempted rape may also constitute a violation of section 702, since those acts by their very nature would contribute to the delinquency of the minor, the converse is not true. The facts may fail to establish rape or attempted rape yet justify a conviction under section 702. Consequently, petitioner's acquittal under the first count of the information is not a bar to his prosecution and conviction under the second count.

"Petitioner also claims that not only is the occurrence underlying the rape charge identical with that relied upon to support the accusation under section 702, but that the proof in support of the two charges is the same. He says that he would be guilty of rape if the things the prosecutrix testified to actually occurred, but that if her story is untrue he is not guilty of any offense. Petitioner argues that his acquittal of rape and of the included offense of attempted rape establishes the falsity of her testimony, and that he cannot be retried upon evidence which was addressed to the charge of which he stands acquitted. There is no merit in this contention. The jury may reject a portion of the testimony of a witness and accept a part of it. The testimony accepted by the jury may support a conviction of one offense, while another charge contained in the same information may fail because the jury has rejected evidence necessary to establish an essential element of the crime."

In People v. Greer, supra, 30 Cal.2d 589, 184 P.2d 512, 517, the defendant was charged with statutory rape, Pen.Code, § 261, subd. 1, and lewd and lascivious conduct, Pen.Code, § 288, arising out of the same act. In a previous trial he was charged not only with these identical offenses but also with contributing to the delinquency of a minor, the same person on whom the rape and lewd and lascivious conduct were alleged to have been committed. Welf. & Inst.Code, § 702. In that trial he was found guilty of violating section 702, but the jury disagreed as to the counts of statutory rape and lewd and lascivious conduct. The court observed: "In the first trial, therefore, it was not necessary for the district attorney to charge a violation of section 702 to obtain a conviction of defendant for committing that offense. He could have charged statutory rape and lewd and lascivious conduct, and the jury, under proper instructions, could have returned a verdict of guilty of contributing to the delinquency of a minor," citing People v. Lopez, supra, 46 Cal.App. 2d 857, 117 P.2d 10.

[2, 3] In the case at bar there was sufficient evidence introduced to have warranted the trial judge in finding defendant guilty as charged in the information. To establish a violation of section 288 there must be proof of a specific intent to arouse, appeal to, or gratify the lust or passions or sexual desires of the defendant or of the child. People v. Jones, 42 Cal.2d 219, 223, 266 P.2d 38. Proof of such specific intent is not necessary to establish the commission of the offense commonly called contributing to the delinquency of a minor. It is apparent the trial judge discounted some parts of the testimony of Janice. He may have had a reasonable doubt that defendant had the specific intent required by section 288. The evidence was adequate to support his finding that defendant

committed the offense of which he found him guilty.

[4] Defendant's acquittal of a violation of section 288 of the Penal Code is not a bar to his conviction of contributing to the delinquency of a minor.

[5] Defendant appealed from the judgment and the sentence imposed. The judgment in a criminal action is the sentence. People v. Tokich, 128 Cal.App.2d 515, 519, 275 P.2d 816. Also see People v. Clarke, 146 Cal.App.2d Supp. 904, 304 P.2d 271. Affirmance of the judgment carries with it affirmance of the sentence.

The judgment is affirmed.

SHINN, P. J., and PARKER WOOD, J., concur.



148 Cal.App.2d 14

James Sheridan WOOD, Administrator of the Estate of Sid Wood, Deceased, Plaintiff and Appellant,

v.

Robert B. DENNEY, Jr., Vera M. Denney, J. F. Denney and W. H. Denney, partners doing business under the firm name and style of Denney Logging Co.; Denney Logging Co., a copartnership, Defendants and Respondents.

Civ. 9007.

District Court of Appeal, Third District, California.

Jan. 25, 1957.

Action to have a contract for the sale of timber cancelled and to quiet title to land and for damages for withholding possession. Judgment adverse to plaintiff in the Superior Court, Del Norte County, Samuel F. Finley, J., and the plaintiff appeals. The District Court of Appeal, Warne, J. pro tem., held that the failure of purchasers to make certain required payments under the contract did not justify termination of their rights under the contract.

Judgment affirmed.

1. Logs and Logging ⇐3(7)

An agreement relating to the sale and purchase of timber was not construable as requiring anything to be paid by the purchaser as rental for the use of the lands.

2. Logs and Logging ⇐3(7)

Where contract for the sale and purchase of standing timber expressly stated that contract was to continue over a number of years, time was not of the essence.

3. Logs and Logging ⇐3(13)

Where purchasers under contract for sale of standing timber were in default because of failure to make payments required under contract, purchasers were properly relieved of forfeiture of their rights under contract where vendors had received a substantial part of purchase price, it did not appear that breach was willful and purchasers offered to pay what was still due and owing as price of timber. West's Ann.Civ.Code, § 3275.

4. Logs and Logging ⇐3(15)

In action by vendors to have a contract for sale of timber cancelled and for damages, findings restricting payments to be made by the purchaser were supported by the contract which was in evidence.

William R. Walsh, Los Angeles, Robert F. Appel, Crescent City, for appellant.

Huber & Goodwin, Norman C. Cissna, Eureka, for respondents.

WARNE, Justice pro tem.

James Wood, as administrator of the estate of Sid Wood, brought this action to have a contract for the sale of timber cancelled and set aside; to quiet title to

certain land in Del Norte County and for damages for the withholding of the possession of the land.

Judgment was in favor of the plaintiff for the sum of $4,098.75 plus interest in the amount of $840.67, and also ordered that a final determination of the amount of the actual price of the timber, according to the formula provided in the contract, abide the cutting of timber. It also decreed that the contract was valid and enforceable.

In 1948 Sid Wood and his wife, Valborg K. Wood, entered into a written agreement for the sale of timber on lands which they owned in Del Norte County to Ralph E. Yoder and Joe M. Reinarz, copartners doing business under the name of Del Norte Milling Company.

On June 12, 1950, Del Norte Milling Company, for a valuable consideration, assigned the contract to the defendants.

The contract provided that the timber was to be sold on a stumpage basis at the price of $3.25 per thousand board feet for all merchantable timber on said lands with the provision that if the lumber market conditions materially changed, then at 60 day periods the price was to be adjusted on a percentage basis of increase or decrease over or under present market conditions. The contract called for payments of $2,500 at six month intervals, with minimum payments of $5,000 per year until the logging operations started, when payments were to be made monthly on a stumpage basis, but in no event were the annual payments to be less than $5,000. No logging was ever done on the property. The annual payments of $5,000 were made to September 10, 1951, at which time the Woods had received $20,000. Defendants then stopped making further payments, because they were afraid that the payments made exceeded the value of the merchantable timber on the land. Under date of September 11, 1953, by letter, appellant gave the 30 day notice of default required by the contract. He contended that the defendants were under an obligation to make annual payments until the timber was removed. Defendants answered this letter, denied that they were in default, and offered to pay $4,098.75 which would be the maximum price due on the contract based on a certified cruise which reflected there was 7,415,000 board feet of timber on the property. Appellant rejected the offer and in November of 1953 commenced this action. At the commencement of the trial defendants tendered to appellant a certified check payable to him in the sum of $4,098.75. The offer was again rejected.

Appellant contends that the contract required defendants to continue making the minimum $5,000 annual payments until the timber was removed and that all the payments that were made prior thereto were payments for rent on the premises, under the minimum requirement of the contract. The agreement is entitled "Agreement to Purchase and Sell Timber." The agreement provides as follows:

> "And whereas the Second Parties are desirous of purchasing all the Merchantable timber on said lands, and parties of the First Part are desirous of selling all the merchantable timber on the above described 429.74 Acres, therefore it is mutually agreed as follows:—
>
> "First Parties agree to sell, and Second Parties agree to buy said merchantable timber on said lands on the following terms and conditions, to-wit:
>
> "Said timber is being sold on a stumpage basis at price of $3.25 per M. B. M. Ft. for all merchantable timber thereon. * * *"

[1] All of the agreement relates to the sale and purchase of timber. There is nothing in the agreement that in the least justifies an inference that anything was to be paid as rental for the use of the lands. The contract was obviously one for the sale and purchase of timber and nothing more.

[2, 3] While the defendants admit that they did not make any payments after

September of 1951 because of the uncertainty of the amount remaining due, that did not excuse their default. The timber cruise disclosed that they still owed $4,098.75. However, the court properly granted the defendants relief from their default under the provisions of section 3275 of the Civil Code. The Woods had received $20,000, which is a substantial part of the entire amount that they were entitled to under the contract. It cannot be said as a matter of law that the breach was willful in view of the uncertainty as to what remained due the sellers, nor has any gross negligence on the part of defendants been shown. Following the service on them of the notice of default, defendants offered to pay what was still due and owing as the price of the timber. This indicated their willingness to continue with the contract. They were able to make the payments. The contract expressly stated that the contract may continue over a number of years, so time was not the essence or an important factor to either party. To have decreed a forfeiture of the contract would have resulted in an unjust enrichment of the appellant. Appellant was allowed interest on the payment in default and has sustained no loss as a result of the default. As stated in Barkis v. Scott, 34 Cal.2d 116, 122, 208 P.2d 367, 371, "when the default has not been serious and the vendee is willing and able to continue with his performance of the contract, the vendor suffers no damage by allowing the vendee to do so. In this situation, if there has been substantial part performance * * * permitting the vendor to terminate the vendee's rights under the contract and keep the installments that have been paid can result only in the harshest sort of forfeitures. Accordingly, relief will be granted whether or not time has been made of the essence."

[4] Appellant also contends that findings number 7 and number 8 are not supported by the evidence. Finding 7 reads: "That while the timber may not be taken off 'for a number of years,' the payments shall not continue after an amount sufficient to reasonably cover the value of the timber has been paid," and finding 8 reads: "That the agreement is for the sale of timber and is not a lease or rental agreement, the only payment to be made by purchaser being for the timber sold." What this court had said in construing the contract fully answers these contentions. Further, the findings are supported by the contract which is in evidence.

The judgment is affirmed.

VAN DYKE, P. J., and SCHOTTKY, J., concur.



147 Cal.App.2d 786

The PEOPLE of the State of California, Plaintiff and Respondent,

v.

Walter BURGESS, Defendant and Appellant.

District Court of Appeal, Third District, California.

Jan. 23, 1957.

Defendant was convicted of issuing a check without sufficient funds in drawee bank. The Superior Court, Nevada County, James Snell, J., rendered judgment on the jury's verdict, and defendant appealed. The District Court of Appeal, Peek, J., held that evidence was sufficient to sustain verdict.

Judgment affirmed.

False Pretenses ⚖49(3)

Evidence was sufficient to sustain conviction of issuing a check without sufficient funds in drawee bank. West's Ann.Pen. Code, § 476a.

Reynold J. Gualco, Sacramento, for appellant.

Edmund G. Brown, Atty. Gen., by Doris H. Maier, Deputy Atty. Gen., for respondent.

PEEK, Justice.

The defendant, Walter Burgess, in propria persona, appeals from a judgment of conviction entered pursuant to the jury's verdict finding him guilty of the crime of issuing a check without sufficient funds in violation of section 476a of the Penal Code, and from an order denying his motion for a new trial.

Upon defendant's request, Mr. Reynold J. Gualco was appointed by this court to represent him on appeal. Mr. Gualco has reported to the court that he has made a careful review of the record; that he has had a lengthy interview with defendant; and that he finds no grounds for reversal. In view of the situation presented, this court has made an independent study of the entire record, and we conclude, as did Mr. Gualco, that there is no merit in the appeal.

The record shows that defendant delivered a check in the sum of $105 dated October 14, 1954, to the payee and complaining witness Osborne in payment on the purchase price of a Mercury automobile. Defendant testified that when he issued the check he knew he had neither sufficient funds in, nor credit with the drawee bank for payment of said check, but that when he issued said check he believed he would be able to cover it. An employee of the bank testified that the check was received on October 18, 1954, by the drawee after it had been endorsed by the payee for collection, and that there were no funds in defendant's account to pay said check when it was made, nor were there any funds subsequent to that date. There was a substantial conflict in the evidence regarding the question of defendant's criminal knowledge and intent. Defendant's testimony that he told Osborne he did not think he had the check covered at the time but was expecting a check over the weekend which he intended to deposit Monday morning, and that the check would be covered at that time, was in conflict with Osborne's testimony that he had no such discussion with the defendant. The jury was not compelled to believe the defendant's testimony that he expected to receive $500 that weekend from an agreement he was negotiating for the rental of his tractor. Particularly is this true in view of defendant's further testimony that he expected to receive, at about that time, $900 from one Lloyd Monroe in payment for certain logging operations, which testimony was contradicted by Mrs. Virginia E. Monroe who testified that she was her husband's bookkeeper and that there was no money due to the defendant from them.

Our examination of the record has disclosed no error in the admission or exclusion of evidence. It further appears that the jury was fully and fairly instructed. Hence, under all of the circumstances, it necessarily follows that the verdict is amply sustained by the record and that the appeal is without merit.

The judgment and order are affirmed.

VAN DYKE, P. J., and SCHOTTKY, J., concur.

147 Cal.App.2d 638

Calvin BOWMAN, and Calvin Bowman and A. A. Bowman, doing business as San Diego County Molasses Service, Plaintiffs and Respondents,

v.

Robert DAVIS, Defendant and Appellant.

Civ. 5529.

District Court of Appeal, Fourth District, California.

Jan. 17, 1957.

Hearing Denied March 13, 1957.

Action by owners and driver of truck for damages resulting from collision with defendant's automobile. The Superior Court of Orange County, John Shea, J., entered judgment on a verdict in favor of plaintiffs, and defendant appealed. The District Court of Appeal, Barnard, P. J., held that improper statements by trial court to jury as to nature and actual existence of medical phenomenon known as retrograde amnesia were not sufficiently prejudicial to justify a reversal, in view of the evidence and other instructions.

Judgment affirmed.

1. Appeal and Error ⇐1046(5)
Trial ⇐29(2)

In action by owners and driver of truck for damages resulting from collision with defendant's automobile, statements by trial court to jury as to the nature and actual existence of medical phenomenon known as retrograde amnesia were improper but not sufficiently prejudicial to justify reversal of judgment for plaintiffs under circumstances.

2. Appeal and Error ⇐1064(1)

In action by owners and driver of truck for damages resulting from collision with defendant's automobile, instructing jury as to presumption of ordinary care to which each party was entitled at the outset of trial was not prejudicial to defendant, where truck driver testified that he remembered none of the material facts concerning collision and there was no evidence as to conduct of truck driver immediately prior to and at time of collision.

3. Trial ⇐241

In action by owners and driver of truck for damages resulting from collision with defendant's automobile, evidence that defendant, after making left turn at intersection and proceeding for some distance in center lane of four-lane through highway, attempted to cross curbside lane in front of truck to enter service station driveway justified giving instruction in language of statute that a vehicle may not be turned from a direct course or moved right or left unless and until such movement can be made with reasonable safety and then only after appropriate signal is given, and such instruction was not objectionable on ground that defendant did not make a full right-angle turn or that proper signal could not have been seen by truck driver. West's Ann.Vehicle Code, § 544(a, b).

4. Appeal and Error ⇐1064(1)

In action by owners and driver of truck for damages resulting from collision with defendant's automobile after it had made a left turn at intersection onto four-lane through highway in front of truck, giving instruction in language of statute with respect to right and left turns at an intersection was not prejudicial to defendant. West's Ann.Vehicle Code, § 540 (a, b).

5. Trial ⇐241

In action by owners and driver of truck for damages resulting from collision with defendant's automobile, evidence that defendant, after making a left turn at intersection and proceeding for some distance in center lane of four-lane highway, attempted to cross outside lane in front of truck to enter service station driveway justified giving instruction in language of statute requiring that vehicle be driven as near as practical within a single lane and not moved from such lane until such movement can be made with safety. West's Ann.Vehicle Code, § 526 (a).

C. F. Jorz and Gary W. Sawtelle, Los Angeles, for appellant.

Ben M. Shera, Los Angeles, for respondents.

BARNARD, Presiding Justice.

This is an action for damages resulting from a collision between the defendant's automobile and a truck owned by the plaintiffs and driven by the plaintiff Calvin Bowman. A jury returned a unanimous verdict awarding the plaintiffs $7,660, and the defendant has appealed from the judgment.

The accident occurred at 12:10 p. m. on November 5, 1952, a clear dry day, at the intersection of U. S. Highway 101 and Del Obispo Street, near Dana Point. U. S. Highway 101 in this area runs east and west, and is a 4-lane highway with a double white line in the center and a single line between the lanes on each side. As one approaches this intersection from the west, there is a considerable down-grade from the crest of a hill near Dana Point, but the road is level for 600 feet immediately west of the intersection. Del Obispo Street, a 2-lane street with a white line in the center, comes into the highway from the north, and there is a stop sign at the northwest corner of this intersection. What would normally be the extension of Del Obispo Street to the south of the highway appears to be a small road or a private driveway, with rounded curbs at the edge of the highway. On the southeast corner of this intersection there is a service station, and south of that a cafe. There is a driveway between the service station and the cafe.

On this occasion Calvin Bowman was driving east in this truck which, with its load, weighed 32,500 pounds. The defendant entered the highway from Del Obispo Street, crossed the center line, turned easterly, and then turned south to enter the driveway between the service station and the cafe. As he was entering this driveway the right front of the truck hit the right rear of his automobile and the truck rolled over and slid along its side. Bowman was rendered unconscious and remained unconscious until after he was taken from the scene nearly an hour later. An officer testified that the point of impact between the automobile and the truck was approximately 48 feet south of the southeast corner of this intersection; that the marks disclosed that the right rear wheel of the automobile was seven feet north of the south curb of the highway at the time of the impact; that the truck left 150 feet of skid marks in all; and that there were 30 to 35 feet of skid marks before the point of impact. There was evidence that there was no other traffic on this highway which could have had any effect in causing this accident.

The only eyewitness to the accident testified that he was traveling east in the outside lane of the highway directly behind this truck for about a mile before the accident happened; that he stayed about 50 yards behind it, and the truck was also in the outside lane; that they were both traveling at about 50 miles an hour; that he first saw the appellant's automobile when he was 600 to 900 feet from a crosswalk which is east of the point where the collision occurred; that when he first saw that car it was entering the outside lane of the west-bound lanes; that appellant's car crossed into the inside east-bound lane, turning in an easterly direction "and to all appearances he was trying to make a left turn and continued in the inside lane (going) east"; that the appellant's car then continued "right across in front of a truck, turned into the driveway next to the crosswalk"; that the truck had started to slow down when the appellant's automobile was crossing the center line of the highway; that the truck was then 50 feet from the automobile; that the truck was going less than 50 miles an hour at the moment of impact; that when the truck was about 50 feet from the automobile he saw the truck's brake lights go on, and knew that its brakes were being applied; that "When the car crossed in front of the truck, he put on his brakes and turned sharply to the left"; and that "The right front wheel of the truck hit the right rear of the Sedan, threw the truck into a

heavy skid then, and the right front buckled under and went down and the truck rolled over."

Another witness called by the plaintiffs testified that he was traveling west on this highway; that he first saw this truck when he was about 1,500 feet east of the scene of the accident; that the truck was then from 100 to 150 feet west of a crosswalk to the east of the intersection; that the front of appellant's automobile was "up on the riser, coming off of 101;" that half or two-thirds of defendant's car extended out into the outside lane; that defendant's car was either stopped or moving very slowly; and that he did not see the actual occurrence of the accident.

The plaintiff Calvin Bowman testified that he did not remember the occurrence of the accident; that the last thing he remembered was coming over the crest of the hill about a mile and a half west of this intersection; that he was then traveling in an easterly direction in the outside lane closest to the curb; that he did not recall any traffic ahead of him at that point; that he did not recall approaching the intersection or seeing the defendant's automobile at any time; and that his next recollection after reaching the crest of the hill at Dana Point was hearing his wife's voice at the hospital.

The defendant testified that he made a complete stop before entering Highway 101; that he looked to his left and right, saw a clear highway and proceeded across; that he started to pull into the filling station; that he did not see the truck until after he felt an impact at the back of his automobile; and that at the moment of the impact the front bumper of his car "was up over the curb line, up over the apron."

Appellant's first contention is that the court was guilty of misconduct and prejudicial error in commenting to the jury on "retrograde amnesia" when there was no evidence of such amnesia. It is argued that in so commenting the court assumed the role of an expert medical witness and thus denied the appellant the right to cross-examine; that there was strong evidence of negligence on the part of Calvin Bowman since he was traveling 50 miles an hour with a total weight of 32,500 pounds, in violation of Section 515(a) of the Vehicle Code, and since he did not apply his brakes until he was about 50 feet from the point of impact although the eyewitness who was traveling behind him saw appellant's car when he was more than 600 feet away; and that since the issues of negligence and contributory negligence were extremely close questions of fact any expression of his own view on the part of the trial judge could not help but tend to influence the jury.

In his opening statement counsel for the respondents had stated that Mr. Bowman was rendered unconscious in this accident, and that as a result of this unconsciousness "he suffered a medical phenomenon termed 'retrograde amnesia.'" Several witnesses testified that Bowman was unconscious for a considerable time after the accident. Bowman himself testified that he could remember nothing which immediately preceded the accident, as above stated. While he was testifying with respect to the damage to the truck the court took a recess. Immediately thereafter the court said:

"Ladies and gentlemen, I have already indicated to counsel an observation I intend to make, and I will give Mr. Sawtelle the opportunity to make his objection for the record, but I feel that I should do it in view of the state of the record.

"It has to do with the subject of retrograde amnesia. I have had the experience of lay people who do not believe that such a medical phenomenon does exist, but I can assure you if a doctor were asked the question, he would say that that is a medical phenomenon that does actually exist.

"Amnesia is a state of forgetfulness of events during a period. The word 'retrograde' means that it goes

back, precedes the event. It is not uncommon in cases of injury, particularly of concussion, that a person will be blacked out as to events that occurred prior to the time he incurred the injury. We have had cases where it has gone back as much as one or two days. Every event that transpired prior to that time is blacked out of that particular person's memory, so it is a medical fact it does exist.

"Now, in making this statement, I do not presume to say to you that this witness had that. That is a matter for your determination. I am not trying to express my idea to you as to my thinking as to his credibility. All I intend to do is point out the fact that there is such a fact and such a phenomenon as retrograde amnesia.

"Now, whether this witness had retrograde amnesia is entirely within your determination."

In his general instructions the court instructed the jury to disregard any statement or expression on his part which had seemed to indicate an opinion relating to the credibility of witnesses or what inferences should be drawn from the evidence, and not to be influenced by anything he had said or done that might suggest to it that he was inclined to favor the position of either party. The court also gave this instruction on the presumption of ordinary care:

"At the outset of this trial, each party was entitled to the presumptions of law that every person takes ordinary care of his own concerns and that he obeys the law. These presumptions are a form of *prima facie* evidence and will support findings in accordance therewith, in the absence of evidence to the contrary. (When there is other evidence that conflicts with such a presumption, it is the jury's duty to weigh that evidence against the presumption (and any evidence that may support the presumption), to determine which, if either preponderates.)"

[1] While we agree that the court's statement with respect to retrograde amnesia should not have been made, it cannot be held sufficiently prejudicial to justify a reversal. While there had been no evidence on "retrograde amnesia" there was undisputed evidence that the respondent Calvin Bowman was rendered unconscious and remained so for a considerable period. The evidence amply justified the jury in believing that Bowman was telling the truth when he testified that he remembered none of the material facts concerning the actual happening of the accident. The court's statement was largely a matter of quite common knowledge, and the court pointed out to the jury very clearly that he was not passing on the credibility of that witness, and repeatedly told the jury that whether or not this witness had suffered such amnesia was a matter for its determination. The evidence does not indicate that the issues of negligence and contributory negligence presented very close questions. When the element of proximate cause is taken into consideration the evidence of negligence on the part of Calvin Bowman was not strong. On the other hand, the evidence clearly indicates that the appellant crossed into the east-bound lanes of this main highway without proper regard to the approaching heavy truck, that he moved some distance in the inside of the east-bound lanes and that he then turned across the outside lane when he was only a short distance in front of the truck and at a point nearly 50 feet east of the intersection. Under the circumstances here appearing, it would be unreasonable to hold that this statement of the trial court could have had any effect on the jury's verdict.

[2] It is next contended that the court erred in giving the above instruction on the presumption of ordinary care. Reliance is placed on the case of Stout v. Southern Pacific R. Co., 127 Cal.App.2d 491, 274 P.2d 194, 197, where it is stated that it was erroneous to give an instruction in the language there used "when thereby the benefit of the presumption of due care is accorded to a party who, by his testimony or

by evidence introduced in his behalf, has disclosed his acts and conduct immediately prior to and at the time of an accident." In that case the court also pointed out: "Whether the error in the giving of the instruction is or is not prejudicial turns upon the circumstances of the case, including the facts and the remainder of the instructions." While there was a little evidence here as to what the respondents' truck did immediately before the impact there was no testimony which fully disclosed the acts and conduct of the driver of the truck immediately prior to and at the time of the accident, and there was no evidence as to what the driver saw or could have seen at the critical time in question. There was no evidence as to whether he saw the appellant's automobile turn into his path as soon as he could or should have seen it, or whether he acted with reasonable promptness after observing what the other driver intended to do. There was no inconsistency between this instruction and any of the evidence received, and under the authorities it was not prejudicial error to give this instruction. Roselle v. Beach, 51 Cal.App. 2d 579, 125 P.2d 77; Russell v. Andersen, 101 Cal.App.2d 684, 226 P.2d 350; Stout v. Southern Pacific R. Co., 127 Cal.App.2d 491, 274 P.2d 194; Mar Shee v. Maryland Assurance Corp., 190 Cal. 1, 210 P. 269; Duehren v. Stewart, 39 Cal.App.2d 201, 102 P.2d 784. A further consideration is that the instruction as given applied only to the situation as it existed at the outset of the trial, and applied equally to each of the parties.

[3] Complaint is made of the giving of three other instructions. While it is conceded that these instructions correctly stated the law, it is argued that the giving of the same was not justified by the evidence. It is argued that it was error to instruct the jury in the language of Section 544(a) and (b) of the Vehicle Code, to the effect that a vehicle may not be turned from a direct course or moved right or left unless and until such movement can be made with reasonable safety, and then only after an appropriate signal is given. It is argued that the evidence shows that the appellant had no intention of turning to the left but intended only to proceed across the highway at an angle to his left for the purpose of turning into the service station, and that it would have been useless to have given such a signal as it could not have been seen by the driver of the truck. The evidence is uncontradicted that after entering the intersection he proceeded to his left for some distance over the inside easterly-bound lane, and then to his right across the outside lane directly in the path of the approaching truck. The fact that these were not full right-angle turns is not controlling, and no reason appears why a proper signal could not have been seen by the driver of the truck. The giving of this instruction was fully justified by the evidence.

[4] Error is assigned in the giving of an instruction in the language of Section 540(a) and (b) of the Vehicle Code as it existed in 1952, with respect to right and left turns at an intersection. The appellant testified to facts which would disclose a compliance with this section, and while the instruction would not appear to have been necessary no possible prejudice appears from the fact that it was given.

[5] Error is assigned in the giving of an instruction in the language of Section 526(a) of the Vehicle Code providing that a vehicle shall be driven as near as practical within a single lane and shall not be moved from such lane until such movement can be made with safety. It is argued that there was no evidence introduced bearing upon a change of lanes, and that this section of the code was not intended to regulate the movement of vehicles across an arterial highway or the making of turns. There was ample evidence that the appellant, after making his first turn into the highway, proceeded for some distance along the inner lane and then moved over and across the outer lane in order to enter the driveway leading to the service station.

After these instructions were given the court instructed the jury that a violation

of these sections of the Vehicle Code constituted negligence per se; that the presumption of negligence arising from such a violation was not conclusive, and might be overcome by other evidence showing that such conduct was excusable or reasonable under the circumstances; and that such a violation of law is of no consequence unless it was a proximate cause of, or contributed in some degree as a proximate cause to, an injury found to have been suffered by the plaintiff.

The judgment is affirmed.

GRIFFIN and MUSSELL, JJ., concur.



147 Cal.App.2d 554

O. J. WITT, Plaintiff and Appellant,

v.

Douglas C. MILTON, M. P. Nation and C. J. Green, Defendants and Respondents.

No. 17105.

District Court of Appeal, First District, Division 1, California.

Jan. 14, 1957.

Hearing Denied March 13, 1957.

Chattel mortgagee brought action for possession of mortgaged personal property held by third party. From order of Superior Court, County of Monterey, Stanley Lawson, J., sustaining defendants' demurrer without leave to amend, the mortgagee appealed. The Supreme Court, Bray, J., held that chattel mortgage which does not include property's location or describe property in such a manner that it can be identified is void as to third parties.

Judgment affirmed.

1. Chattel Mortgages ⇐173(3)

In mortgagee's action to recover possession of mortgaged personal property where neither complaint nor copy of mortgage attached to complaint described location of mortgaged property or gave any basis for inquiry as to location, complaint did not state a cause of action.

2. Chattel Mortgages ⇐47

A chattel mortgage which does not include the property's location or describe the property in such manner that it can be identified is void as to third party.

3. Evidence ⇐460(12)

Extrinsic evidence is not admissible to identify the chattels mortgaged unless the mortgage or description of the property suggests inquiries or means of identification which would enable third persons to identify the property.

Husted, Pinney & Smith, W. M. Pinney, Jr., San Francisco, for appellant.

Mandl & Atteridge, Salinas, for respondent C. J. Green.

Theo H. Cominos, Salinas, for respondents Milton and Nation.

BRAY, Justice.

The principal question presented by this appeal by plaintiff from a judgment in favor of defendants entered upon an order sustaining demurrer without leave to amend is—Is a chattel mortgage void as to third parties where it fails to describe the location of the personal property thereby sought to be mortgaged?

Second Amended Complaint.

It alleged that plaintiff is the owner of and mortgagee in a chattel mortgage executed by Daley and wife to secure the payment of a certain promissory note. The property mortgaged consists of certain personal property therein listed, such as 9 single beds, 13 double beds, etc. (Nowhere is the location of such property mentioned.) While plaintiff was entitled to immediate possession of the mortgaged property, defendants (who are not parties to the mortgage) seized the property, took it into their own possession and now withhold it from plaintiff. In the order sus-

taining the demurrer without leave to amend the court stated that it was granted "Inasmuch as the location of the personal property cannot be determined from the chattel mortgage, nor by reasonable inquiry based thereon * * *"

Is the Mortgage Void?

[1] Preliminarily it can hardly be contended, in view of the fact that neither the mortgage itself (copy of which is attached to the complaint) nor the complaint either describe the location of the articles or give any basis for inquiry as to their location, that the complaint states a cause of action or that the court was not justified in sustaining the demurrer.

In Pace v. Threewit, 1939, at page 513, 88 P.2d 247, at page 249, 31 Cal.App.2d 509 in discussing the rules for determining the sufficiency of the description in a mortgage of this type, the court said: "It is pointed out in the rules above set forth that the description should be such that the property may be identified by it alone or that the description in itself should suggest inquiries or means of identification which, if pursued, will identify the property."

[2] The more serious question is whether the mortgage is void because of the omission of the property's location, or whether the property could be identified by extrinsic evidence under proper allegations in an amended complaint. If the latter, the court should have permitted the complaint to be amended to identify the property.* An examination of the mortgage supplies no hint as to the location of the property. In the Pace case it was held "There should be something more than merely the name of the mortgagor" 31 Cal. App.2d at page 514, 88 P.2d at page 249, for this purpose. Quoting from 10 Am. Jur. 752, section 55, the court said, 31 Cal. App.2d at page 510, 88 P.2d at page 248: "'To be sufficient against a third person, the description of the mortgaged property must be definite enough to enable him, *aided by inquiries which the instrument itself suggests,* to identify the property. * * *'" (Emphasis added.) In Pacific Nat. Agr. Credit Corp. v. Wilbur, 2 Cal.2d 576, 589, 42 P.2d 314, 320, the court quoted from 11 C.J. 457: "'As against third persons the description in the mortgage must point out the subject-matter so that such persons may identify the chattels covered, but it is not essential that the description be so specific that the property may be identified by it alone, *if such description suggests inquiries or means of identification which, if pursued, will disclose the property covered.* * * *'" (Emphasis added.) See also 14 C.J.S., Chattel Mortgages, § 57.

Applying the test as set forth in the emphasized language of the above cases to the situation in our case, we find the mortgage contains no suggestion of inquiries or means of identifying the property. The mortgage merely lists certain quantities of beds, bedding, furnishings and furniture. Location, of course, is not important in itself but merely as a means of identification. But, as said in 14 C.J.S., Chattel Mortgages, § 64, p. 671, "When neither the location, the ownership, nor the possession of the property is stated in the [chattel] mortgage, it is ordinarily fatal to the description; and in all cases the location of the property mortgaged must be stated, where the property cannot otherwise be sufficiently identified, or it is not otherwise sufficiently described * * *."

In In re Kessler, D.C.1950, 90 F.Supp. 1012, the mortgage described a cash register, soda fountain and other equipment, gave the mortgagor's occupation as "Kessler's Pharmacy," and the location of the mortgaged property as "Burbank, California." This was held as against creditors of the mortgagor to be insufficient description for identification. In our case, fol-

* Plaintiff made no showing in the trial court, nor has he in his briefs here, of any circumstances which might be alleged (if the mortgage were not void on its face) to establish identity. Nor has he claimed that defendants actually knew what property was intended to be mortgaged.

lowing the names of the mortgagors in the mortgage, appeared "by occupation motel operator." In In re Driscoll, D.C., 127 F.Supp. 81, 82, the mortgaged property was restaurant equipment with some of which was listed the serial number, model number, manufacturer's name, dimensions, color and material of which constructed; no location other than "'County of Los Angeles'" was stated. There the court after pointing out that the statutory form of the mortgage provided in section 2956, Civil Code, does not expressly require the location of the mortgaged chattels to be set forth, held that "since the property in question appears to be described in the chattel mortgage in sufficient detail so that on inquiry it could be found and identified, a statement of the address where located, however desirable from the standpoint of convenience, is not essential to validity of the mortgage." At pages 84–85. Differing from the facts in our case, the mortgage did describe the county in which the property was located, but more important, described the equipment in such manner that it could be identified, while in our case none of the chattels were described so that they could be identified. The phrase "9 snigle beds" does not describe them so that they could be distinguished from any 9 single beds anywhere.

[3] Plaintiff has cited and we have found no case where extrinsic evidence has been admitted to identify the chattels mortgaged unless there is something in the description or in the mortgage itself which suggests inquiries or means of identification. Apparently it is plaintiff's theory that without any specific clue to identification in the mortgage, he would be permitted to prove where, as a matter of fact, the property was located, the mortgagor lived, and the manner in which and from where defendants acquired the property. This theory violates the rules set forth in the above mentioned cases. As said in Pace v. Threewit, supra, 31 Cal.App.2d 509, 512, 88 P.2d 247, 248, quoting from Cobbey on Chattel Mortgages, section 170, it must be "'A description which will enable third persons to identify the property, aided by inquiries which *the mortgage itself indicates and directs* * * *.'" (Emphasis added.) Again the court quoted from Ehrke v. Tucker, 99 Kan. 52, 160 P. 985, "'* * * the suggestions which indicate the line of inquiry must be taken from the mortgage itself and not rest alone in the mind of the mortgagor or mortgagee.'"

Thus, it appears that it is impossible from the mere listing of the articles in the mortgage to determine their identity, and hence under the authorities, the mortgage is void as to third parties, and hence as to defendants. The court therefore properly sustained the demurrer without leave to amend.

Judgment affirmed.

PETERS, P. J., and FRED B. WOOD, J., concur.



147 Cal.App.2d 671

Harold J. OSTLY, as ex officio Clerk of the Superior Court of the State of California in and for the County of Los Angeles, Plaintiff,

v.

Lewis H. SAPER, etc., et al., Defendants, Cross-defendants, Cross-complainants, Applicants and Respondents,

and

Harold J. Ostly, etc., et al., Respondents on Order to Show Cause and Appellants.

Civ. 21796.

District Court of Appeal, Second District, Division 2, California.

Jan. 18, 1957.

Hearing Denied March 13, 1957.

A county's claim for the interest which accrued on deposit which had been made in interpleader proceeding was rejected by the Superior Court of Los Angeles County,

Harold W. Schweitzer, J., and the clerk, treasurer and auditor appealed. The District Court of Appeal, Ashburn, J., held that where money which had been paid into Superior Court in interpleader proceeding was deposited by clerk in county treasury and county treasurer commingled such funds with others deposited with him where such money earned substantial interest, such interest belonged to persons ultimately held to be owners of the principal amount and not to the county, as against contention that no one other than one of the public agencies specifically named in statute referring to county, city, municipality or other public or municipal corporation may recover the accretions to moneys deposited through the court with county treasurer.

Portion of judgment appealed from affirmed.

1. Depositaries ⇐9

The Superior Court is on a parity with other depositing "local agencies" within Depositary Act and hence Superior Court is in control of deposited funds and owner of any interest earned thereon which ownership is that of a trustee for person ultimately determined by the court to be entitled to receive the money from it, and such determination relates back to time of initial deposit of fund in court. West's Ann.Gov.Code, §§ 53630, 53636, 53647.

See publication Words and Phrases, for other judicial constructions and definitions of "Local Agencies".

2. Depositaries ⇐9

Where money which had been paid into Superior Court in interpleader proceeding was deposited by clerk in county treasury and county treasurer commingled such funds with others deposited with him where such money earned substantial interest, such interest belonged to persons ultimately held to be owners of the principal amount and not to the county, as against contention that no one other than one of the public agencies specifically named in statute referring to county, city, municipality or other public or municipal corporation may recover the accretions to moneys deposited through the court with county treasurer. West's Ann.Code Civ. Proc., § 573; West's Ann.Gov.Code, §§ 53630, 53636, 53647.

Harold W. Kennedy, County Counsel and A. Thomas Grazer, Deputy County Counsel, Los Angeles, for appellants.

George R. Schmidt, Los Angeles, for respondents.

ASHBURN, Justice.

Certain money which was paid into superior court in an interpleader proceeding was deposited by the clerk in the county treasury. While there it earned substantial interest. The question is whether that interest belongs to the persons ultimately held to be owners of the principal amount or to the county of Los Angeles. The county's claim having been rejected, its clerk, treasurer and auditor appeal. The deposit was made pursuant to § 573, Code of Civil Procedure, which says: "Whenever money is paid into or deposited in the court, the same must be delivered to the clerk * * * [who] must, unless otherwise directed by law, deposit such money with the county treasurer, to be held by him subject to the order of the court."

Appellants' claim is that the treasurer rightly commingled these funds with others deposited with him, they became county moneys, and no interest earned thereon may be recovered by any one except under statutory authority; that existing statutes are not broad enough to cover deposits made by individuals, being limited to "local agencies" as defined in § 53630 Government Code, i. e., county, city, municipality or other public or municipal corporation. As stated in Metropolitan Water Dist. of Southern California v. Adams, 32 Cal.2d 620, at page 631, 197 P.2d 543, at page 549, appellants' "interpretation of the statute in issue results in a windfall to the county, substantially undeserved and unearned."

The ruling herein is governed by that case. Metropolitan Water District had

made deposits in condemnation actions as security upon orders for immediate possession. The funds were turned over to the county treasurer, commingled, then deposited in various banks where they earned interest. In due course the moneys were drawn down and paid to the landowners. But the county refused to pay to the Water District the earnings which had accrued upon the funds while on deposit. A motion to compel such payment was made and granted. In rejecting the contention that a separate suit was necessary the court said, 32 Cal.2d at page 622, 197 P.2d at page 544: "We have concluded that moneys deposited with the court as in the nature of security or a *cash bond* in order to gain possession of the subject property in eminent domain proceedings are legally in the custody and within the control of such court and that any interest paid on such moneys by a bank in which they are deposited attaches in ownership to the owner of the moneys and, being in the custody of the court, is, like the principal sum, subject to the court's control. * * * We further conclude that in making the bank deposits, the county treasurer was representing the court and, acting as the court's ex-officio treasurer, was depositing moneys belonging to the water district."

It was further said, 32 Cal.2d at page 626, 197 P.2d at page 547: "All that the court can claim in the funds is the naked security title which it holds for the property owners. The court obtained possession, but it had no right to make use of the funds other than for the limited purpose for which they were deposited; all that it could do, in the absence of default by plaintiff, was hold the funds in safekeeping to be returned to the plaintiff water district when and if it (the district) met all its obligations regarding the land of defendant property owners." 32 Cal.2d at page 627, 197 P.2d at page 547: "To that moment [i. e., making of court order], at least, the moneys *belong* to plaintiff water district and the court acts solely as a trustee or bailee, holding the moneys as the property of the plaintiff water district, without any divestiture of the district's title, with power to 'make some order transmuting the money deposited from security into payment' if the plaintiff should default but bound to return the plaintiff's property if no default occurs. * * * For safekeeping the court is directed to place the money with the county treasurer 'to be held by him subject to the order of the court.' To the county treasurer the court gave only actual custody, bare possession; it had no power to give the treasurer or the county the beneficial title to the money and such money still belongs to the water district (and, in this case, as previously noted, the balance of principal has been repaid." 32 Cal.2d at page 628, 197 P.2d at page 548: "Respondents contend that in making the deposits in the banks the county treasurer was depositing money which was in the custody of the county, was acting directly as county treasurer, representing the county and its treasury, and, therefore, the interest on funds deposited belonged to the county. It is clear that the funds were not in the custody of the county as such, for the sums remain subject to the order of the court, and the county treasurer in handling the funds must look to the court for direction; the county treasurer is in effect the treasurer of the court, an ex-officio officer, and holds the money for the court, not for the county. The court, not the county board of supervisors, has control of the money."

The court then turned its attention to the question of statutory authority for payment of interest, particularly the Depositary Act (of 1933), which is now Government Code, §§ 53630–53681. It said, 32 Cal.2d at page 628, 197 P.2d at page 548: "In the absence of a statute which, in effect, accretes sums to amounts deposited, it is conceded by plaintiff water district that no claim would arise for return of other than the original deposit." Section 2 of the Depositary Act (now § 53647 Government Code) was quoted to the effect that interest earned on deposited funds shall be paid quarterly into the general fund "of the county, city and county, city, town,

municipality or other public or municipal corporation represented by the officer making such deposit," and it was further said, 32 Cal.2d at page 629, 197 P.2d at page 549: "The solution of the above question, therefore, resolves itself into a determination of which 'public body' the county treasurer was representing in making the bank deposits under section 1 of the Depositary Act. The two possible contenders are the county and the court (in its representative capacity), who, unfortunately (in the sense that it gives rise to this dispute), have the same official authorized to act as the custodian of funds." A school district and a board of law library trustees having been held to fall within the statutory provisions, Pomona City School District v. Payne, 9 Cal.App.2d 510, 50 P.2d 822; Board of Law Library Trustees of Los Angeles County v. Lowery, 67 Cal.App.2d 480, 154 P.2d 719, the court further said, 32 Cal.2d at page 630, 197 P.2d at page 549: "The appellant water district contends that no sound distinction can be made between funds entrusted to the county treasurer by a school district or the trustees of a law library and funds entrusted to him by a court. This contention appears sound. Aside and separate from his duties as official treasurer for the county, the county treasurer, by legislative direction, is in effect ex-officio treasurer for public bodies without treasurers of their own, including the superior court. In other words, though these public bodies are in their purposes and functions dissimilar, yet their reasons for depositing their funds, or moneys coming into their custody, in the county treasurer's hands, are the same, namely, that none has a treasurer of its own, and for convenience and safekeeping the county treasurer has been designated the proper official to care for them. All are directed by statute to so deposit their funds: the court by Code of Civil Procedure, section 573, the school districts by Education Code, §§ 5002 and 7517, and the trustees of the library fund by Business and Professions Code, section 6320. It is to be noted that the applicable statute here (Code Civ.Proc., § 573) expressly directs that 'The treasurer must keep each fund distinct, and open an account for each.' We conclude that it is the superior court which in the view of the law holds the entire sum, the principal together with its accretions of interest, as custodian for the water district, and, inasmuch as the object of such retention has ended, the court must return to the water district the entire sum, or any balance thereof, which it may determine remains on hand."

[1] This opinion places the superior court on a parity with other depositing "local agencies" just as if it were included in the definition of that term in § 53630. The depositary act and the code, § 53647 both say that the moneys while in the custody of the county treasurer "shall be deemed to be in the treasury" § 53636, of the depositing agency, and that interest earned thereon "shall belong to and shall be paid quarterly into the general fund" of the depositing agency. The Metropolitan decision, supra, 32 Cal.2d 620, 197 P.2d 543, 545, establishes that, as a matter of general law and one of statutory construction, the superior court is in control of the deposited funds and the owner of any interest earned thereon. Of course its ownership is that of a trustee for the person ultimately determined by the court to be entitled to receive the money from it; such determination relates back to the time of the initial deposit of the fund in court.

[2] The Metropolitan ruling appears to be conclusive at bar and effectually disposes of the contention that no one other than one of the public agencies specifically named in § 53630, Government Code, may recover the accretions to moneys deposited through the court with the county treasurer.

The portion of the judgment under appeal is affirmed.

MOORE, P. J., and FOX, J., concur.

147 Cal.App.2d 676

Ione CLARK and Reed W. Clark, Plaintiffs and Appellants,

v.

Robert PAMPLIN, G and G Construction Company, a Corporation, et al., Defendants and Respondents.

Civ. 22061.

District Court of Appeal, Second District, Division 2, California.

Jan. 18, 1957.

Action for damages arising out of automobile collision. From judgment for defendants entered in Superior Court of Los Angeles County, Robert H. Scott, J., plaintiffs appealed. The District Court of Appeal, Ashburn, J., held that instruction relative to speed limits in a district was erroneous without proof that the district had been sign posted as required by statute, and that giving of instructions which created a conflict as to burden of proving or disproving negligence as to speed was reversible error.

Judgment reversed.

1. Automobiles ⇐246(58)

In action for damages sustained in automobile collision, instruction that automobile speed in excess of 15 miles per hour was unlawful at obstructed intersection was not erroneous where question as to whether intersection was obstructed was for jury and evidence warranted jury finding that plaintiff was exceeding 15 miles per hour. West's Ann.Vehicle Code, § 511.

2. Appeal and Error ⇐1066
Trial ⇐252(7)

In action for damages sustained in automobile collision at intersection wherein there was evidence that plaintiff was traveling more than 25 miles per hour, instruction that speed in excess of 25 miles per hour was unlawful in business or residential district was erroneous and prejudicial where there was no proof of the nature of the district and no showing that district had been sign posted as required by statute for speed limit to apply. West's Ann. Vehicle Code, §§ 468, 511.

3. Automobiles ⇐168(2)

Where district has not been sign posted as required by statute for speed limit of residence or business district to be in effect, the speed limit for highways becomes applicable. West's Ann.Vehicle Code, §§ 468, 511, and (c).

4. Appeal and Error ⇐216(1)

On appeal, no complaint can be made of trial court's failure to give an instruction where no request for the instruction was made.

5. Appeal and Error ⇐216(3)

In automobile collision case, where there was no proof that accident occurred in residence or business district although plaintiff did not request instruction that speed applicable to highway was in effect, plaintiff was not precluded from complaining of instruction that speed limit of residence or business district was in effect. West's Ann.Vehicle Code, §§ 468, 511, and (c).

6. Trial ⇐243, 296(3)

In automobile collision case, instruction that excess speed "is prima facie unlawful unless the defendant establishes by competent evidence that any said speed in excess of said limits did not constitute a violation of the basic rule" when given with instruction that excess speed "at a particular time and place shall not establish negligence as a matter of law" created a conflict which was not eliminated by added instruction that excess speed "is unlawful unless proved to be not in violation of the basic speed law." West's Ann. Vehicle Code, §§ 511, 513.

7. Automobiles ⇐246(20)

Instruction that excess speed "is prima facie unlawful unless the defendant establishes by competent evidence that any said speed in excess of said limits did not constitute a violation of the basic rule" should not be given in a civil case. West's Ann.Vehicle Code, § 511.

8. Trial ⇐296(3)

In automobile collision case, error in instruction as to burden of proving that excess speed was not negligence under statute was not cured by use of word "defendant" in instruction where jury would probably apply the instruction to issue of plaintiff's contributory negligence. West's Ann. Vehicle Code, § 511.

Wyman & Finell by Frank Rothman, Beverly Hills, for appellants.

Parker, Stanbury, Reese & McGee, Los Angeles, for respondents.

ASHBURN, Justice.

Plaintiffs Ione Clark and Reed W. Clark appeal from the judgment entered upon a verdict in favor of defendants in an action for damages for personal injuries to the wife and property damage to the husband. Immediately preceding the accident they were traveling north on Guadalupe Avenue in the city of Redondo Beach, and were nearing its intersection with Pearl Street, upon which defendant Pamplin was driving his employer's one and one-half ton Ford truck in a westerly direction. The vehicles collided within the intersection.

Appellants complain of error in the court's instructions to the jury. The controversy revolves around an instruction upon § 511, Vehicle Code, reading as follows: "You are instructed that Section 511 of the Vehicle Code of the State of California in effect at the time of the accident herein involved provided in part as follows:

" 'The speed of any vehicle upon a highway not in excess of the limits specified in this section or established as authorized in this code is lawful unless clearly proved to be in violation of the basic rule declared in Section 510 hereof.

" 'The speed of any vehicle upon a highway in excess of any of the limits specified in this section or established as authorized in this code is prima facie unlawful unless the defendant establishes by competent evidence that any said speed in excess of said limits did not constitute a violation of the basic rule declared in Section 510 hereof at the time, place and under the conditions then existing.

" 'The prima facie limits referred to above are as follows and the same shall be applicable unless changed as authorized in this code and, if so changed, then only when signs have been erected giving notice thereof, in which event the speed designated on the sign shall be the prima facie limit:

" '(a) Fifteen miles per hour:

" '(4) When traversing any intersection of highways if during the last 100 feet of his approach to such intersection the driver does not have a clear and unobstructed view of such intersection and of any traffic upon all of the highways, entering such intersection for a distance of 100 feet along such highways, except on a through highway or at a traffic-controlled intersection.

" '(b) Twenty-five miles per hour:

" '(1) In any business or residence district.' " The instruction was requested by defendants and was immediately followed by another defense request concerning § 513, Vehicle Code, viz.: "You are instructed that Section 513 of the Vehicle Code of the State of California in effect at the time of the accident herein involved provided as follows:

" 'In any civil action proof of speed in excess of any prima facie limit declared in Section 511 hereof at a particular time and place shall not establish negligence as a matter of law but in all such actions it shall be necessary to establish as a fact that the operation of a vehicle at such excess speed constituted negligence.' "

[1] One of the appellants' criticisms of the instruction on § 511 is that there was no evidence that the intersection was obstructed to the extent specified in (a) (4) of said section. An examination of the testimony and exhibits discloses that there was evidence tending to establish that at a distance of 100 feet south of the intersection a traveler could not see the highway for 100 feet to the east. The evidence on

this subject is of an unsatisfactory nature, but it presented a question of fact for the jury. There was also evidence, mostly indirect but somewhat persuasive, that plaintiff Reed W. Clark was driving at a speed in excess of 15 miles when entering and traversing the intersection. He placed his speed at 15–20 miles when he was some 13–14 feet south of the south curb line. The car laid down 18 feet of skid marks which started when plaintiff was in the north half of Pearl Street; it collided with the truck when the latter was 18 feet from the east curb line and only 6 feet from the north curb; there was evidence that plaintiffs' Hudson automobile pushed the truck sideways for 3 feet. Moreover, defendant Pamplin's description of plaintiff's approach to the crossing would warrant the inference that he entered at a speed of more than 15 miles, although defendant did not undertake to state plaintiff's rate of speed. That phase of the instruction, considered alone, was not erroneous.

[2–5] The statement therein that the prima facie speed limit in a business or residence district is 25 miles per hour was erroneous, for there was no proof of the nature of the district (as defined in Vehicle Code §§ 89 and 90), and, more importantly, there was no showing of any sign posting pursuant to § 468, Vehicle Code. Such posting is indispensable to an instruction concerning the prima facie speed limit applicable to a business or residence district. In the absence of an affirmative showing of posting, an instruction based upon the existence of such a district is erroneous. Reynolds v. Filomeo, 38 Cal.2d 5, 10–13, 236 P.2d 801; Guerra v. Brooks, 38 Cal.2d 16, 19, 236 P.2d 807; Daniels v. City and County of San Francisco, 40 Cal.2d 614, 624, 255 P.2d 785. Where there has been no such posting the 55 mile prima facie limit of subdivision (c) of § 511 becomes applicable. There was indirect evidence that plaintiff was traveling more than 25 miles per hour shortly before reaching the intersection, and it was prejudicial to tell the jury to test his conduct by a 25 mile speed limit. True, he did not request the giving of subdivision (c) to the jury and therefore cannot complain of failure to include it in the instruction which was given. But he is not thereby precluded from complaining of his being limited to an inapplicable 25 mile maximum. Tabata v. Murane, 24 Cal.2d 221, 227–228, 148 P.2d 605. This was error of such substantiality as to require a reversal. See Guerra v. Brooks, supra, 38 Cal.2d 16, 20, 236 P.2d 807.

[6, 7] Another major contention of appellants is that the second paragraph of § 511, which places on the defendant the burden of proving that speed in excess of the prima facie limit was not negligent under § 510, is applicable only to a criminal case and when, as here, it is given in conjunction with § 513 an irreconcilable conflict is created which necessitates a reversal. It has been held repeatedly that the second paragraph of § 511 should not be included in an instruction given in a civil case, and that it is in irreconcilable conflict with the rule of § 513. Westberg v. Willde, 14 Cal.2d 360, 369, 94 P.2d 590; Burch v. Valley Motor Lines, Inc., 78 Cal. App.2d 834, 848, 179 P.2d 47; Akers v. Cowan, 26 Cal.App.2d 694, 696, 80 P.2d 143; Eslick v. Leach, 135 Cal.App.2d 455, 457, 288 P.2d 38; Deshotel v. Atchison, T. & S. F. Ry. Co., 126 Cal.App.2d 303, 309, 272 P.2d 71. The error in the instruction was not cured by the giving of the instruction known as BAJI 144 A, for the reason, among others, that it contains this misleading language: "[A]nd if the speed of a vehicle upon a highway is in excess of the applicable prima facie limit, such speed is unlawful unless proved to be not in violation of the basic speed law."

[8] The question arises whether use of the word "defendant" in the second paragraph of § 511 cures the vice of the instruction when it is directed at the question of plaintiff's contributory negligence, as in this case. We think that the word "defendant" probably would be applied by any hearer to the plaintiff in that exact context and application; that even a layman, the juror, would do so. If this be true,

the irreconcilable conflict with the rule of § 513 persists. To say the least, the instruction was confusing and prejudicial.

The judgment is reversed.

MOORE, P. J., and FOX, J., concur.



147 Cal.App.2d 661

Anthony J. IGNAGNI, Plaintiff and Respondent,

v.

A. J. PETERS & SON, a Corporation, Defendant and Appellant,

Argonaut Insurance Exchange, Plaintiff in Intervention and Respondent.

Civ. 17020.

District Court of Appeal, First District, Division 1, California.

Jan. 18, 1957.

Rehearing Denied Feb. 15, 1957.

Hearing Denied March 13, 1957.

Action by general contractor's employee against plumbing and heating subcontractor for injuries sustained when employee fell after stepping on a short piece of pipe lying on floor of building under construction. The Superior Court, County of Santa Clara, Leonard R. Avilla, J., entered judgment for employer and subcontractor appealed. The District Court of Appeal, Agee, J. pro tem., held that evidence presented a jury issue as to whether piece of pipe was left on floor by one of subcontractor's employees and evidence failed to disclose contributory negligence on part of injured employee in failing to see pipe.

Affirmed.

1. Appeal and Error ⇐930(1)

In review of personal injury action wherein a verdict is returned for plaintiff, court must resolve conflicting evidence in a light most favorable to the plaintiff.

2. Evidence ⇐100, 595

Proof may be made by means of indirect evidence if direct and positive evidence of a fact is not available and the decision of the court may rest on reasonable inferences as well as on direct evidence.

3. Evidence ⇐587

In order to support an inference based on circumstantial evidence it is not incumbent upon plaintiff to exclude possibility of every other reasonable inference from the proven facts.

4. Negligence ⇐136(22)

In action by general contractor's employee against plumbing and heating subcontractor for injuries received when employee stepped on a short piece of pipe lying on floor of building being constructed, evidence presented jury issue as to whether such pipe had in fact been negligently left on floor by one of subcontractor's employees.

5. Negligence ⇐135(4)

In action by employee of general contractor against plumbing and heating subcontractor for injuries received when employee stepped on short piece of pipe lying on basement floor of building being constructed, evidence failed to disclose any contributory negligence by employee in failing to see such pipe.

Campbell, Custer, Warburton & Britton, Frank L. Custer, San Jose, W. R. Dunn, Burlingame, of counsel, for appellant.

Harrett W. Mannina, San Jose, for respondent.

AGEE, Justice pro tem.

Defendant appeals from a judgment following a jury verdict in favor of plaintiff and plaintiff in intervention in a personal injury action. Plaintiff in intervention is the compensation insurance carrier for plaintiff's employer.

Plaintiff was employed as a cement finisher by the general contractor in the construction of a hospital building. De-

fendant was the subcontractor employed by the general contractor to do all of the plumbing and heating installation. The building was a four-story concrete building with a basement below. All of the concrete for the floors and walls had been poured prior to the accident.

Plaintiff arrived at work on August 13, 1952, at about 7:45 A.M. He went down the stairway to the east wing of the basement and placed his bucket and tools on one of the window sills. He then crossed over to the middle of the room where his boss was. The latter instructed him where to start work that morning. On the way back to get his tools and bucket, plaintiff stepped on a short piece of one-half inch pipe which was lying loose on the floor. It rolled when stepped on, causing plaintiff to fall and break his right leg. The pipe was admitted in evidence as Exhibit One and is hereafter referred to as such.

Defendant concedes that it had the duty to exercise ordinary care for the plaintiff's safety, Pauly v. King, 44 Cal.2d 649, 284 P.2d 487, and states that "the appeal is rested on the single contention that there is no substantial evidence on which to base an inference of defendant's responsibility for plaintiff's injuries." Defendant contends that the evidence is insufficient to support a finding that Exhibit One was left by its employees and that, assuming the contrary, it was not negligence to have done so.

[1–3] On this appeal we must, of course, resolve the conflicting evidence in the light most favorable to plaintiff. No witness testified to having seen any of defendant's employees actually drop Exhibit One on the floor. However, the following rule is well settled: "Where direct and positive evidence of a fact is not available, proof may be made by means of indirect evidence, and the decision of the court may rest on reasonable inferences as well as on direct evidence." 18 Cal.Jur.2d 478. It is also well settled that "in order to support an inference based on circumstantial evidence it is not incumbent upon the plaintiff to exclude the possibility of every other reasonable inference from the proved facts." Spolter v. Four-Wheel Brake Serv. Co., 99 Cal.App.2d 690, 694, 222 P.2d 307, 310.

Exhibit One was identified by several witnesses as being of the same type and size of pipe as that used by defendant in the heating installation. No one other than defendant was doing such work. The area where plaintiff fell was the same as that where, on the day before, defendant's employees had been cutting pipe. The floor in this area had been littered on that day with debris and pieces of pipe.

[4] As against this, defendant produced its foreman, who testified that he did not recognize the trademark (a triangle) which was stamped on Exhibit One and that he had not seen any pipe so branded being used on the job. He admitted that he did not buy or inspect any of the pipe or personally install any of it. It would seem obvious that more satisfactory evidence could have been produced as to whether any pipe of the same brand as Exhibit One had been purchased for or used on the job. In any event, the testimony of this employee was not so clear, positive and uncontradicted that the jury was required to accept it. See Blank v. Coffin, 20 Cal.2d 457, 126 P.2d 868.

Defendant also states that Exhibit One might have come from the elevator installation. This work was done in another part of the basement at another time and there is no evidence whatever that pipe of the type in question was used in such installation.

On the day before the accident, before quitting time, defendant's employees cleaned up their work site in the basement and moved their equipment elsewhere. Plaintiff and several other witnesses testified that when they came to work the next morning the basement floor in this area appeared to have been swept and to be clean and free of any debris or pieces

of pipe. Plaintiff only found out that this was not so when he stepped on Exhibit One and fell.

We conclude that the jury could reasonably have inferred that Exhibit One had been negligently left by defendant's employees.

[5] Defendant next argues that it cannot be held to be guilty of negligence unless the plaintiff is held to be guilty of contributory negligence because the omission of each was the failure to see the object in question on the floor. The fallacy of this argument is that while both parties were required to exercise the same degree of care, i. e., ordinary care, the amount of care which each was required to exercise would vary with their respective positions. Defendant undertook to clean up its work site in the basement when its work there was finished. It doing so, its employees' attention was specifically directed to the pieces of pipe and other debris on the floor. Under the circumstances, the leaving or overlooking of an object such as Exhibit One might reasonably be held to be a want of ordinary care. In effect it created a trap for those, such as plaintiff, who were still working in the basement. Plaintiff had seen the floor littered up on the day before his accident and when he saw it the next morning it appeared to have been cleaned up and all debris and pipe removed. Plaintiff could well have been lulled into believing that the floor was clear and unobstructed. There was no artificial lighting in the basement but natural lighting came in through the window openings. Plaintiff was walking toward such an opening at the time he fell and his attention was mainly occupied with getting his tools and starting to work. His failure to see Exhibit One was under entirely different circumstances than those confronting defendant's employees, who *knew* that pieces of pipe such as Exhibit One were on the floor and that it was their purpose and duty to remove them.

We conclude that the jury's implied finding that defendant was negligent did not require it to find that plaintiff was also negligent.

The judgment is affirmed.

PETERS, P. J., and FRED B. WOOD, J., concur.



147 Cal.App.2d 740

The PEOPLE of The State of California, Plaintiff and Respondent,

v.

Louis Charles CHANEY, Defendant and Appellant.

Cr. 5756.

District Court of Appeal, Second District, Division 2, California.

Jan. 22, 1957.

Defendant was convicted of bookmaking. The Superior Court of Los Angeles County, LeRoy Dawson, J., entered judgment of conviction and an order denying motion for new trial, and defendant appealed. The District Court of Appeal, Fox, J., held that evidence sustained conviction.

Judgment and order affirmed.

1. Criminal Law ⇐260(11)

In prosecution for bookmaking, interpretation of evidence, weight to which it was entitled, and credibility of witnesses were matters for trial court. West's Ann. Pen.Code, § 337a, subd. 1.

2. Gaming ⇐73

In order to justify conviction for bookmaking, there is no requirement that bet be recorded, and hence offense of bookmaking can take place without a writing. West's Ann.Pen.Code, § 337a, subd. 1.

3. Gaming ⇐98(3)

In prosecution for bookmaking, testimony of officer that officer heard third person say to defendant that third person

wanted "two to win on Jet Action in the eighth at Gulfstream," and defendant's reply, "Okay," clearly justified inference that third person was placing a bet on the race in question and that defendant was accepting such bet and not merely that third person was expressing a desire to place a bet. West's Ann.Pen.Code, § 337a, subd. 1.

4. Gaming ⇐98(3)

Evidence sustained conviction for bookmaking. West's Ann.Pen.Code, § 337a, subd. 1.

G. Vernon Brumbaugh, Los Angeles, for appellant.

Edmund G. Brown, Atty. Gen., William E. James, Deputy Atty. Gen., for respondent.

FOX, Justice.

Defendant was convicted of bookmaking, Pen.Code, sec. 337a, subd. 1. He appeals from the judgment and order denying his motion for a new trial.

Officer Kenney of the Los Angeles Police Department entered a cafe on South San Pedro Street at approximately 2:00 p. m., on Saturday, March 17, 1956. He observed defendant approach several people and carry on a conversation with them, during which they examined a copy of the National Daily Reporter, commonly known as a scratch sheet. Following this, money changed hands between the parties. Defendant then approached a Mr. Fraser, with whom the officer had been talking about betting on horses. Fraser and defendant conversed briefly, during which time the former referred to the sports section of a local daily newspaper that contained information on racing at various tracks throughout the United States. Officer Kenney overheard Fraser tell defendant he wanted "two to win on Jet Action in the eighth at Gulfstream." Defendant replied, "Okay," and moved on to other persons in the bar. The National Daily Reporter for that date disclosed that a horse by the name of Jet Action was entered in the eighth race at Gulfstream Park. The officer did not see any money pass between defendant and Fraser. The officer arrested two other suspects for bookmaking. In the meantime, defendant left the cafe and was not arrested until three days later.

Fraser testified to a conversation with defendant on this occasion. He said to defendant, "I'd like to have a two-dollar bet on Jet Action in the eighth race at Gulfstream." He testified defendant "didn't say a word" and that he did not give defendant any money. He stated, however, that he had placed other verbal bets with defendant but had not given him any money on these bets; also, that he had never collected any money on such bets. He further testified that any money he won was used later to make bets on other races.

At the time of his arrest on March 20th, defendant stated he had been "making book" in that cafe and in various other small places around the area for the last year or so but that "he hadn't made any book since the previous week." When informed that his arrest was for bookmaking on the previous Saturday, defendant made no comment.

Defendant did not testify and did not present any evidence in his behalf.

Defendant's position is that "The evidence is insufficient to sustain the judgment." Defendant suggests that the conversation that Officer Kenney overheard between him and Fraser was "the mere expression of a desire" on the part of the latter to place a $2 bet on the horse in question. Also, defendant appears to question the officer's testimony that he overheard such a conversation between him and Fraser since the officer did not arrest him at that time.

[1] The interpretation of the evidence, the weight to which it is entitled, and the credibility of the witnesses are, of course, matters for the trial court.

[2] As pointed out by this court in People v. Burch, 118 Cal.App.2d 122, at

page 124, 257 P.2d 44, at page 45, "There is no requirement that the bet be recorded." Hence, "the offense of bookmaking can take place without a writing."

[3, 4] The failure of Officer Kenney immediately to arrest defendant was due apparently to his departure while the officer was preparing to arrest two other suspects for bookmaking. The testimony of Officer Kenney that he heard Fraser say to defendant that he wanted "two to win on Jet Action in the eighth at Gulfstream," and defendant's reply, "Okay," clearly justifies an inference that Fraser was placing a bet on the race in question and that defendant was accepting such bet and not merely that Fraser was expressing a desire to place such a bet. The court obviously accepted the officer's testimony as true. This evidence, plus the other facts and circumstances and the reasonable inferences to be drawn therefrom, amply support the conviction. People v. Newland, 15 Cal.2d 678, 681, 104 P.2d 778.

The judgment and order are affirmed.

MOORE, P. J., and ASHBURN, J., concur.



147 Cal.App.2d 591

PEOPLE of the State of California, Plaintiff and Respondent,

v.

Raymond Clifford HODGE, Defendant and Appellant.

Cr. 3244.

District Court of Appeal, First District, Division 2, California.

Jan. 15, 1957.

Rehearing Denied Feb. 14, 1957.

Hearing Denied March 13, 1957.

Proceeding for a writ of error coram nobis to set aside a judgment on petitioner's plea of guilty of murder. From a judgment of the Superior Court, Marin County, Jordan L. Martinelli, J., denying the writ petitioner appealed. The District Court of Appeal, Draper, J. pro tem., held that petitioner was not entitled to relief sought on grounds that district attorney induced plea by promises to recommend life imprisonment rather than to add penalty by district attorney threatened to seek death penalty if petitioner refused to plead court or that court-appointed counsel for petitioner held out fear of such penalty to him.

Judgment affirmed.

1. Criminal Law ⇐997(11)

A petitioner for writ of error coram nobis must allege facts showing diligence in discovering and presenting facts on which he relies for writ.

2. Criminal Law ⇐997(11, 12)

Where petition for writ of error coram nobis to set aside judgment on petitioner's plea of guilty of murder alleged, as only excuse for his long delay in filing petition, that he formerly thought that habeas corpus was proper remedy, and alleged that after presenting three applications for such writ to state Supreme Court, petitioning for rehearings after denials of two of them, and petitioning United States Supreme Court for certiorari after one such denial, petitioner discovered that coram nobis was proper remedy, without alleging date or manner of such discovery, he did not meet burden of showing diligence to discover and present facts on which he relied for writ, but District Court of Appeal will review substance of petitioner's allegations.

3. Criminal Law ⇐997(4)

One pleading guilty of murder was not entitled to writ of error coram nobis to set aside judgment entered on plea on ground that it was induced by district attorney's promises to recommend life imprisonment, rather than death penalty, where such attorney did recommend and court imposed life sentence.

4. Criminal Law ⇐997(5)

One pleading guilty of first-degree murder was not entitled to writ of error

coram nobis to set aside judgment imposing life sentence on plea on ground that district attorney threatened to seek death penalty if defendant refused to plead guilty, as filing of complaint and information charging such offense carried implied threat of death penalty.

5. Criminal Law ⇐997(5)

One petitioning for writ of error coram nobis to set aside judgment imposing life sentence on his plea of guilty of murder was not entitled to relief on ground that his court-appointed counsel held out fear of death penalty to petitioner, in absence of showing that such apprehension was unwarranted.

6. Criminal Law ⇐997(5)

One pleading guilty of murder was not entitled to writ of error coram nobis to set aside judgment entered on plea on ground that his attorneys failed to investigate case and prepare his defense, urged him to plead guilty and threatened to quit case if he refused to do so, where there was no showing that such advice was not sound, judges appointing attorneys believed them able, and there was no specification of any fact favorable to petitioner which they failed to investigate.

7. Criminal Law ⇐997(5)

One pleading guilty of murder was not entitled to writ of error coram nobis to set aside judgment entered on plea on ground that his attorneys failed to investigate case and prepare defense and urged him to plead guilty, where he made no complaint to municipal or superior court about his counsel, expressed in open court his acceptance of senior attorney's services, answered in affirmative trial court's questions as to whether petitioner had advice of counsel and was thoroughly aware of what guilty plea meant, personally joined in waiver of time for imposition of sentence, and answered in negative question whether he had any legal cause to show why judgment should not be pronounced.

8. Criminal Law ⇐997(5)

An accused's claim of lack of effective aid of counsel cannot be asserted in coram nobis proceeding to set aside judgment on his plea of guilty.

9. Criminal Law ⇐997(4)

Allegations of petition for writ of error coram nobis to set aside judgment entered on petitioner's plea of guilty of murder that he was placed in state prison on his arrival in county of venue after his arrest in another state and placed in Isolation Row very close to Death Row and that he was at times in direct contact with condemned prisoners were insufficient to show duress contributing to his admission of guilt, in absence of showing of any treatment of petitioner different from that accorded persons believed to be more than normal security risks.

10. Criminal Law ⇐997(4)

One pleading guilty of murder was not entitled to writ of error coram nobis to set aside judgment on plea on ground of duress by placing him in Isolation Row near Death Row in state prison and subjecting him to direct contact with condemned prisoners on his arrival in county of venue after his arrest in another state, in absence of showing that statute authorizing sheriff to remove prisoner to state prison for safe-keeping when there is reasonable ground to believe that he may be forcibly removed from county jail and requiring prison warden to accept and detain such prisoner until his removal is ordered by superior court of county from which he was delivered was not fully complied with. West's Ann.Pen.Code, § 4007.

11. Prisons ⇐13

The statute authorizing sheriff to remove prisoner to state prison for safe-keeping when there is reasonable ground to believe that he may be forcibly removed from county jail and requiring prison warden to accept and detain prisoner until his removal is ordered by superior court of county from which he was delivered does not require court

order for such transfer of prisoner to state prison. West's Ann.Pen.Code, § 4007.

12. Criminal Law ⇐241

Two orders, made by superior court of county of venue of prosecution for murder on day after accused was transferred to state prison, recognizing that he was detained at such prison, directing warden and sheriff to deliver him to municipal or superior court as required for steps in his trial, and specifically directing his return to prison after each such appearance, properly authorized his detention at such prison. West's Ann.Pen.Code, § 4007.

13. Criminal Law ⇐997(3)

An accused's claims based on facts well known to him before pronouncement of judgment imposing life sentence on his plea of guilty of murder, but not brought to trial court's attention, are not proper bases for proceeding in coram nobis to set aside judgment.

14. Criminal Law ⇐997(15)

An affidavit of fellow prisoner of one sentenced to life imprisonment on his plea of guilty of murder that his accomplice had admitted falsity of his testimony at preliminary hearing was inadmissible as hearsay in coram nobis proceeding to set aside judgment on plea.

15. Criminal Law ⇐997(8)

Coram nobis is not proper proceeding to raise issue whether accomplice's testimony at preliminary hearing against one subsequently sentenced to life imprisonment on his plea of guilty of murder was false.

Raymond C. Hodge, in pro. per.

Edmund G. Brown, Atty. Gen., Clarence A. Linn, Asst. Atty. Gen., Raymond M. Momboisse, Deputy Atty. Gen., for respondent.

DRAPER, Justice pro tem.

Petitioner's application for writ of error coram nobis was denied by the trial court without hearing. Petitioner appeals. By his petition, appellant sought to withdraw his plea of guilty to the murder of Roy E. Kapphahn, and to set aside the judgment entered upon that plea.

[1, 2] Appellant's plea of guilty was entered and judgment pronounced November 2, 1953. No appeal was taken. His present application was not filed until March 12, 1956. It is well settled that a petitioner in a coram nobis proceeding must allege facts showing diligence in discovering and presenting the facts upon which he relies for the writ. People v. Shorts, 32 Cal.2d 502, 512, 197 P.2d 330; People v. Stonom, 139 Cal.App.2d 408, 293 P.2d 807. Here all the facts alleged by petitioner were known to him at the time of plea. His only allegation to excuse his delay is that he formerly thought that habeas corpus was the proper remedy. He presented three applications for that writ to the Supreme Court of California, petitioned for rehearing upon denial of two of them, and petitioned the United States Supreme Court for certiorari after one such denial. He alleges that he has discovered that coram nobis is his proper remedy, and now seeks it. He does not allege the date or manner of such discovery. It seems clear that he has not met the burden of showing diligence. However, the course usually followed by appellate courts in such cases, particularly where the appellant acts as his own attorney, suggests review of the substance of appellant's allegations.

[3] His principal complaint appears to be that the district attorney, by promises to recommend life imprisonment rather than the death penalty, induced the plea of guilty. But the district attorney did recommend the life sentence, and, more important to appellant, that is the sentence imposed by the court. He got precisely what he bargained for. It is a perversion of the rule of People v. Gilbert, 25 Cal.2d 422, 154 P.2d 657, to argue that the keeping of such a promise by the prosecutor vitiates the plea. Appellant's contention can-

not be sustained. See In re Rogers, 91 Cal.App.2d 394, 205 P.2d 667.

[4, 5] Appellant also contends that the district attorney threatened to seek the death penalty if appellant refused to plead guilty. Of course, the filing of the complaint and information charging murder in the first degree carried with it the clearly implied threat of the death penalty. Assuming a direct threat by the prosecutor to seek the greater penalty, there is no proper ground for setting aside the plea. People v. Toledo, 111 Cal.App. 204, at page 208, 295 P. 353, at page 355, where the court expresses "serious doubt as to whether a statement by a district attorney that he contemplates doing his duty may ever be considered as duress." Appellant also asserts that his court-appointed counsel held out to him the fear of the death penalty. But there is nothing to show that their apprehension was in any way unwarranted.

[6] The petition also alleges that his attorneys failed to investigate the case and prepare his defense, urged him to plead guilty, and "threatened to quit the case" if he refused this advice. But there is nothing to indicate that their advice was not sound. Two attorneys were appointed to represent appellant both in the Municipal and the Superior Court. The appointing judges believed them able, and the Municipal Judge spoke of the broad experience of the senior counsel appointed. There is no specification of any fact, favorable to appellant, which they failed to investigate. Appellant's assertion that their threat "to quit the case" was duress inducing him to plead guilty comes strangely from him. He devotes much of his brief to attacking their sincerity and devotion to his cause. If he is sincere in these attacks, he should have welcomed their alleged offer to drop the case, which would have left him free to seek other counsel of the court.

[7, 8] In any case, appellant failed to make any complaint to either trial court about his counsel. The senior attorney was appointed August 18, 1953. On August 21, after being interviewed by this attorney, appellant expressed in open court his acceptance of his services. Junior counsel was appointed August 21. From that time through pronouncement of judgment November 2, appellant expressed to the court no dissatisfaction with either, although he appeared in court with both on several occasions. When counsel moved to withdraw the plea of not guilty and enter a guilty plea, the court asked appellant whether he had had the advice of counsel, and whether he was "thoroughly aware of what the request means and what the purpose of it is." Appellant answered "yes" to both questions. Appellant personally joined in the waiver of time for imposition of sentence, and upon arraignment for judgment personally answered "no" to the question whether he had any legal cause to show why judgment should not be pronounced against him. His present complaints as to his representation are without merit. Further, "the claim of lack of effective aid of counsel cannot be asserted in a coram nobis proceeding." People v. Fritz, 140 Cal.App.2d 618, 622, 295 P.2d 449, 452.

[9] Appellant complains that he was placed in San Quentin Prison upon his arrival in Marin County after arrest in Oregon. He says he was placed in "Isolation Row" which, he asserts, is "in very close proximity to Death Row," and that he was, "at times, in direct contact with condemned prisoners." This, he asserts, was duress which contributed to his admission of his guilt. Of course, one can conceive of circumstances under which exhibition of the execution chamber, or exposure to or contact with those condemned to death, would constitute a most brutal form of duress. Such a situation is not shown by the application here. The allegations of the petition are, in this respect, vague and unconvincing. They show no treatment of appellant different from that accorded persons believed to be somewhat more than normal security risks.

[10] Under statutory provision, the sheriff may remove a prisoner to a California state prison "for safekeeping" whenever there is reasonable ground to believe that he "may be forcibly removed" from the county jail. This statute makes it the duty of the warden to "accept and detain such prisoner in his custody until his removal is ordered by the superior court of the county from which he was delivered." Pen.Code § 4007. The petition here makes no showing whatever that this code section was not fully complied with in the case at bar.

[11] The Attorney General, in a supplemental brief, has set forth a letter written by the sheriff to the warden at San Quentin, asking that appellant be detained there pursuant to the foregoing code section. This letter is not a part of the record before us. We refer to it only because appellant, in his reply to the supplemental brief, relies upon the letter to show a failure of compliance with Penal Code section 4007. He argues that the code section requires a court order for such transfer. In this he is mistaken, as is clear from the language of the section.

[12] In any event, there are before us two orders of the Superior Court, made the day after appellant's transfer to the prison, which recognize that he is detained at that prison, and which order the warden and the sheriff to deliver him to the Municipal or Superior Court as required for steps in his trial. Both orders specifically direct his return to the prison after each such appearance. Thus his detention at San Quentin was properly authorized.

[13] Most of the claims previously reviewed are based upon facts well known to appellant before judgment was pronounced, but not brought to the attention of the trial court, and thus not proper bases for a proceeding in coram nobis. People v. Adamson, 34 Cal.2d 320, 210 P.2d 13; People v. Fritz, supra, 140 Cal.App.2d 618, 295 P.2d 449.

[14, 15] Appellant also asserts that testimony of his accomplice at the preliminary hearing was false. He relies on the affidavit of a fellow prisoner that the accomplice has admitted such falsity. This affidavit is, of course, inadmissible hearsay. Still further, coram nobis is not the proper proceeding to raise such an issue. People v. Adamson, supra.

The petition showed no sound ground for relief. Judgment affirmed.

DOOLING, Acting P. J., and KAUFMAN, J., concur.



147 Cal.App.2d 758

R. A. JARVIS, Plaintiff and Appellant,
v.
Margaret J. O'BRIEN, Defendant and Respondent.
Civ. 17236.

District Court of Appeal, First District, Division 2, California.
Jan. 23, 1957.

Action brought by broker's assignee to recover commission. The Superior Court, Santa Clara County, M. G. Del Mutolo, J., denied the relief sought, and plaintiff appealed. The District Court of Appeal, Nourse, P. J., held that where broker employed by vendor to sell property was undisclosed partner of three prospective purchasers, and they, upon learning of broker's dual capacity, objected and dealt directly with vendor for less price, broker could not recover commission.

Affirmed.

1. Appeal and Error ⇐544(2), 1010(1)

Where record consisted of clerk's and reporter's transcript, appellant's opening brief, and nothing more, court could assume burden of reviewing record for itself, and if, in so reviewing record, court found

that there was sufficient competent evidence to support judgment and that procedural objections were insubstantial, it would be its duty to affirm the judgment. West's Ann.Rules on Appeal, rule 17(b).

2. Principal and Agent ⇐84

Unless both parties know of double agency at time of transaction, agent cannot recover commission from either.

3. Brokers ⇐65(4)

Where broker employed by vendor to sell property was undisclosed partner of three prospective purchasers, and they, upon learning of broker's dual capacity, objected and dealt directly with vendor for less price, broker could not recover commission.

David Freidenrich, Palo Alto, Herman D. Gill, San Francisco, for appellant.

No appearance for respondent.

NOURSE, Presiding Justice.

[1–3] This cause has been submitted for decision pursuant to notice given respondent under Rule 17(b) of the Rules on Appeal. The record consists of the Clerk's and the reporter's transcript, the appellant's opening brief—and nothing more. In such a case this court may assume the burden of reviewing the record for itself. If, in so reviewing the record, we find that there is sufficient competent evidence to support the judgment and that the procedural objections are insubstantial, it becomes our duty to affirm the judgment.

A brief statement of the facts will suffice. Plaintiff's assignor, a broker, entered into a written contract with defendant to sell her restaurant and saloon premises for the fixed price of $100,000. The contract stipulated that defendant would pay plaintiff's assignor a broker's commission, the sum of $10,000, the basis of this action. At the trial it was shown that the broker was an undisclosed partner of the three prospective purchasers. This relation, having been disclosed and admitted by plaintiff's assignor during the trial, the court found that plaintiff's assignor had failed to disclose to the purchasers, with whom he became a partner, that he had a separate agreement with the owner to be paid a commission of $10,000 on the sale which was made for $100,000. The result of this dual capacity was that the purchasers would be required unknowingly to pay to their partner an additional ten thousand dollars on the purchase price which would go to him as broker through the agency of a broker's commission. When the purchasers learned of this they objected and dealt directly with the seller for a lesser price.

Such a transaction has been condemned by all the authorities. The leading case in this state is Glenn v. Rice, 174 Cal. 269, 272, 162 P. 1020, 1021, affirmed in Gordon v. Beck, 196 Cal. 768, 773, 239 P. 309; See McConnell v. Cowan, 44 Cal.2d 805, 285 P.2d 261.

The settled rule of the cases is that unless both parties knew of the double agency at the time of the transaction, the agent cannot recover a commission from either. The rule is thus stated in Glenn v. Rice, 174 Cal. at page 272, 162 P. at page 1021—"The reason for the rule is that he thereby puts himself in a position where his duty to one conflicts with his duty to the other, where his own interests tempt him to be unfaithful to both principals, a position which is against sound public policy and good morals. His contract for compensation being thus tainted, the law will not permit him to enforce it against either party. It is no answer to this objection to say that he did, in the particular case, act fairly and honorably to both. The infirmity of his contract does not arise from his actual conduct in the given case, but from the policy of the law, which will not allow a man to gain anything from a relation so conducive to bad faith and double dealing. And the fact that the party whom he sues was aware of the double agency and of the payment, or agreement to pay, compensation by the other party, and consented thereto, does not entitle him to recover. He must show knowledge by both parties. One party might willingly consent, believing that

the advantage would accrue to him, to the detriment of the other. The law will not tolerate such an arrangement, except with the knowledge and consent of both, and will enter into no inquiry to determine whether or not the particular negotiation was fairly conducted by the agent. It leaves him as it finds him, affording him no relief."

Though this issue was raised during the course of the trial, and the Glenn and McConnell cases were cited, no mention of the point is made in appellant's brief and no reference is made to the cited cases.

The questions raised by appellant in his brief do not meet this basic issue.

Judgment affirmed.

DOOLING and KAUFMAN, JJ., concur.



147 Cal.App.2d 651

John L. PORTMAN, Plaintiff, Appellant and Respondent,

v.

CLEMENTINA COMPANY et al., Defendants.

Clementina Company, Clementina Contractors Trucking Service Company, Devincenzi Bros. and Company and A. D. Devincenzi, Defendants and Respondents.

Edward A. Larkin, Defendant and Appellant.

Civ. 16692.

District Court of Appeal, First District, Division 1, California.

Jan. 18, 1957.

Rehearing Denied Feb. 15, 1957.

Hearing Denied March 13, 1957.

Action by property owner for damages allegedly resulting from the creation of a nuisance consisting of dumping fill on an unaccepted public street, resulting in an interference with drainage customarily afforded by said street and consequent flooding and damage to plaintiff's property. The Superior Court, City and County of San Francisco, Frank T. Deasy, J., entered judgment against employer of contractors who conducted filling operations, in favor of one of the contractors, upon a jury verdict for him, and directed a nonsuit as against other contractor, and employer of contractors and plaintiff appealed. The District Court of Appeal, Agee, J. pro tem., held, inter alia, that evidence presented a question for the jury as to whether contractor who dumped fill on street in question was liable to plaintiff for creation of a nuisance contrary to statute, notwithstanding fact that injury occurred after performance of his contract and acceptance of work by his employer.

Two judgments affirmed, and one judgment reversed, in accordance with opinion.

1. Municipal Corporations ⇐671(1)

Where property owner alleged a cause of action under statute proscribing unlawful obstruction of the use of a public street recovery did not depend upon establishing either an intent to harm or negligence. West's Ann.Civ.Code, § 3479.

2. Municipal Corporations ⇐845(6)

In action by property owner for damages sustained to his property from flooding after filling of a street obstructed the flow of water thereon and allegedly created a nuisance within meaning of statute proscribing unlawful obstruction of use of a public street, instruction that in order to recover property owner was required to prove by a preponderance of the evidence that defendant had created a nuisance, as defined by law, which proximately caused damage to property owner, was not improper even though it did not refer to fault or negligence. West's Ann. Civ.Code, § 3479.

3. Municipal Corporations ⇐281(1)

"Expedient" as used in section of Public Works Code of City and County

of San Francisco providing that application for permission to do any street work upon any unaccepted public street shall be made and Director of Public Works shall investigate such application and determine whether the work is expedient means suited to the circumstances.

See publication Words and Phrases, for other judicial constructions and definitions of "Expedient".

4. Trial ⇐241, 296(2)

In action by property owner for damages sustained from flooding after filling of a street obstructed flow of water thereon and allegedly created a nuisance within meaning of statute proscribing unlawful obstruction of use of a public street, instruction on sections of code of City and County of San Francisco relating to street obstructions was properly given in view of defendant's admission of liability if he unlawfully obstructed free passage of the street and in view of court's further instruction that violation of law was of no consequence unless the violation was proximate cause of the injury.

5. Municipal Corporations ⇐845

In action by property owner for damages allegedly resulting from the creation of a nuisance consisting of dumping fill on an unaccepted public street, resulting in an interference with drainage customarily afforded by said street, where trial court instructed jury that property owner could not recover if he did not exercise reasonable care to avoid damage to himself, defendant was not entitled to reversal of judgment in favor of property owner on any theory of avoidable consequences.

6. Municipal Corporations ⇐845(5)

In action by property owner for damages allegedly resulting from the creation of a nuisance consisting of dumping fill on an unaccepted public street, resulting in an interference with drainage customarily afforded by said street, evidence presented a question for the jury as to whether contractor who dumped fill on street in question was liable to plaintiff for creation of a nuisance contrary to statute, notwithstanding fact that injury occurred after performance of his contract and acceptance of work by his employer.

7. Municipal Corporations ⇐844

In action by property owner against an employer of filling contractor, and against contractor, for damages sustained from flooding allegedly caused by creation of a nuisance in unlawfully filling a street, where property owner's case was based entirely upon unlawful filling of the street, he was not entitled to judgment against contractor who did filling only on employer's property, and not on street in question.

William J. Connolly, San Francisco, for appellant Edwin A. Larkin.

Bledsoe, Smith, Cathcart, Johnson & Phelps, San Francisco, Donald J. Kennedy, Palo Alto, for appellant John L. Portman.

Hancock, Elkington & Rothert, Harlow P. Rothert, San Francisco, for respondents Clementina Co. and Clementina Contractors Trucking Service Co.

R. Edward Burton, San Francisco, for respondents Devincenzi Bros. & Co. and A. D. Devincenzi.

AGEE, Justice pro tem.

This is an action for damages resulting from the creation of a nuisance. The complaint alleges that the defendants, without procuring permission from the City and County of San Francisco, as required by city ordinances, dumped rock and dirt on Shafter Avenue, San Francisco, an unaccepted public street; that this interfered with the drainage customarily afforded by said street, with the result that plaintiff's premises were flooded and plaintiff was thereby damaged.

The parties are described as follows: Plaintiff manufactures sweeping compounds, waxes and other floor maintenance

materials under the name of Flor-Ton Chemical Company, at 1131 Shafter Avenue, San Francisco; defendant Larkin owns all of the real property in the eleven hundred odd-numbered block on Shafter except the premises occupied by plaintiff and one O'Neill; defendants Devincenzi Bros. & Co. and A. D. Devincenzi (hereinafter referred to collectively as Devincenzi) placed rock and dirt fill on Larkin's property and on Shafter Avenue; defendants Clementina Company and Clementina Contractors Trucking Service Company (both referred to hereafter as Clementina) also placed fill material on Larkin's property.

Three appeals arose out of this action. A jury verdict of $10,000 was returned against Larkin and he has appealed from the judgment entered thereon. Devincenzi obtained a nonsuit at the completion of plaintiff's case and plaintiff has appealed from the judgment which followed. The jury returned a verdict in favor of Clementina and plaintiff has appealed from the judgment thereon.

A general description of the area follows. Shafter Avenue runs east and west. The eleven hundred block is bounded on the east by Griffith Street and on the west by Hawes Street, both running north and south. The next street south of and running parallel to Shafter is Thomas Avenue. The dimensions of this block are 400 feet (on Shafter and Thomas) by 200 feet (on Griffith and Hawes). Larkin owned the entire block with the exception of a parcel having a frontage on Shafter of 87½ feet and a depth of 100 feet. The building in which plaintiff conducted his business was on the westerly part of this parcel and had a frontage of 30 feet. One O'Neill conducted a general contracting business in a building on the easterly part of the same parcel. The distance from the easterly side of O'Neill's building to Griffith Street was 200 feet.

Plaintiff had been in possession of the premises occupied by him since 1946 or 1947. During the fall of 1951, Larkin directed Devincenzi and Clementina to dump fill on his property. Prior to this, surface water ran down Shafter Avenue from the west toward the east. There was a shallow ditch about one or two feet deep and about three or four feet wide running along the southerly side of Shafter Avenue, commencing at a point a few feet east of the O'Neill property and extending easterly to Griffith Street. This ditch helped to carry off the surface water. For the purpose of improving the access to the Larkin property, Devincenzi, with Larkin's knowledge and consent, also dumped fill on Shafter Avenue, thereby filling up the ditch and raising the grade of the street. As the result, when heavy rains fell on December 1, 1951, and thereafter, the surface waters backed up and flooded plaintiff's premises. The jury estimated his damages at $10,000.

Plaintiff's cause of action is founded upon the theory of a nuisance, which is defined in section 3479 of the Civil Code as "Anything which is * * * an obstruction to the free use of property, so as to interfere with the comfortable enjoyment of * * * property, or unlawfully obstructs the free passage or use, in the customary manner of any * * * street, or highway * * *". Section 731 of the Code of Civil Procedure provides: "An action may be brought by any person whose property is injuriously affected, * * * as the same is defined in section thirty-four hundred and seventy-nine of the Civil Code, * * *".

The Larkin Appeal

[1, 2] Larkin's main contention is that the jury was instructed that he was absolutely liable, even though he was without fault. His brief discloses that, by "fault," he means intentional harm or negligence. Neither of these elements is involved in this case. Malice may be an issue in a nuisance case, Griffin v. Northridge, 67 Cal.App.2d 69, 75, 153 P.2d 800, "spite fence", and negligence very often is. 20 Cal.Jur. p. 268. In the instant case, however, the complaint alleges a cause of action under section 3479 of the Civil Code

for the unlawful obstruction of the use of a public street and does not depend upon either an intent to harm or negligence. "According to the generally accepted meaning of the terms 'negligence' and 'nuisance,' proof of negligence is not essential to liability for the creation or maintenance of a nuisance." 20 Cal.Jur., p. 268. Furthermore, the jury was not instructed that Larkin was absolutely liable. It was specifically instructed that, in order to recover, plaintiff was required to prove by a preponderance of the evidence that Larkin had created a nuisance, as defined by law, which proximately caused damage to plaintiff. Nuisance was correctly defined in the language of section 3479 of the Civil Code.

Larkin himself proposed the following instruction: "The defendants are not responsible to plaintiff unless the filling of Shafter Avenue created an obstruction to the free use of Mr. Portman's property so as to interfere with the comfortable enjoyment of his life and property, or unless it unlawfully obstructed the free passage or use of Shafter Avenue by Mr. Portman in the customary manner." This instruction states in substance the very principle which Larkin now criticizes. If it was error to so instruct the jury, and we do not believe that it was, it was error invited by Larkin. Nevis v. Pacific Gas & Electric Co., 43 Cal.2d 626, 629–630, 275 P.2d 761.

Larkin argues that the placing of fill upon his land was for a lawful purpose and was necessary for its beneficial use. He urges that the utility of his activity should be weighed and considered against the harm to plaintiff. A sufficient answer to this is that the plaintiff's cause of action is based upon the unlawful obstruction of Shafter Avenue and not upon the filing of Larkin's property.

[3] Plaintiff alleged in his complaint that the work upon Shafter Avenue was done without permission as required by section 405 of the Public Works Code of the City and County of San Francisco. Larkin admitted this in his answer. This section provides as follows: "Application for permission to do any street work in or upon any unaccepted public street in the City and County of San Francisco by private contract must be made in writing to the Director of Public Works, which application shall contain a comprehensive description of the work to be done. Said Director shall thereupon investigate such application, and if after investigation the Director determines that the public interest or convenience requires the doing of the proposed work and that the same is expedient and will not be productive of detriment to the public safety or convenience, he is hereby authorized to grant permission for the doing of the same as applied for or as modified by the direction of the City Engineer, subject to the conditions and provisions in this Article hereinafter prescribed and provided." "Expedient," as used in this section, means "suited to the circumstances." Webster's New World Dictionary. The obvious purpose of the investigation required is to safeguard against detriment to others which might result from the doing of the proposed work. If the investigation discloses that no such detriment will result the permission would then undoubtedly be granted. However, if the City Engineer directs a modification in order to avoid detriment to others, that also would undoubtedly be ordered. In the instant case, it would have been obvious to the City Engineer that the raising of the level of Shafter Avenue and the filling up of the ditch between the O'Neill property and Griffith Street would cause surface water to back up during the rainy season and flood plaintiff's property unless a culvert or some other method of draining was provided for. Thus, there is a definite causal relation between the failure to comply with section 405 and the damage sustained by plaintiff.

The trial court instructed the jury as to the general rule of liability for damage resulting from diversion of surface water from the land of one owner onto the adjoining property of another. Larkin contends that this general rule does not

apply to city lots and in this he may be correct, generally speaking. See 1 Cal. Jur.2d 733. However, the jury was specifically instructed as follows: "The defendants are not responsible to Mr. Portman for any damages claimed by him in this proceeding unless the filling of Shafter Avenue resulted in or proximately caused the loss for which Mr. Portman now seeks damages, even though the defendants did not have the right to fill Shafter Avenue without a permit from the City authorities to do so. "It is thus clear that the jury could not have been misled into thinking that plaintiff could recover for the work done by Larkin on his own property.

[4] Larkin complains of the giving of instructions on sections 310 and 4103 of the Building Code of the City and County of San Francisco. Section 310 requires a permit to occupy any part of a street for building operations or any other purpose and section 4103 provides that material for work to be done under a permit shall not be placed on public property so as to interfere with the free flow of water in any street. This was not error. Larkin admitted in his answer and at the trial that he had no permit to dump fill in Shafter Avenue and, as already pointed out, Larkin himself acknowledged in his proposed instructions that he was liable if he "unlawfully obstructed the free passage or use of Shafter Avenue by Mr. Portman in the customary manner." The jury was also instructed as follows: "I instruct you that in this case in violation of law, if you find that the defendant did commit a violation, it is of no consequence unless the violation was a proximate cause of the injury found by you to have been suffered by the plaintiff."

[5] The last point made by Larkin is that the judgment should be set aside under the so-called rule of "avoidable consequences." He argues that plaintiff could have easily avoided the flooding by taking steps to prevent it. Just how this could have been done is not clear but Larkin suggests that, inasmuch as O'Neill (who was on higher ground) put in a pump and a drain at a cost of only $150, plaintiff could have done something of the sort. Without passing upon the propriety of instructing on contributory negligence, it is a sufficient answer to this contention to point out that the jury was instructed that the plaintiff could not recover if he did not exercise reasonable care to avoid the damage to himself. The jury by its verdict found, by necessary implication, that plaintiff did exercise such reasonable care and this finding is amply supported by the record. It is true that there is a distinction between contributory negligence and avoidable consequences. Contributory negligence usually refers to conduct at and before the time of injury and avoidable consequences to conduct after the injury. However, under the facts of this case the concept would be the same as a practical matter because the first flood was the one which did the damage.

Larkin has also called attention to a number of instructions which he contends are conflicting and which must have confused the jury. We do not agree. It is true that the charge was a long one and undoubtedly could have been streamlined. But in essence this is a very simple case. The jury was correctly instructed on the fundamental issues and what plaintiff was required to prove in order to recover. We do not feel impelled to discuss each and every instruction and compare it with the others in order to justify our conclusion that the jury was not misled or confused. The verdict against Larkin was eminently fair and, to say the least, was not a miscarriage of justice either in the broad sense or in the sense of whether Larkin received a trial in accordance with the rules of law pertaining thereto.

Plaintiff's Appeal from the Devincenzi Judgment on Nonsuit

[6] Devincenzi asserts that it was an independent contractor, that it had completed its work, and that Larkin had accepted the same before the flooding occurred. The general rule is as follows:

"A contractor is not liable for injuries occurring after the performance of the contract and the acceptance of the work by the employer, * * *." 13 Cal.Jur. p. 1059. Devincenzi acknowledges that there are exceptions to this rule, one of which is applicable when the work so performed creates a nuisance per se, citing 27 Am. Jur. 535, § 56, which states: "In other words, a right of action against an independent contractor for injuries to third persons from defects in completed works may be predicated upon the ground that the finished work is a nuisance, * * *." Section 3479 of the Civil Code proscribes "Anything which * * * unlawfully obstructs the free passage or use, in the customary manner, of any * * * street, * * *." A violation of this section constitutes a nuisance per se. Curtis v. Kastner, 220 Cal. 185, 30 P.2d 26; People v. Amdur, 123 Cal.App.2d Supp. 951, 267 P. 2d 445.

In answer to this, Devincenzi argues that section 3479 of the Civil Code does not include drainage of surface waters as being a "use, in the customary manner" of a street. On the contrary, our Supreme Court, in Shaw v. Sebastopol, 159 Cal. 623, 115 P. 213, and Richardson v. City of Eureka, 96 Cal. 443, 31 P. 458, treated the drainage of surface waters over a public street as a use thereof by abutting property owners which could not be unlawfully obstructed.

Devincenzi also contends that the damages sustained by the plaintiff must be the natural result of the filling of Shafter Avenue and that such result must have been reasonably foreseeable. This merely presents a question of fact upon which reasonable minds might differ.

A nonsuit should not have been granted to Devincenzi. The question as to its liability should have been presented to the jury under appropriate instructions.

Plaintiff's Appeal from the Clementina Judgment

[7] Plaintiff's case is based entirely upon the unlawful filling of Shafter Avenue. There is no evidence that Clementina had any part in this. All of its filling was done on Larkin's property. The jury verdict in its favor was the only one that could have been properly returned.

The judgment against Larkin is affirmed; the judgment in favor of Devincenzi is reversed; and the judgment in favor of Clementina is affirmed. Plaintiff is to recover his costs on appeal from Larkin and Devincenzi in equal portions; Clementina is to recover its costs of appeal from plaintiff.

BRAY, Acting P. J., and FRED B. WOOD, J., concur.



147 Cal.App.2d 801

In the Matter of Buddy KAPELIS, also known as Robert D. Kapelis, Albert Kapelis, and Alice Kapelis, also known as Alice Marie Kapelis, persons under the age of 21 years who should be declared free from the custody and control of their parents.

John C. Cave and Mildred Cave, Petitioners-Respondents,

Robert Kapelis, also known as Harry Socrates Kapelis, et al., Respondents,

Harry Socrates Kapelis, Respondent-Appellant.

Civ. 8900.

District Court of Appeal, Third District, California.

Jan. 24, 1957.

Proceeding upon petition to have children in petitioners' care and custody declared free from parental custody and control. The Superior Court, Solano County, Joseph M. Raines, J., entered order finding the children to be free from parental custody and control, and father appealed. The District Court of Appeal, Peek, J., held

that, even if father's letters inquiring concerning his children and attempting to arrange to have children visit him while he was in state prison were sufficient to establish that father was making every possible effort to communicate with and visit his children after they had, by juvenile court order, been placed in care and custody of others, fact that husband had admitted offense pertaining to sexual perversion with 15 year old girl was sufficient to make father come within Welfare and Institutions Code provision authorizing the juvenile court to declare father's children free from his custody and control.

Order affirmed.

1. Infants ⇐16.1

Even if father's letters were sufficient to establish that father was making every possible effort to communicate with and visit his children after they had, by juvenile court order, been placed in care and custody of others, fact that father had admitted to an offense pertaining to sexual perversion with 15 year old girl was sufficient to make father come within Welfare and Institutions Code provision authorizing the juvenile court to declare father's children free from his custody and control. West's Ann.Pen.Code, § 288a; West's Ann.Welfare and Inst.Code, § 701, and (d).

2. Infants ⇐16.15

Even if, in proceeding to free children from parental custody and control, court erred in admitting evidence, admitted without objection, of father's various prior misdemeanors, such error would not warrant reversal of order finding the children to be free from parental custody and control, in view of objecting father's admitted conviction of felony involving sexual perversion with 15 year old girl. West's Ann.Pen. Code, § 288a; West's Ann.Welfare and Inst.Code, § 701, and (d).

William H. McPherson, Fairfield, for respondent-appellant.

Dobbins & Weir, Vacaville, for petitioners-respondents.

PEEK, Justice.

Appellant, the father of the three minor children involved in this proceeding, appeals from an order finding said children to be free from parental custody and control. Section 701, Welfare and Institutions Code. The children's mother did not appear in the juvenile court, nor does she appear in this appeal.

The facts show that on May 24, 1952, the father, following a plea of guilty of a violation of section 288a of the Penal Code, was sentenced to San Quentin Penitentiary, and three other counts in the information were dismissed. On May 16, 1952, pursuant to an order of the juvenile court, the children were placed in the care and custody of the petitioners here, John C. and Mildred Cave, husband and wife. The petitioners testified that since April, 1952, they had received no communication from either the father or the mother of the children, nor had the children's parents in any other way sought to contact them.

[1] It is appellant's contention that certain letters sent by himself to his father wherein he inquired concerning the children, and his attempt to arrange to have the children visit him while he was in the state prison at Tracy, were ample evidence of the making of every possible effort to communicate with and visit his children, and hence the contrary findings of the trial court are not sustained by the evidence. Even assuming that the appellant is correct in this regard, he is still confronted with his admitted violation of section 288a, the dismissal of four other counts, all involving similar offenses with the same 15-year-old girl, the resulting loss of his civil rights and the serving of a penitentiary sentence therefor. These facts amply support the finding of the trial court that appellant was a person within the meaning of subsection (d) of section 701, Welfare and Institutions Code.

[2] Appellant finally contends that the court also erred in admitting evidence of various prior misdemeanors. Even if we were to assume that the court erred in this regard, although it should be noted that the evidence went in without objection by counsel, nevertheless such action by the trial court could not be such error as would warrant a reversal of the order in view of the admitted felony conviction and the facts surrounding the same.

The order is affirmed.

VAN DYKE, P. J., and SCHOTTKY, J., concur.



147 Cal.App.2d 558

UNITED STATES CREDIT BUREAU, Inc., a corporation, Plaintiff and Appellant,

v.

Charles I. MANNING, Lillian Burke Shepard Manning, also known as Lillian Backes, John Doe and Jane Doe, Defendants,

Charles I. Manning, Respondent.

Civ. 21711.

District Court of Appeal, Second District, Division 3, California.

Jan. 14, 1957.

Hearing Denied March 13, 1957.

Action to renew judgment which had been obtained on note. The Superior Court, Los Angeles County, J. F. Moroney, J., rendered judgment for judgment debtor, and judgment creditor appealed. The District Court of Appeal, Vallée, J., held that where note had been given by judgment debtor for amount which he had allegedly misappropriated, and record of original action did not disclose fraud or defalcation, evidence of origin of the indebtedness was admissible to meet debtor's special defense that debt had been discharged in bankruptcy subsequent to judgment, and to show the nondischargeable character of original obligation.

Judgment reversed; appeal from order dismissed.

1. Bankruptcy ⇐426(1)

The acceptance of note from one who procures money by fraud, as evidence of debt thereby created, after fraud has been discovered, does not take the debt out of operation of Bankruptcy Act provision that a discharge in bankruptcy shall release bankrupt from all his provable debts, except such as were created by his fraud, embezzlement, misappropriation or defalcation while acting as an officer or in any fiduciary capacity. Bankr.Act, § 17, sub. a(2, 4), 11 U.S.C.A. § 35, sub. a(2, 4).

2. Bankruptcy ⇐436(2)

In action on note, it is proper to receive evidence with respect to nature of liability represented by note in order to determine whether it is of a character which is dischargeable in bankruptcy. Bankr.Act, § 17, 11 U.S.C.A. § 35.

3. Payment ⇐17

The giving of a note by debtor for amount of debt does not constitute payment unless there is an agreement between parties that it shall be so accepted, and acceptance merely postpones time of payment of original debt until default is made in payment of note.

4. Judgment ⇐713(1)

A judgment does not in all cases, foreclose an investigation into nature of obligation upon which it was obtained.

5. Bankruptcy ⇐436(3)

In action by judgment creditor to renew judgment obtained on note against judgment debtor who claimed debt had been discharged in bankruptcy, evidence established that note had been given and received as evidence of debt growing out of debtor's fraud and defalcation and not as satisfaction thereof. Bankr.Act, § 17, 11 U.S.C.A. § 35.

6. Bankruptcy ⇐436(2)

In action to renew judgment obtained on note which allegedly had been given by

judgment debtor for amount which he had misappropriated, where record of original action did not disclose fraud and defalcation, evidence of origin of indebtedness evidenced by note was admissible to meet debtor's special defense that he had been discharged in bankruptcy proceeding subsequent to judgment, and to show nondischargeable character of original obligation. Bankr.Act, § 17, 11 U.S.C.A. § 35.

7. Bankruptcy ⇐426(1)

If liability on note was excepted from provisions of Bankruptcy Act with regard to discharge of debts because note was given for debt arising from fiduciary's fraud and defalcation, judgment obtained on such note would not be dischargeable in bankruptcy. Bankr.Act, § 17, 11 U.S.C.A. § 35.

8. Appeal and Error ⇐110

Order denying a new trial is not appealable.

Hayes, Bletz & Lawson and S. Oliver Bletz, Los Angeles, for appellant.

Prince & Maslow and Robert M. Maslow, Hollywood, for respondent.

VALLÉE, Justice.

Appeal by plaintiff from a judgment for defendant Charles I. Manning in an action to renew a judgment.

On October 21, 1949 a default judgment for $6,845.52 was entered in favor of plaintiff against defendant on a promissory note. On October 14, 1954 plaintiff filed this action to renew the judgment. The answer does not controvert or put in issue any of the allegations of the complaint except as a special defense it alleges that on November 13, 1951 defendant was adjudged a bankrupt by the United States District Court and on January 3, 1953 he was "discharged from all debts and claims provable by said Acts of Bankruptcy against his estate, and which existed on the said 13th day of November, 1951, excepting only such debts as were then by law excepted from the operation of a discharge in bankruptcy"; that the debt and judgment alleged in the complaint was a debt provable against the bankruptcy estate; it was duly and regularly scheduled in the bankruptcy proceedings; plaintiff had notice thereof and had actual knowledge of the commencement and pendency thereof. The evidence was that defendant was adjudge a bankrupt, that he was discharged of all debts except such as were excepted, that the debt was scheduled, and that plaintiff had notice as alleged.

The promissory note on which the original action was brought was executed March 10, 1948 by defendant to Claudette Colbert. At that time defendant was engaged in the insurance brokerage business and writing insurance as a broker for and in behalf of Claudette Colbert. While so acting he received about $5,986.68 from Miss Colbert to be applied by him in payment of accrued premiums on insurance policies for her benefit. Instead of doing so, he secretly appropriated the money to his own use and benefit. He had acted as insurance broker for Miss Colbert for a continuous period of seven or eight years. He handled accident, life, and property insurance for her and advised and counseled her on insurance matters during that time. Miss Colbert relied upon his advice and information with reference to her insurance.

After defendant appropriated the money, Miss Colbert was compelled to and did pay the amount a second time to insurance carriers to cover her accrued premiums. Thereafter defendant gave her his note for the amount of his debt and to prevent any prosecution for his defalcation.

These facts were not controverted. The evidence was received subject to a motion to strike or subject to being disregarded by the court in the event it was not material. A motion to strike was made and denied. The court found the evidence was not in conformity with the pleadings and "the debt and judgment * * * was then and is now a debt provable against the said bankruptcy estate, to wit: a debt and judgment based upon the promissory note of this defendant."

The original action was on the note, and the record does not disclose the fraud or defalcation. The question is whether in the action at bar the nondischargeable character of the original obligation may be shown by evidence dehors the record of the prior action in order to meet the special defense alleged in the answer.

The Bankruptcy Act provides:

"A discharge in bankruptcy shall release a bankrupt from all of his provable debts, whether allowable in full or in part, except such as * * * (2) are liabilities for obtaining money or property by false pretenses or false representations, * * * (4) were created by his fraud, embezzlement, misappropriation or defalcation while acting as an officer or in any fiduciary capacity * * *." 11 U.S.C.A. § 35.

The authorities are in conflict on the question. The author of an annotation in 170 American Law Reports says that by the weight of authority the nondischargeable character of the original obligation may not be shown if all the record of the original action shows is that the action was on a note and does not disclose the nondischargeable character of the original obligation. 170 A.L.R. 371. The minority view is that the nondischargeable character of the original indebtedness may be shown by evidence dehors the record of the judgment or of the proceedings culminating in the judgment although the record itself contains nothing indicating the character of the original indebtedness as one nondischargeable in bankruptcy. We think the reasoning of the California decisions and of the cases holding the minority view align this state with that view.

[1, 2] The acceptance of a note from one who procures a sum of money by fraud, as an evidence of the debt thereby created, after the fraud has been discovered, does not take the debt out of the operation of the above quoted provision of the Bankruptcy Act. Gregory v. Williams, 106 Kan. 819, 821, 189 P. 932; 8 C.J.S., Bankruptcy, § 573, p. 1513. In an action on a promissory note to which the defendant pleads as a defense his discharge in bankruptcy, it is proper to receive evidence with respect to the nature of the liability represented by the note in order to determine whether it is of a character which is dischargeable in bankruptcy. Mathewson v. Naylor, 18 Cal.App. 2d 741, 64 P.2d 979; Crespi & Co. v. Giffen, 132 Cal.App. 526, 23 P.2d 47; Donahue v. Conley, 85 Cal.App. 15, 258 P. 985; Annotation: 145 A.L.R. 1238. Carit v. Williams, 74 Cal. 183, 15 P. 751, held that in determining whether a discharge of a debtor under the State Insolvency Act operated as a discharge from a judgment against him, the court could go behind the judgment and examine the pleadings for the purpose of ascertaining the nature of the liability on which the judgment was founded. In Citizens' Bank of Paso Robles v. Rucker, 138 Cal. 606, 72 P. 46, 48, the court stated it was competent to "look beyond the judgment to determine the character of the original debt." It appears from a summary of the briefs in the report of the latter case that one of the grounds urged for reversal was that "the court cannot go behind the pleading upon which the judgment was rendered," citing Donald v. Kell, 111 Ind. 1, 11 N.E. 782, and Palmer v. Preston, 45 Vt. 154. It appears from the opinion in the Rucker case that the judgment was based on a promissory note and that the court must have gone beyond the pleadings and considered other evidence by which the fraud of the judgment debtor in obtaining the money on the note was made to appear. It thus appears from the California cases that in an action on a note where a plea of discharge in bankruptcy is interposed it is proper for the court to receive evidence with respect to the nature of the liability for which the note was given. Also see O'Brien v. Appling, 133 Cal.App. 2d 40, 283 P.2d 289. We do not see any logical distinction between that situation and one where a judgment has been obtained on the note.

One reason given by the courts reaching the majority view is that by suing on the note a plaintiff who was induced to part with the money represented thereby by fraud waives the fraud and elects to sue on the contract. It would seem to follow that where the question arises on the trial of an action on the note the plaintiff would be precluded from overcoming the defense of discharge in bankruptcy by evidence as to the nature of the liability for which the note was given. Another reason given for the majority view is that to permit evidence dehors the record in which the judgment was rendered constitutes in effect an attack on the judgment. Others assume that the rendition of a judgment operates to change the character of the original liability on which it is founded. Annotation: 170 A.L.R. 371–372, 374–378.

The fallacy of this reasoning is pointed out with unclouded explicitness in Fidelity & Casualty Co. of New York v. Golombosky, 133 Conn. 317, 50 A.2d 817, 818, 170 A.L.R. 361, in which the court stated the question was: "Does the fact that the judgment was based upon a note preclude the plaintiff from showing that the debt which it represented was created by fraud, embezzlement, misappropriation or defalcation within the clause quoted from the act?" The court said, 50 A.2d 819:

"The decisions which have held that in determining the nature of the indebtedness a court cannot go behind the judgment and record seem generally to have overlooked two principles which the cases place beyond dispute: Where an action is brought upon a note, and a discharge in bankruptcy is set up as a defense, proof is admissible to show that the underlying debt was created by fraud or one of the other excepted causes, American Surety Co. v. McKiearnan, 304 Mich. 322, 8 N.W.2d 82, 145 A.L.R. 1235, and note, 1238; Zimmern v. Blount, [5 Cir.], 238 F. 740, 745, 151 C.C.A. 590; and the rendition of a judgment upon an obligation does not change the character of the indebtedness. Boynton v. Ball, 121 U.S. 457, 466, 7 S.Ct. 981, 30 L.Ed. 985; Brown v. Hannagan, supra [210 Mass. 246, 96 N.E. 714]; Guernsey-Newston Co. v. Napier, 151 Wash. 318, 320, 275 P. 724; Argall v. Jacobs, 87 N.Y. 110, 113, 41 Am.Rep. [357]; Wade v. Clark, 52 Iowa 158, 159, 2 N.W. 1039, 35 Am.Rep. 262; Young v. Grau, supra [14 R.I. 340]. In the light of these accepted principles, there would seem to be no escape from the conclusion that the rendition of a judgment based upon a note does not preclude proof by evidence extraneous to the record, in reply to a defense of discharge in bankruptcy, that the underlying debt was created by fraud, embezzlement, misappropriation or defalcation within the exception we are considering. Moreover, some of the decisions above cited falling within the first category seem to regard proof that the debt was created by one of these causes by means of evidence dehors the record of the case in which the judgment was rendered as involving an attack upon that judgment; that clearly is not so; the plaintiff sues upon the judgment, the defendant pleads a defense entirely extraneous to the action in which the judgment was rendered, i. e., his discharge, and the plaintiff attacks his right to avail himself of that defense; the plaintiff is in no sense attacking the judgment but is throughout insisting upon his right to recover upon it in the manner and form in which it was rendered. It is significant of the intent of the Congress that in the Bankruptcy Act of 1898 (30 Stat. 544) the second clause of § 17 (corresponding to 11 U.S.C. § 35, 11 U.S.C.A. § 35) excepted from the discharge 'judgments in actions for frauds, or obtaining property by false pretenses or false representations, or for willful and malicious injuries to the person [or property] of another.' In order to avoid a discharge under this clause, it

was clearly necessary that the record of the action in which the judgment was rendered should show that the action was founded upon one of the grounds mentioned. In re Rhutassel, D.C., 96 F. 597, 599; Hargadine-McKittrick Dry Goods Co. v. Hudson, C.C., 111 F. 361, 363; see Bullis v. O'Beirne, 195 U.S. 606, 619, 25 S.Ct. 118, 49 L.Ed. 340. The fourth clause, which we are considering, read in the 1898 act as it does now. Had the Congress intended that, where a claim has, under this clause, been reduced to judgment, the nature of the obligation must be determined upon the basis of the record in the action, it would not have been apt to use the broad language: debts 'Created by * * * fraud, embezzlement, misappropriation, or defalcation.'

"The purpose of the Bankruptcy Act was 'To relieve the honest debtor from the weight of oppressive indebtedness, and permit him to start afresh free from the obligations and responsibilities consequent upon business misfortunes.' Williams v. U. S. Fidelity & Guaranty Co., 236 U.S. 549, 554, 35 S.Ct. 289, 290, 59 L.Ed. 713. It was also clearly the intent of the Congress that clemency should not be so far extended as to include obligations resulting from the acts of dishonesty specified in § 17 (11 U.S.C. § 35, 11 U.S.C.A. § 35). Where the conduct of the bankrupt has created such an obligation, the intent should be effectuated unless there has occurred some circumstance which justifies setting it aside. We are unable to see why the purpose of the Congress should be defeated because, where a defendant has been guilty of a misappropriation of money, he has given a note representing that money and the person to whom the obligation is due has taken a judgment on it. Indeed, when the note is accepted, it is probably far from the mind of the creditor that the debtor may become bankrupt, and the clemency which the former has extended to the latter in not pressing the fact of the misappropriation might, if the law were otherwise than we hold, result in the discharge of the obligation."

There are a number of decisions in which it has been held that the origin of the indebtedness may be proved by evidence dehors the record of the case in which the judgment was rendered.[1]

[3] The giving of a note by a debtor for the amount of the debt does not constitute payment unless there is an agreement between the parties that it shall be so accepted. Dick v. Woolson, 106 Cal. App.2d 415, 418, 235 P.2d 119. There was no evidence that Miss Colbert so treated the note. Acceptance of a note merely postpones the time of payment of the original debt until default is made in payment of the note. Western Fuel Co. v. Sanford G. Lewald Co., 190 Cal. 25, 26, 210 P. 419; American Marine Paint Co. v. Tooley, 53 Cal.App.2d 530, 538, 127 P.2d 960.

[4] While a judgment is sometimes said to be the highest evidence of an obligation it does not, for that reason, in all cases, foreclose an investigation into the nature of the obligation. Smith v. Broderick, 107 Cal. 644, 650, 40 P. 1033; Wilson v. Walters, 19 Cal.2d 111, 121, 119 P.2d 340; Woehrle v. Canclini, 158 Cal. 107, 108, 109 P. 888; Fitzgerald v. Herzer, 78 Cal.App.2d 127, 130, 177 P.2d 364. Mr. Justice Carter, writing for the court in Wilson v. Walters, 19 Cal.2d 111, at page 121, 119 P.2d 340, at page 345, said:

1. Packer v. Whittier, 1 Cir., 91 F. 511, 513; Greenfield v. Tuccillo, 2 Cir., 129 F. 2d 854, 856; Brown v. Hannagan, 210 Mass. 246, 96 N.E. 714, 715; Stewart v. Emerson, 52 N.H. 301, 311; Gehlen v. Patterson, 83 N.H. 328, 141 A. 914, 915; Howland v. Carson, 28 Ohio St. 625, 629; Young v. Grau, 14 R.I. 340, 341; Simpson v. Simpson, 80 N.C. 332, 334; Councill v. Horton, 88 N.C. 222, 223; Giella v. Birdman, Civ.A. 8428, Appellate Dept. Superior Court of Los Angeles County, California. Also see Mackel v. Rochester, D.C., 135 F. 904, 905.

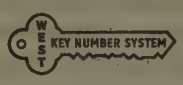
"The mere fact that the liability excepted from the discharge has been reduced to judgment does not take it out of the exception; it is the nature of the liability itself which is the determining factor. 8 C.J.S., Bankruptcy, §§ 563, 573."

[5, 6] It is clear from the evidence that the note executed by defendant was given and received as evidence of the debt growing out of his fraud and defalcation and not as satisfaction thereof. And the normal inference is that a creditor would not intentionally relinquish a nondischargeable claim for a dischargeable claim on a judgment in an action on a note given as evidence of the nondischargeable claim.

[7] We conclude that the origin of the indebtedness evidenced by the note on which the judgment was obtained may be proved by evidence dehors the record of that case; and if it appears the liability is an accepted one, that it was not dischargeable by the bankruptcy.

[8] The judgment is reversed. The appeal from the nonappealable order denying a new trial is dismissed.

SHINN, P. J., and PARKER WOOD, J., concur.



Samuel S. BLOOM, Plaintiff and Respondent,

v.

Bess BENDER, an individual, et al., Defendant and Appellant.*

Civ. 5528.

District Court of Appeal, Fourth District, California.

Jan. 17, 1957.

Hearing Granted March 13, 1957.

Action on guaranty contract to recover balance due on open account after deducting therefrom amount received by creditor upon execution of release to debtor agreeing to accept its pro rata dividend under assignment for benefit of creditors as accord and satisfaction of all liabilities. The Superior Court, Riverside County, Hilton H. McCabe, J., entered judgment for creditor and guarantor appealed. The District Court of Appeal, Coughlin, J. pro tem., held that provision of contract of guaranty reciting that liability assumed should not be affected by acceptance of any settlement or compensation, was rendered ineffective by statute abolishing distinction between sureties and guarantors and making guarantors subject to all provisions of the law relating to suretyships in general.

Reversed with instructions.

* Opinion vacated 313 P.2d 568.

1. Limitation of Actions ⇐167(1)

Fact that cause of action against debtor on its obligation was barred by statute of limitations, did not bar action against defendant on contract guaranteeing payment of that obligation, in view of statute abolishing distinction between guarantors and sureties and subjecting contracts of guaranty to all provisions of law relating to suretyships. West's Ann.Civ.Code, § 2787; West's Ann.Code Civ.Proc., §§ 337, 351.

2. Limitation of Actions ⇐84(2)

Where defendant executed a contract constituting a continuing guaranty of payment of open account and remained absent from state for 13 months, statute of limitations respecting action on guaranty itself was tolled during her absence. West's Ann.Code Civ.Proc., §§ 337, 351.

3. Limitation of Actions ⇐195(3)

Where defendant executed contract constituting a continuing guaranty of an open account for goods sold to manufacturer and there was no proof of the date on which various goods were purchased, under the circumstances the guarantor could not claim action against her was barred by statute of limitations. West's Ann.Code Civ.Proc., § 337.

4. Limitation of Actions ⇐195(3)

Burden of proving facts warranting an application of statute of limitations is upon person claiming benefit of same.

5. Guaranty ⇐77(1)

Where contract of continuing guaranty of payments on goods supplied to manufacturer recited that supplier was not required to give notice of any failure upon part of manufacturer to meet all payments as they matured, giving of notice of manufacturer's default was not condition precedent to liability, either by agreement or by law. West's Ann.Civ.Code, § 2807.

6. Guaranty ⇐59

Where creditor accepted payment under debtor's assignment for benefit of creditors in full settlement of its claims, provision in contract guaranteeing payment, that liability of guarantor should not be affected by acceptance of any settlement or composition offered by the debtor, was rendered ineffective by statutes providing that guarantors are subject to law of suretyship in general and that obligation of surety must be neither larger in amount nor in other respects more burdensome than that of principal. West's Ann.Civ.Code, §§ 2787, 2809.

7. Principal and Surety ⇐118

Where the principal is discharged, surety likewise escapes liability and the discharge of the surety in such a case is effected by operation of the law.

8. Guaranty ⇐36(1)

The language of a contract of guaranty purporting to impose an obligation on the guarantor which is greater than that of the principal is limited by plain mandate of statute providing that obligation of a surety must be neither larger in amount nor in other respects more burdensome than that of the principal. West's Ann.Civ. Code, §§ 2787, 2809.

Simon, Brown & Arnold, Palm Springs, for appellant.

Milton D. Klein, Los Angeles, for respondent.

COUGHLIN, Justice pro tem.

This appeal is taken on a clerk's transcript alone. The trial court found that on April 18, 1947, the defendant, Bess Bender, executed an instrument addressed to Crompton-Richmond Co., Inc. by which she guaranteed "the prompt payment" at maturity of all amounts owing to it by Midwest Sportswear Manufacturing Co., Inc., and agreed that the liability assumed should "not be affected by any forbearance" by it, or "by the giving of any extension of time or by any other modification" of any account or obligation or "by the acceptance of any settlement, or composition * * * either in liquidation, readjustment, receivership, bankruptcy or otherwise," that notice was not required of the different purchases, nor of any failure to meet all payments as they matured and that "immediately upon a notice of default in the payment * * * of any bill" she would pay the amount thereof; that the instrument in question constituted a continuing guarantee; that after April 18, 1947, up to November 30, 1949, Midwest Sportswear Manufacturing Co., Inc. became indebted to Crompton-Richmond Co., Inc. on an open book account in the sum of $5,031.03; that on April 16, 1951, Crompton-Richmond Co., Inc. signed a document entitled "Release" which provided that it agreed "to accept its pro rata and proportionate dividend" under an assignment for the benefit of creditors previously executed by Midwest Sportswear Manufacturing Co., Inc. "as an accord and satisfaction of and release, discharge and acquittance of * * * all claims, demands, obligations and liabilities" existing in its favor as against said manufacturing company, and thereafter accepted $321.99 under the terms of said "Release"; that this document did not release the defendant from liability under the "agreement of guaranty"; that the plaintiff is the assignee of Crompton-Richmond Co., Inc. and claims $4,709.04 from defendant; that any cause of action which Crompton-Richmond Co., Inc. had against Midwest Sportswear Manufacturing Co., Inc. was barred by the

statute of limitations; and that the defendant left the State of California on October 1, 1951, tolling the statute of limitations on the contract of guaranty until her return on November 1, 1952.

The trial court rendered judgment in favor of the plaintiff in the sum of $4,709.04 principal, together with interest at 7% per annum from November 30, 1949, from which judgment the defendant appeals.

It is contended that the judgment should be reversed because the running of the statute of limitations against the obligation on the principal barred any action against the guarantor; that the obligation of the guarantor under the contract of guaranty also is barred by the statute of limitations; that the guarantee failed to give notice of default as required by the contract; that the obligation of the guarantor, as determined by the trial court, exceeded the obligation of the principal, contrary to the provisions of Section 2809 of the Civil Code; and that the release of the principal terminated the guaranty.

[1] In 1939, the legislature abolished the distinction between guarantors and sureties by the adoption of Section 2787 of the Civil Code, which provides that, "The distinction between sureties and guarantors is hereby abolished. * * * Guaranties of collection and continuing guaranties are forms of suretyship obligations, and except in so far as necessary in order to give effect to provisions specially relating thereto, shall be subject to all provisions of law relating to suretyships in general." Prior to this time the bar of the statute of limitations against an action on the obligation of the principal foreclosed recovery from the guarantor, Anderson v. Shaffer, 98 Cal. App. 457, 277 P. 185; Santa Ana Sugar Co. v. Smith, 116 Cal.App. 422, 2 P.2d 866, but did not prevent recovery from a surety. Gaffigan v. Lawton, 1 Cal.2d 722, 37 P.2d 79; Gill v. Johnson, 8 Cal.App.2d 369, 48 P.2d 139. The provisions of Civil Code Section 2787, which abolished the distinction between sureties and guarantors, Ingalls v. Bell, 43 Cal.App.2d 356, 365, 110 P. 2d 1068, specifically subjected contracts of guaranty "to all provisions of law relating to suretyships." As a consequence, and contrary to the contention of defendant, the fact that the cause of action of Crompton-Richmond Co., Inc., on the obligation of Midwest Sportswear Manufacturing Co., Inc., was barred by the statute of limitations, did not bar the action against defendant on the contract guaranteeing payment of that obligation.

[2-4] The next question for determination is whether the action on the guaranty itself was barred by the statute of limitations. Pursuant to stipulation, the trial court found that between April 18, 1947 and November 30, 1949, Midwest Sportswear Manufacturing Co., Inc. became indebted to Crompton-Richmond Co., Inc. in the sum of $5,031.03 on an open book account for goods purchased. There is no evidence establishing the date of purchase of any of these goods. This action was commenced June 10, 1954. Defendant relies on the four-year statute of limitations. Code Civ.Proc., Sec. 337. The running of the statute was tolled during the thirteen months when defendant was absent from the State of California, Code Civ.Proc., Sec. 351. As a consequence plaintiff's cause of action would not be barred unless it accrued prior to May 11, 1949. Even assuming that defendant's liability as a guarantor accrued when goods were furnished to her principal, Brock v. Western Nat. Indem. Co., 132 Cal.App.2d 10, 16, 281 P.2d 571, there is no proof that the goods representing the balance now due on the account were not delivered between May 11, 1949 and November 30, 1949. The burden of proving facts warranting an application of the statute of limitations was upon the defendant. Wise v. Williams, 72 Cal. 544, 548, 14 P. 204. Failure of such proof required an adverse finding.

[5] The defendant's contention that notice to her of the principal's default was a condition precedent to liability is without merit. Neither the agreement in question nor the law required such notice.

Civ.Code, Sec. 2807. The defendant guaranteed the "prompt payment" of all amounts owed by her principal; agreed that the guarantee is not required to give notice of any failure on the part of the principal to meet all payments as they matured; and promised that "immediately" upon notice of default in the payment of any bill by the principal to pay the same "without question". To give meaning to all of the terms of this contract it is necessary to interpret it as providing that notice of default on the part of the principal need not be given to the guarantor, but if given she would pay the amount due "immediately" and "without question."

[6–8] The final contention of the defendant concerns the effect of the guarantee's release of the principal upon the obligation of the guarantor under her agreement. The guarantee accepted $321.99 under the principal's assignment for the benefit of creditors, in full settlement of its claims. The contract of guaranty in this case stated: "The liability hereby assumed shall not be affected by * * * the acceptance of any settlement or composition offered by the customer, either in liquidation, readjustment, receivership, bankruptcy or otherwise." Plaintiff contends that the langauge of the contract is clear and constitutes a consent to the acceptance of the $321.99 in the assignment. However, whether the defendant consented to the acceptance of this settlement or composition is not decisive of the issue under consideration. The guarantor's liability may not be determined exclusively by the written provisions of the contract of guaranty. The law applicable thereto also must be considered. Section 2809 of the Civil Code provides: "The obligation of a surety must be neither larger in amount nor in other respects more burdensome than that of the principal; and *if in its terms it exceeds it, it is reducible in proportion to the principal obligation.*" (Italics ours.) As heretofore noted guaranties are subject to all provisions of law relating to suretyships. Civ.Code, Sec. 2787. "[T]he liability of a guarantor is limited in amount to that which could be recovered from the principal." Lewin v. Hanford, 35 Cal.App. 36, 38, 169 P. 242, 243. A judgment entered against a principal is the measure of the maximum liability of the guarantor. State Athletic Comm. of California v. Massachusetts Bonding, etc., Co., 46 Cal.App.2d 823, 827, 117 P.2d 75. In Goatman v. Pacific Ready-cut Homes, Inc., 112 Cal.App. 397, 402, 297 P. 68, 70, the court said: "It requires but little citation to support the rule that, where the principal is discharged, the surety likewise escapes liability." The discharge of the surety in such a case is effected by operation of law. Holden v. Mensinger, 175 Cal. 300, 304, 165 P. 950. The language of a contract of guaranty purporting to impose an obligation on the guarantor which is greater than that of the principal is limited by the plain mandate of the statute. The law is a part of the contract. Hub Hardware Co. v. Aetna Acc., etc., Co., 178 Cal. 264, 173 P. 81; Bell v. Minor, 88 Cal.App.2d 879, 881, 199 P.2d 718; Hales v. Snowden, 19 Cal.App.2d 366, 369, 65 P.2d 847. As a consequence, the promise of the defendant, that the liability assumed by her "shall not be affected by * * * the acceptance of any settlement or composition offered by the" principal, contains an implied exception of those settlements or compositions which discharge the obligation of the principal, and an implied limitation on the amount of the guarantor's liability in those instances where the settlement or composition reduces the amount of the principal's obligation, although it does not effect a discharge thereof. A principal has the right to set up a release from liability as a defense to an action on the original obligation. A promise in a contract of guaranty which deprives the guarantor of this right certainly creates an obligation "more burdensome than that of the principal", and to that extent is ineffective.

It is our opinion that the provision of the contract of guaranty in this case which attempts to hold the defendant liable for the amount of the principal's original obligation, after the plaintiff's assignor and

the principal discharged that obligation, is rendered ineffective by the statute.

The judgment appealed from is reversed, with instructions to the trial court to enter judgment in favor of the defendant.

BARNARD, P. J., and GRIFFIN, J., concur.



149 Cal.App.2d 776

Florence Vidor HEIFETZ, formerly Florence Vidor, Plaintiff and Appellant,

v.

BANK OF AMERICA NATIONAL TRUST AND SAVINGS ASSOCIATION et al., Defendants and Respondents.

Civ. 22019.

District Court of Appeal, Second District, Division 2, California.

Jan. 23, 1957.

Hearing Denied March 20, 1957.

Action by trustor against trustee and others to obtain judicial determination of trustor's right to revoke her inter vivos trust and obtain delivery of the trust assets. The Superior Court, Los Angeles County, Clarence M. Hanson, J., entered judgment adverse to trustor, and trustor appealed. The District Court of Appeal, Ashburn, J., held that, in view of inhibition, in declaration of trust as amended, upon trustor's withdrawal of trust assets if such withdrawal would reduce trust res to less than $150,000 in value, expressed power in trustor to revoke in part would be taken to refer to other aspects of the trust, the most obvious of which would be identity of beneficiaries and the scheme of distribution, and, therefore, trustor had right to change trust by making herself and her daughter the sole beneficiaries, to exclusion of all former remaindermen, vested or contingent, born or unborn, and then terminate the trust with her daughter's consent.

Judgment reversed with instructions.

1. Appeal and Error ⇐882(3)

Fact that, in action to obtain determination whether trustor had effected a revocation of the trust and was entitled to delivery of trust assets to her, parties expressly agreed that power to revoke trust, in whole or in part, as expressed in the original declaration of trust, included the power to amend and that certain amendments were valid did not relieve the District Court of Appeal of duty to determine such question.

2. Appeal and Error ⇐882(1)

Agreement of parties to an action upon the law of the case does not bind a court of review.

3. Trusts ⇐58

Where declaration of trust gave trustor right to withdraw trust assets and thus reduce amount of the corpus and reserve to trustor right to revoke trust in whole or in part, the reserved power to revoke the inter vivos trust embraced an implied power on part of trustor to amend by changing beneficiaries or scheme of distribution, and therefore subsequent amendments which modified scheme of distribution and which made trust irrevocable by trustor as to money or property held in the trust up to a certain value were valid.

4. Trusts ⇐112

Nature and extent of rights retained by trustor are to be measured by the four corners of the trust instrument.

5. Trusts ⇐58, 59(1)

Any right, found in trust instrument, on part of trustor to revoke or amend can be exercised lawfully by trustor without regard to the effect on remaindermen's rights, since trustor owes them no duty to refrain from exercising any reserved right.

6. Trusts ⇐58, 61(3)

In view of inhibition, in declaration of inter vivos trust as amended, upon trus-

tor's withdrawal of trust assets if such withdrawal would reduce trust res to less than $150,000 in value, expressed power in trustor to revoke in part would be taken to refer to other aspects of the trust, the most obvious of which would be identity of beneficiaries and the scheme of distribution, and, therefore, trustor had right to change trust by making herself and her daughter the sole beneficiaries, to exclusion of all former remaindermen, vested or contingent, born or unborn, and then terminate the trust with her daughter's consent. West's Ann. Civ.Code, § 2280.

7. Trusts ⇐61(3)

Policy of state of California favors alienability of property and the termination of trusts upon application of all beneficiaries when they are sui juris and when no subversion of trustor's expressed wishes is apparent. West's Ann.Civ.Code, § 2280.

Scudder & Forde, Pacific Palisades, Guy Richards Crump, Los Angeles, for appellant.

Freston & Files, Eugene D. Williams, Los Angeles, for respondent Bank of America Nat. Trust & Savings Ass'n as Trustee.

Joseph J. Burris, Los Angeles, for respondent Los Angeles Orthopaedic Foundation.

Albert Lee Stephens, Jr., Los Angeles, for respondent Viola Powell, as guardian ad litem.

Macdonald & Halsted, Los Angeles, for respondent Adams.

ASHBURN, Justice.

This case presents two controlling questions. Does reserved power to revoke, wholly or in part, an inter vivos trust embrace an implied power to amend? If yes, can the trust, though expressly declared irrevocable, be terminated by the process of eliminating beneficiaries through amendments until there are left only one or more who are sui juris and who join in a notice of revocation and a demand for delivery of the property? As applied to the facts at bar the authorities require an affirmative answer to each question.

On January 14, 1925, plaintiff, then named Florence Vidor, created a trust with Bank of Italy, the corporate predecessor of defendant Bank of America National Trust and Savings Association. The declaration of trust provides that the net income be paid to the trustor or her daughter, Suzanne Vidor (now Suzanne Vidor Adams), dependent upon certain contingencies of age and survivorship; Suzanne to take half of the corpus and accumulated income at the age of 25 years or at the death of her mother; the trust to terminate entirely on Suzanne's 35th birthday if the trustor be not then living, or upon her death if it occur after Suzanne reaches the age of 35. Upon such termination the entire trust is to go to Suzanne, if living, but if she be deceased then to her lawful issue by right of representation; in the absence of such issue the estate to go to trustor's mother or her sister or to the children or grandchildren of the sister, depending upon certain specified contingencies; or, in a certain event, to the trustor's heirs at law exclusive of her husband.

Paragraph 2 of the declaration of trust specifically provides that the trustor may add to the corpus at any time, and paragraph 10 reserves the right to withdraw from the trust at any time any portion or all of the trust estate. Paragraph 9 reserves to the trustor "the right and option to cancel and revoke this trust in whole or in part at any time during her lifetime by the service of a notice in writing of such cancellation and revocation upon the trustee, such notice to be served as hereinafter provided, and immediately upon the expiration of thirty (30) days from the service of said notice, this trust shall forthwith cease and determine and the trustee shall immediately restore, repay, transfer, convey, assign and deliver to the trustor all of the trust estate and property, including principal and income, then held by it hereunder, or if such cancellation and revocation be only partial, such part of said

trust estate and property as the trustor may elect to receive."

On December 28, 1927, the trustor amended the trust instrument to provide, among other things, that after her death the income should go to Suzanne, who on her 21st birthday should receive $25,000 of corpus and a like amount at the end of each five-year period; but it is further provided that the corpus in no event shall be reduced to less than $75,000, and "that the trust shall never be revoked as to property of this value during the continuance of the trust, but that the said Suzanne Vidor shall, during her lifetime, receive the income from the sum of Seventy-five Thousand Dollars ($75,000), and in the event the payments, herein provided, of Twenty-five Thousand Dollars ($25,000), at each five year period should, during the lifetime of Suzanne Vidor reduce the trust to this amount, then such payments shall cease and terminate." It is also provided that the trust terminate upon the death of Suzanne if her mother be not then living, and that the remainder be distributed to different persons and in a different manner from that provided in the original declaration. The amendment concluded as follows: "In all other respects the trust agreement and the trusts therein created are hereby fully ratified and confirmed."

On December 31, 1928, another amendment was made by the trustor and accepted by the trustee. It expressly changed paragraph 9 to read: "Anything else herein contained to the contrary notwithstanding, the Trustor hereby reserves, and she is hereby expressly given and granted the right and option to cancel and revoke this trust *in part* at any time during her lifetime by the service of a notice in writing of such cancellation and revocation upon the Trustee, such notice to be served, as hereinafter provided, and immediately upon the expiration of thirty (30) days from the service of said notice, this trust shall forthwith cease and determine as to such part of said trust estate and property as such partial termination shall designate.

"Said Trustor shall not, however, at any time, by such revocation, withdraw from the hands of the Trustee or from said trust estate any money or property which shall reduce the trust estate to a value of less than One Hundred Fifty Thousand Dollars ($15,000.00) [sic], it being the intention of the Trustor herein to make said trust at this time and to continue during the lifetime of the Trustor *irrevocable by any act on her part as to money or property* held in said trust of a value of at least One Hundred Fifty Thousand Dollars ($150,000.00) * * * it being the intention of the Trustor at this time, and by this act and instrument, to create a portion of said trust estate in a value not to exceed One Hundred Fifty Thousand Dollars ($150,000.00), and to take and withdraw from herself any authority, hereinbefore contained in said Declaration of Trust, to reduce said trust estate to a sum less than said amount." (Emphasis added.) The document concludes with this: "In all other respects the trust agreement and the trusts therein created are hereby fully ratified and confirmed." It appears that there never has been as much as $150,000 in the trust, its value being about $143,000 at the time of trial.

The trustor having remarried, two children were born to her after the making of the 1928 amendment, namely, Josepha Heifetz and Robert Heifetz, who were aged 24 and 22 years, respectively, at the time of the trial. It is a fair inference that the addition of these children to her family was a motivating cause for the termination of the trust.

On May 15, 1953, plaintiff gave notice to the bank requesting termination of the trust and delivery to her of all trust property, pursuant to paragraphs 9 and 10 of the original trust agreement, stating that she had been advised by counsel that the amendments were invalid and that she repudiated the same. After the bank's refusal to comply plaintiff filed her original complaint on September 3, 1953, based upon this notice and demand. It sought a judicial determination of revocation of the

trust and delivery of all assets to plaintiff. The bank filed an answer.

Subsequently, on January 7, 1954, plaintiff served another notice on the bank (without waiving any rights or prior demand) to revoke the trust in part, i. e., all provisions which provide for payment or distribution to anyone other than herself and daughter. The pertinent language is: "I hereby revoke each and all of the provisions in said Declaration of Trust, and in each amendment, or purported amendment thereto, insofar as the same does, or purports to, provide for the payment or distribution of any of the income or corpus of the trust estate to anyone other than myself and my daughter, Suzanne Vidor (now Suzanne Vidor Adams)."

Two days later, on January 9, 1954, she served a further notice (without prejudice to her former purported cancellation and revocation) revoking the original trust and the two amendments in their entirety and demanding delivery of the trust corpus. Her daughter evidenced her consent in writing. Because of the pending litigation, the bank refused to comply. Thereupon the pleadings were appropriately amended and the court tried the case upon the basis of all the foregoing documents.

Plaintiff's claim of termination was and is resisted not only by the trustee but also by contingent remaindermen, some of whom are infants and others are unborn, both of the latter classes appearing by guardians ad litem.

The trial court held that under the original agreement giving trustor the power to revoke or cancel in whole or in part, she could amend the trust, and the 1927 and 1928 amendments are valid; also that she had the right to change the beneficiaries as she did by the 1927 amendment; that paragraph 10 was impliedly revoked by the 1928 amendment; that by reason of that amendment to paragraph 9, the trust is irrevocable as to $150,000 and she cannot reduce the estate to a sum less than that amount, nor can she cancel, revoke, amend or change the beneficiaries of said trust insofar as the same shall affect any of the assets to the extent of $150,000; that the notices of revocation are invalid and ineffective and the trust has not terminated. The judgment contains the following: "[T]he Court hereby adjudges and decrees that she did thereby render said trust irrevocable as between herself, the trustee and all of the beneficiaries thereof to the extent of $150,000.00 of the value of the assets of the corpus of said trust; plaintiff retaining the right to cancel, revoke or amend said trust as to any part of the assets thereof in excess of $150,000.00." Also: "That the plaintiff does not have the power to cancel, revoke or amend or to change the beneficiaries of said trust insofar as the same shall affect any of the assets of said trust to the extent of $150,000.00."

[1,2] Counsel for all parties expressly agree that the power to revoke in whole or in part, as expressed in the original declaration, includes the power to amend, and that the 1927 and 1928 amendments are valid. But though that agreement upon the law is persuasive, it does not relieve this court of the duty to determine the question, for the agreement of the parties upon the law of the case does not bind a court of review. Desny v. Wilder, 46 Cal.2d 715, 729, 299 P.2d 257. The basic question at bar is whether a reserved power of total or partial revocation includes a right to amend.

The cases are few, and while their general tenor and that of the text books is in favor of the existence of such implied power, Long v. Cleveland Trust Co., Ohio Com.Pl., 97 N.E.2d 107, 108; Chase Nat. Bank of City of New York v. Mackenzie, Special Term, 192 Misc. 172, 76 N.Y.S.2d 19, 22–23; 3 Scott on Trusts, § 331.1, page 1811; 4 Bogert on Trusts and Trustees, § 996, at page 463; Stevenson on Drafting Wills and Trust Agreements, § 15.3, page 322, the correct appraisal of the state of the law seems to be that of 1 Nossaman on Trust Administration and Taxation, § 306, page 289: "Does power to revoke include power to amend? It has been held that it does not where the only power reserved is to revoke the trust in its entirety. Where

the terms of the trust are less explicit, the answer is more doubtful. The Restatement (§ 331g) is favorable to the view that the power to amend is included in the power to revoke. The authorities upon the point do not seem to be numerous. As a practical proposition, the principle referred to, if it exists, is too uncertain, too dependent on language furnishing only disputable evidence of intent, to provide a safe working rule." The Restatement of Trusts, § 331, Comment g, on page 1001, says: "It is a question of interpretation to be determined in view of the language used and all the circumstances whether a power to revoke the trust includes a power to modify it. Ordinarily a general power to revoke the trust will be interpreted as authorizing the settlor not only to revoke the trust in part by withdrawing a part of the trust property from the trust (see § 330, Comment n), but also to modify the terms of the trust, and it will be unnecessary for the settlor first to revoke the trust and then to create a new trust. If, however, the effect of the modification is to add to or vary the duties of the trustee, this is a ground for permitting the trustee to resign as trustee (see § 106). If the settlor reserves power to revoke the trust 'as an entirety,' he cannot modify the trust, although he can revoke the trust and if he so desires create a new trust."

[3] In the instant case the declaration specifically declares the right of the trustor to withdraw assets and thus reduce the amount of corpus (par. 10). The same thought is repeated in the revocation clause (par. 9). But if that were all that was intended there would have been no occasion for having both paragraphs as 10 would be all sufficient. The preliminary language of 9 is: "Anything else herein contained to the contrary notwithstanding, the trustor reserves, and she is hereby expressly given and granted the right and option to cancel and revoke this trust in whole or in part at any time during her lifetime by the service of a notice in writing of such cancellation and revocation upon the trustee." This is not necessarily limited by the language which immediately follows and relates to redelivery of assets covered by a revocation; it is directed primarily to the consequence of a total revocation and, when speaking of a partial one, provides for delivery of "such part of said trust estate and property as the trustor may elect to receive." If, perchance, the trustor revokes some portion of the trust (e. g., a gift to her daughter), that would not entail any redelivery of property nor evidence any election of the trustor to receive any, but it would be a partial revocation nevertheless. Nor is the quoted passage limited to a total revocation, as was the case in National Newark & Essex Banking Co. v. Rosahl, 97 N.J.Eq. 74, 128 A. 586, 587. The reasonable construction of the provision under consideration is that the power extends to something more than withdrawal of assets, to modifications such as change of beneficiaries or scheme of distribution. We agree with counsel that the trial judge correctly held the amendments of 1927 and 1928 to be valid,—this because of an implied power embraced within the reservation of power to revoke in whole or in part.

Accepting this as the basic rule it appears that the trust was made irrevocable to the extent of $75,000 in 1927, and to the extent of $150,000 in 1928. In each instance the power to revoke in part was retained.

[4, 5] In considering the effect of the 1928 amendment (around which the real controversy at bar revolves) it is to be remembered that there is nothing in the record to suggest that the trust was based upon any consideration moving from anyone to Mrs. Vidor, or that it was not wholly gratuitous and in the nature of a settlement upon the issue of the trustor. By its terms she conferred certain future interests upon them, but those interests were upon condition subsequent and subject to being defeated upon the trustor exercising her reserved right to revoke wholly or in part. The nature and extent of the rights retained by the trustor are to be measured by the four corners of the instrument. Any right of revocation or amendment found therein

can be exercised lawfully by her without regard to the effect upon the rights of remaindermen, for the simple reason that she owes them no duty to refrain from exercising any reserved right.

[6] We find no basis for a holding that the trust was frozen with respect to the $150,000 corpus so that no change could be made in the identity or respective shares of beneficiaries. The language of the 1928 amendment definitely attaches irrevocability to corpus of a value of $150,000 or less, but does not mention any other restriction upon the right of the trustor to deal with the trust by way of amendment. On the contrary the trustor concludes the matter with a declaration of "it being the intention of the Trustor at this time, and by this act and instrument, to create a portion of said trust estate in a value not to exceed One Hundred Fifty Thousand Dollars ($150,000.00), and to take and withdraw from herself any authority, hereinbefore contained in said Declaration of Trust, to reduce said trust estate to a sum less than said amount." Plainly no existing power or authority was intended to be withdrawn other than that of a right to reduce the amount of corpus to less than $150,000. At the time of this amendment the trust property had never reached a value of $150,000, and the language used in amended paragraph 9 actually related to the entire trust then existing. It is a fair inference that the expressed power to revoke in part when contrasted with the inhibition upon withdrawal of assets which would reduce the trust to less than $150,000 was intended to refer to other aspects of the trust, the most obvious of which would be identity of beneficiaries and scheme of distribution. It is conceded by respondent that that power to change the terms of the trust was reserved as to any property exceeding $150,000 in value, and we perceive no substantial basis for holding that it was not also reserved as to the $150,000 of assets, the then existing trust. So the trustor had the right in January, 1954, to change the trust to the extent of making herself and her daughter the sole beneficiaries, thus eliminating all remaindermen, vested or contingent, born or unborn.

After this was accomplished trustor and her daughter, as sole beneficiaries, joined in a notice to the trustee of revocation in toto and demand for the assets. The court held this could not succeed, as it would accomplish by indirection the result forbidden by the irrevocability clause covering the $150,000. The authorities preponderate to the contrary. Manice v. Howard Sav. Institution, 30 N.J.Super. 267, 104 A.2d 74, 75–76; Petition of Tucker, Sup. Special Term, 70 N.Y.S.2d 626, 627; Faulkner v. Irving Trust Co., 231 App. Div. 87, 246 N.Y.S. 313, 314; Meyer v. Bank of Manhattan Trust Co., 232 App. Div. 228, 249 N.Y.S. 640, 643–644; Schellentrager v. Tradesmens Nat. Bank & Trust Co., 370 Pa. 501, 88 A.2d 773, 775; Sayers v. Baker, Tex.Civ.App., 171 S.W.2d 547, 551; Guaranty Trust Co. of New York v. Howe, Special Term, 193 Misc. 640, 86 N.Y.S.2d 808, 812; Annotations in 38 A.L.R. 941, 965; 91 A.L.R. 102, 114; 131 A.L.R. 457, 469; "Revoking a Trust" by Prof. Scott, 65 Harv.L.Rev. 617; 3 Scott on Trusts, § 338, pp. 1860–1861.

The matter is thus stated in Manice v. Howard Sav. Institution, supra, 30 N.J. Super. 267, 104 A.2d 74, 75: "Where the settlor's power to modify a trust is unrestricted, he can so modify it as to exclude all the beneficiaries, and make himself the sole beneficiary, and, therefore, an unrestricted power to modify includes a power to revoke the trust. Scott on Trusts, § 331.2, p. 1812; Restatement, Trusts, § 331h, p. 1002.

"Once it is determined that the settlor is the sole beneficiary, it is generally held that he can terminate the trust and compel the trustee to reconvey the trust property to him, even though the agreement expressly provides that he should have no power to revoke it and even though the purposes of the trust have not been fully accomplished. Since no one but the settlor has any beneficial interest in the trust, if he is not under a legal disability, he

should be permitted to do with it as he wills, regardless of the prudence of its creation.

"In interpreting and construing the trust instrument in the instant case, it should be considered that the property involved was the settlor's own and that by virtue of the expressed reserved power to change the beneficiaries, no one acquired any right under the instrument, except that of the defendant to administer the trust in accordance with its terms."

[7] The cited authorities are in consonance with the policy of this state which, as declared by the Supreme Court, favors free alienability of property and the termination of trusts upon application of all beneficiaries when they are sui juris and where no subversion of the expressed wishes of the trustor is apparent. In this state § 2280, Civil Code, provided at the time this trust was created: "A trust cannot be revoked by the trustor after its acceptance, actual or presumed, by the trustee and beneficiaries, *except by the consent of all the beneficiaries,* unless the declaration of trust reserves a power of revocation to the trustor, and in that case the power must be strictly pursued." (Emphasis added.) When amended in 1931 the new section concluded as follows: "Trusts created prior to the date when this act shall become a law shall not be affected hereby." Appellant's right to a termination with consent of the only other beneficiary is sustained not only by the code section, but also by Eakle v. Ingram, 142 Cal. 15, 17, 75 P. 566, and Fletcher v. Los Angeles Trust & Savings Bank, 182 Cal. 177, 179, 187 P. 425. The rule was recognized in Bixby v. California Trust Co., 33 Cal.2d 495, 497, 202 P.2d 1018. Of course, cases dealing with termination contrary to the supposed desire of the trustor are not pertinent here, for the application is made by the trustor herself. Indeed, respondents say in their brief: "The respondent trustee has not, at any point in this case, taken the position that, if *all* parties can and do consent to the termination of a trust that such termination would not be proper."

The argument that the trustor should not be thus enabled to accomplish indirectly what she could not do directly, does not induce a different conclusion. The trust, in its various mutations, was in the nature of a gift to the named beneficiaries, subject to a condition subsequent, a change of mind of the trustor resulting in an amendment revoking the share of any one or more of them. When the trustor reached the point of declaring the trust irrevocable to the extent of $150,000 and retained power to partially revoke in other respects, she reserved thereby the legal right to change her mind again, and to make her daughter the sole beneficiary or to place her daughter and herself in that category. That point having been reached she owed no further duty to conditional beneficiaries previously named, and there was no legal impediment to her terminating the trust with the consent of the daughter.

The judgment is reversed with instructions to enter judgment in accordance with paragraphs first and second of the prayer of the amended and supplemental complaint.[1]

MOORE, P. J., and FOX, J., concur.

1. Said paragraphs read: "*First:* That said trust evidenced by the declaration of trust dated January 14, 1925, be adjudged and decreed canceled, revoked and terminated;

"*Second:* That defendant Bank of America National Trust and Savings Association account to plaintiff for all assets including accrued income in its possession or control, and deliver and pay over the same to plaintiff in accordance with the provisions of paragraphs 9 and 10 of said declaration of trust."

147 Cal.App.2d 803

The PEOPLE of the State of California, Plaintiff and Respondent,

v.

Kenneth P. BARNUM and Alfred Bundy, Defendants and Appellants.

Cr. 1215.

District Court of Appeal, Fourth District, California.

Jan. 24, 1957.

Hearing Denied March 20, 1957.

Defendants were convicted of burglaries, and from a judgment of the Superior Court of Kern County, and from orders denying motions for new trial, W. L. Bradshaw, J., defendants appealed. The District Court of Appeal, Coughlin, J., pro tem., held, inter alia, that the circumstantial evidence was sufficient to prove that defendants were the persons who committed the burglaries, but that the convictions would be reversed because the defendants did not by use of language consent to waiver of trial by jury.

Reversed.

1. Criminal Law ⇐566

The identification of the perpetrator of an offense may be established entirely by circumstantial evidence.

2. Criminal Law ⇐1159(2)

Where circumstantial evidence was relied upon to prove that defendants committed burglaries, contention that samples of material furnished to chemist were not of adequate size to justify his conclusion regarding similarity between samples of material furnished him and those which he obtained from clothing of defendants went to weight of evidence which was not a subject of review by the appellate court.

3. Criminal Law ⇐1159(6)

A conviction may not be set aside because the evidence is susceptible of two reasonable inferences, one looking to guilt of defendant and the other to his innocence.

4. Criminal Law ⇐317

Where circumstantial evidence was relied upon to prove that defendants committed burglaries, and chemist testified to similarity between samples of material furnished him and those which he obtained from clothing of defendants, defendants' failure to testify with respect to such matters although they could reasonably be expected to know where they might have come in contact with materials involved justified belief that inferences unfavorable to them were the more probable.

5. Criminal Law ⇐316, 317, 351(3)

Where circumstantial evidence was relied upon to prove that defendants committed burglaries, the unsatisfactory explanation, by one defendant, of their presence in locality where burglaries occurred, refusal of other defendant to answer questions directed toward ascertaining their reason for being in such locality, and their unexplained flight when pursued by officers, were circumstances showing a consciousness of guilt.

6. Criminal Law ⇐552(1)

Although a single circumstance, pointing to guilt of a defendant, when considered alone, may be entitled to little weight, when considered with other similar circumstances, may be significantly incriminating.

7. Burglary ⇐41(6)

Circumstantial evidence was sufficient to prove that defendants were the persons who committed burglaries.

8. Jury ⇐29(6)

Under constitutional provision that trial by jury may be waived in all criminal cases, by consent of both parties, expressed in open court by defendant and his counsel, the consent of defendant must be expressed by him personally and may not be implied. West's Ann.Const. art. 1, § 7.

9. Criminal Law ⇐1166(1)

Where attorney for two defendants charged with burglaries advised court that defendants waived a trial by jury, district attorney joined in such waiver and defendants were present but made no statement and were not asked personally whether they joined in the waiver and made no objection to proceeding to trial before court without a jury, conviction would be

reversed since consent of a defendant waiving a trial by jury must be expressed by use of language. West's Ann.Const. art. 1, § 7.

John H. Marshall, Los Angeles, Harold J. Ackerman, Los Angeles, of counsel, for appellants.

Edmund G. Brown, Atty. Gen., William E. James, Deputy Atty. Gen., for respondent.

COUGHLIN, Justice pro tem.

A market, drugstore and post office in Buttonwillow, California, were burglarized in the early morning of November 26, 1955, at about 4 o'clock. Shortly thereafter, the local office of the sheriff sent out an alarm; a road block was set up on Buttonwillow highway; a few minutes later a deputy sheriff observed an automobile going easterly along this highway and gave chase; the automobile increased its speed; its lights were turned off and on; the sheriff's car increased its speed up to 85 miles per hour and displayed a red light for a mile and a half and sounded a siren for three-quarters of a mile before overtaking the pursued automobile which was occupied by the defendants, who were taken into custody and charged with the burglaries in question. The informations accusing the defendants of these offenses also charged the defendant Bundy with two prior convictions and the defendant Barnum with three prior convictions.

At the time set for trial the attorney for defendants waived a trial by jury and proceeded to trial. The court found each of the defendants guilty of each of the burglaries and also found that the allegations with respect to the prior convictions were true. Motions for new trial were made and denied. Judgments of imprisonment in the state penitentiary followed. This appeal is from the judgments and orders denying defendants' motions for new trial.

The defendants contend that the evidence is insufficient to identify them as the persons who committed the burglaries, and it was error for the court to try the case without a jury as they did not waive a trial by jury in the manner required by law.

[1] Circumstantial evidence is relied upon to prove the defendants were the persons who committed the crimes in question. The identification of the perpetrator of an offense may be established entirely by such evidence. People v. Goodall, 104 Cal.App.2d 242, 247, 231 P.2d 119; People v. Mattmueller, 30 Cal.App.2d 532, 89 P.2d 838.

The three buildings which were burglarized were in close proximity. Attempts to break into the market were made in several places; a board was pried off the outside of a walk-in refrigerator and sawdust insulation fell out; at another section of this refrigerator, where an entry was attempted, fused silica insulation dropped out; and at a third place, which was an old ice chute, red fiber insulation was uncovered. Samples of each of these insulating materials were taken to a forensic chemist who found particles of similar material in the clothing of defendants which had been delivered to him for examination. There were heel prints in the rear of the market similar to prints which could have been made by the heels on defendants' shoes.

In the post office the burglars pried open two safes. One of them was "peeled". In doing so a type of white insulating substance, known as fire clay, was scattered over the floor. This fire clay contained a gold-colored mica which the forensic chemist described as being the same in appearance and composition as samples of mica in a white clay which he removed from the shoes, socks, trousers, cuffs and coat pockets of the defendants. Samples of green paint from the two safes were furnished the chemist and he testified that these were similar in appearance and composition to paint chips which he removed from the shoes and clothing of the defendants. In the rear of the post office there were heel prints similar to those near the market, and which could have been made by the defendants' shoes. From one of the safes a green box containing money was removed. This box was

found on the morning of the burglary alongside the highway over which defendants had traveled, during what appeared to be an attempt to flee from the officers pursuing them, at a point about a mile from where they were stopped. Money was scattered in the vicinity.

In the drugstore, the burglars had ransacked drawers in the prescription room and stolen some narcotics. On the floor was a blue bag containing a drill, hammer, punch and other instruments useful in forcing a safe. In this bag, and on the drill, hammer and punch, there were paint chips similar in physical appearance and chemical composition to the paint chips found on the clothing of the defendants and the samples taken from the post office safes. Also in this bag were mica, reddish wood fibers and fused silica particles similar to those found in the clothing of the defendants and the samples from the market and post office. There was a piece of cardboard on the floor with a heel print on it which an officer testified was similar to the other heel prints heretofore described. Additional heel prints, with the same design, were found in the rear of the store. On the head of the hammer in the blue bag was a fragment of brass and, on examination, a fragment of brass dropped from the shoes of the defendant Bundy. A man was seen coming from the back door of the drugstore, shortly after the officers had been called, who was described as wearing a faded blue jacket. The defendant Bundy was wearing a powder blue sport shirt at the time of his arrest. This man ran through some brush-covered terrain, along near-by railroad tracks, and was chased by one of the officers, but was not overtaken. The brush was described as tumble weed. When arrested, particles of tumble weed were on the trousers of both defendants. The forensic chemist who had been furnished with samples of tumble weed from the area in question, testified that pods from the tumble weed furnished him, which he described as plant material, appeared to be the same as the plant material found on the defendants' clothing. These pods had characteristics which made them readily identifiable. Along the railroad tracks there were additional heel prints similar to those found in the vicinity of the buildings.

When questioned, the defendants gave an unsatisfactory explanation respecting their presence in the vicinity. Bundy said they left Los Angeles on November 24th and went to San Francisco; that they left San Francisco on November 25th to return to Los Angeles and lost their way; they had been in San Luis Obispo, which is on United States Highway 101, many miles away; they were riding in an automobile belonging to a friend of Barnum, whose name he did not know; and he had been employed in Los Angeles but, with one exception, did not know the names of his employers. Barnum said he was in a predicament and would not talk; to most of the questions asked him he made the reply: "No comment", or refused to answer. Neither of the defendants testified at the trial.

[2-4] The principal attack upon the sufficiency of the evidence is directed at the opinions of the forensic chemist who testified to the similarity between samples of material furnished him and those which he obtained from the clothing of the defendants. It is contended that the samples were not of adequate size to justify the conclusion reached. This contention goes to the weight of the evidence which is not a subject of review by this court. In re Estate of Teel, 25 Cal.2d 520, 527, 154 P.2d 384; People v. Primo, 121 Cal.App. 2d 466, 469, 263 P.2d 443; People v. Mercer, 103 Cal.App.2d 462, 466, 229 P.2d 411. It is contended, also, that the trial court was not authorized to infer that the samples found on the defendants' clothing were from the same source as the samples given to the chemist because his identification thereof was limited to describing them as appearing to be the same, similar, of the same color, having the same chemical elements, or similar in physical appearance and chemical composition. It is argued that the materials taken as samples from the defendants' clothing could have come from sources other than the insulating ma-

terials at the market, the safes at the post office or the tumble weeds along the railroad tracks. Likewise, that the heel prints could have been made by shoes other than those of the defendants. Nevertheless, in the light of all the circumstances, it is reasonable to conclude that the source of the materials and footprints in question connect the defendants with the commission of the burglaries under consideration, even though a contrary conclusion also might be reasonable. "A conviction may not be set aside because the evidence is susceptible of two reasonable inferences, one looking to the guilt of the defendant and the other to his innocence". People v. Green, 13 Cal.2d 37, 42, 87 P.2d 821, 823. The conclusion drawn by the trial court is supported by the failure of the defendants to testify and explain the source of the materials found on their clothing. They could reasonably be expected to know where they may have come in contact with tumble weeds, white clay containing mica, sawdust, red insulation material, fiber glass, identified by the expert as fused silica, or particles of green paint, and their failure to testify with respect to these matters justified the belief that the inferences unfavorable to them were the more probable. People v. Adamson, 27 Cal.2d 478, 491, 165 P.2d 3; People v. Kross, 112 Cal. App.2d 602, 610, 247 P.2d 44.

[5] The unsatisfactory explanation, by one of the defendants, of their presence in the locality where the burglaries occurred; the refusal of the other defendant to answer questions directed toward ascertaining their reason for being in this locality; and their unexplained flight when pursued by the officers, are circumstances showing a consciousness of guilt. People v. Waller, 14 Cal.2d 693, 702, 96 P.2d 344; People v. Yeager, 194 Cal. 452, 486, 229 P. 40; People v. Weber, 149 Cal. 325, 339, 86 P. 671; People v. Moody, 93 Cal.App.2d 66, 71, 208 P.2d 692.

[6, 7] Although a single circumstance, pointing to the guilt of a defendant, when considered alone, may be entitled to little weight, when considered with other similar circumstances may be significantly incriminating. People v. Steccone, 36 Cal.2d 234, 240, 223 P.2d 17. The whole of the circumstances in this case constitute substantial evidence supporting the judgment of the trial court.

The remaining contention of the defendants concerns the effect of the proceedings at the time the jury was dismissed and the case proceeded to trial before the court. The attorney for defendants advised the court that they waived a trial by jury. The district attorney joined in this waiver. Thereupon, the court ordered a roll call of the prospective jurors present and advised them that they were excused, as the defendants had waived a trial by jury. The defendants were present during all of this time; they made no statement; were not asked personally whether they joined in the waiver; and at no time made any objection to proceeding to trial before the court without a jury.

[8, 9] Article I, Section 7 of the state constitution provides, in part, that: "A trial by jury may be waived in all criminal cases, by the consent of both parties, expressed in open court by the defendant and his counsel". It has been held repeatedly that the consent of the defendant must be expressed by him personally and may not be implied. People v. Garcia, 98 Cal. App. 702, 277 P. 747; People v. Wilkerson, 99 Cal.App. 123, 278 P. 466; People v. Barba, 100 Cal.App. 557, 280 P. 549; People v. Spinato, 100 Cal.App. 600, 280 P. 691; People v. Wyatt, 101 Cal.App. 396, 281 P. 629; People v. Woods, 126 Cal.App. 158, 14 P.2d 313; People v. Washington, 95 Cal.App.2d 454, 213 P.2d 70; People v. Shannon, 110 Cal.App.2d 153, 241 P.2d 1007; People v. Pechar, 130 Cal.App.2d 616, 279 P.2d 570; People v. Benjamin, 140 Cal.App.2d 703, 295 P.2d 477. In each of these cases in which a petition for hearing before the Supreme Court has been filed such petition has been denied. In People v. Pechar, 130 Cal.App.2d 616, 619, 279 P.2d 570, 572, the court held that the consent of a defendant waiving a trial by jury must be expressed "by the use of language". In the case

at bar, the attorney general, on behalf of respondent, urges the same contention which he urged in the cited case, i. e., that consent may be "expressed" by conduct as well as by words, and asks this court to reappraise the rule. In the light of the consistent adherence to this rule, over a period of 27 years, by the appellate courts of this state, and the refusal of the Supreme Court to grant a hearing in any case applying it, we do not feel that such a reappraisal is within our province.

The judgment and order denying a motion for new trial as to each defendant is reversed.

BARNARD, P. J., and GRIFFIN, J., concur.



147 Cal.App.2d 764

Viola GUAY, Petitioner,

v.

The SUPERIOR COURT of the State of California, IN AND FOR the COUNTY OF LOS ANGELES, Respondent.

Civ. 22141.

District Court of Appeal, Second District, Division 1, California.

Jan. 23, 1957.

Proceedings on petition for writ of mandate directing Superior Court to entertain and act upon order to show cause why attorneys fees, court costs and allowance for support of minor child, pendente lite, should not be paid and why receiver should not be appointed. The District Court of Appeal, White, P. J., held that, in filiation proceeding, court had power to appoint receiver of property of defendant, even though it had no personal jurisdiction over him and would be required to make finding that he was father of child as prerequisite to ordering payment, pendente lite, of support, costs and attorneys fees.

Writ issued.

1. Bastards ⇐16

Proof of parentage is jurisdictional prerequisite for an order to support illegitimate child. West's Ann.Civ.Code, § 231.

2. Bastards ⇐79

Pendente lite support order, in filiation proceeding, implies finding of existence of relationship of parent and child, but such order does not determine issue nor affect final judgment as to paternity, and is not res judicata as to that issue. West's Ann. Civ.Code, §§ 137–141, 196a.

3. Bastards ⇐81

In filiation proceeding, court had power to appoint receiver of property of defendant, even though it had no personal jurisdiction over him and would be required to make finding that he was father of child as prerequisite to ordering payment, pendente lite, of support, costs and attorneys fees. West's Ann.Civ.Code, §§ 140, 196a; West's Ann.Code Civ.Proc., § 564, subd. 7.

4. Bastards ⇐16

Under Civil Code section imposing upon both father and mother burden of supporting illegitimate child, money expended by one toward support of such child cannot be recovered from the other. West's Ann.Civ.Code, § 196a.

5. Bastards ⇐78, 81

Maintenance of mother is necessary part of support of illegitimate child, and allowance of hospital expenses for expectant mother is predicated upon theory that such hospital and medical expenses are part of child's right to support; and in action brought to establish that defendant was father of plaintiff's unborn child, court had jurisdiction to order appointment of receiver for purpose of securing payment of hospital expenses of expectant mother. West's Ann.Civ.Code, §§ 140, 196a; West's Ann.Code Civ.Proc., § 564, subd. 7.

William M. Sternfeld, Beverly Hills, for petitioner.

Harold W. Kennedy, County Counsel, Wm. E. Lamoreaux, Asst. County Counsel, Los Angeles, for respondent.

WHITE, Presiding Justice.

This is a petition for a writ of mandate directing respondent court to entertain and act upon an order to show cause now pending therein.

The record reflects that petitioner is the plaintiff in an action instituted against one Bruce Creighton wherein she seeks to establish that Creighton is the father of petitioner's unborn child.

In her petition it is alleged by petitioner that at the time of the commencement of her action she caused an order to show cause to issue why Creighton should not pay attorneys fees, costs and allowance for the support of the child pending trial of the action, but was unable to obtain service of this order to show cause upon Creighton because he had departed from the state of California. By an amendment to the complaint, the Security-First National Bank, wherein Creighton had an account, was made a party defendant. Petitioner herein, as plaintiff in the action in the court below, therefore caused a second order to show cause to issue, directed to defendants Creighton and the bank to show cause why attorneys fees, court costs and allowance for the support of the minor child *pendente lite* should not be paid and why a receiver should not be appointed. By this order to show cause, the bank was restrained from permitting any moneys to be withdrawn by Creighton from his account with the bank.

There has never been any order for the publication of summons in the action or for substituted service of the order to show cause, but a copy of the order to show cause was mailed to an attorney in Denver, Colorado, who had written counsel for petitioner on behalf of the defendant Creighton.

When the aforesaid order to show cause came on for hearing, respondent court marked the matter "off calendar" as to defendant Creighton, issued an order restraining defendant bank from releasing any of the funds in Creighton's account, but refused to entertain or consider the motion for the appointment of a receiver of the property of defendant Creighton upon the ground that the court was without jurisdiction to appoint a receiver in the absence of personal service upon defendant Creighton.

Petitioner then applied for and obtained from this court an alternative writ of mandate directing respondent court to entertain petitioner's motion to appoint a receiver or to show cause why said court had not done so.

[1–3] By its return to the writ, respondent court asserts that since in a filiation proceeding such as the one now engaging our attention, the court was required to make a finding that defendant Creighton was the father of the child as a prerequisite to ordering payment of support, costs and attorneys fees *pendente lite*, the court did not have the power to order a receiver appointed because parentage could not be established or determined without personal jurisdiction over defendant Creighton. Hartford v. Superior Court, 47 Cal.2d 447, 304 P.2d 1.

It is also urged by respondent court that it lacks jurisdiction to order the appointment of a receiver for the purpose of securing the payment of hospital expenses to the expectant mother. Andrade v. Newhouse, 54 Cal.App.2d 339, 340, 347, 128 P.2d 927.

Respondent court concedes that Section 196a of the Civil Code provides in substance that the father as well as the mother of an illegitimate child is liable for his support; that a civil suit to enforce such obligation may be maintained on behalf of the minor; and that in such action the court shall have power to order and enforce the performance thereof "the same as under sections 137, 137.5, 138, 139 and 140 of the Civil Code." Since the enactment of section 196a, sections 137 through 141, Civil Code, have been amended by

splitting up into separately numbered sections many of the provisions of section 137. There were no substantial changes in the provisions of the law, but the various provisions were recodified. Section 140, both before and after the amendment of 1951, specifically provides that the court may enforce any order made for payment under the provisions of section 137 et seq., by the appointment of a receiver.

It was specifically held in Nichols v. Superior Court, 1 Cal.2d 589, 598, 36 P.2d 380, 95 A.L.R. 894, that where the defendant was absent from the state a receiver might be appointed *ex parte* at the commencement of the action and before any service of summons was made upon the defendant either in person or by publication. In Carbone v. Superior Court, 18 Cal.2d 768, 117 P.2d 872, 136 A.L.R. 1260, it was held that the court has the same powers in bastardy proceedings as it has in divorce proceedings.

In Nichols v. Superior Court, supra, 1 Cal.2d at page 599, 36 P.2d at page 384, it was said: "If the court had jurisdiction to appoint a receiver and to subject the property in the hands of the receiver to the satisfaction of a final judgment in the action, we see no reason why it should not have the equal right to order payment from the same source of the preliminary expenses and charges of such action. In fact, if the court had jurisdiction to appoint a receiver to preserve the property for the protection of the wife's rights therein, and we think it clear that the court had such power, these preliminary costs and charges and temporary support for the wife were simply incidental to the main purpose of the action which was to establish the wife's right to a divorce, and to a division of the community property. It will be noticed that the order of May 2, 1931, for alimony, attorneys' fees and costs did not require the defendant to pay said amounts personally. The order simply fixed the amounts which should be paid for those purposes, and then directed that these should be paid by the receiver from the proceeds of the community property in his possession and control. *It was in all its essential features simply an action in rem and, as such, personal service on the defendant was not required.*" (Emphasis added.)

Respondent court's contention that where separate property is involved it has no jurisdiction to appoint a receiver until the defendant has been personally served is answered by the case of Murray v. Murray, 115 Cal. 266, 47 P. 37, 37 L.R.A. 626, wherein, without service of process the *separate* property of the husband was placed in a receivership to secure the wife's right to support and maintenance in an action for separate maintenance.

Respondent court strongly relies upon the recent case of Hartford v. Superior Court, supra, which holds that in an action commenced pursuant to Civil Code, § 231, to secure a declaration that defendant was the father of plaintiff, personal jurisdiction over the former is essential and that service upon him outside the state was ineffective. We do not regard the case just cited as determinative of the proceeding with which we are here concerned. The Hartford case involved a trial of the main filiation proceeding while the instant proceeding is an ancillary provisional remedy of receivership to preserve the property for the protection of petitioner's unborn child's rights therein. In the Hartford case, supra, it was sought to obtain a *final* judgment, and although, as respondent court contends, proof of parentage is a jurisdictional prerequisite for an order to support an illegitimate child, Kyne v. Kyne, 38 Cal.App.2d 122, 128–129, 100 P.2d 806, nevertheless, in a proceeding, such as the one at bar, while an order made therein implies a finding of the existence of the relationship, the proceeding is not required to be so complete nor the evidence so extensive as upon a trial of the issues in the case and therefore, such an order does not determine those issues nor affect the final judgment as to paternity; and is not *res judicata* nor determinative of the issue of parentage at the trial. Carbone v. Superior Court,

supra, 18 Cal.2d at page 772, 117 P.2d at page 874.

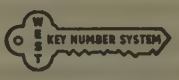
Furthermore, we are persuaded that irrespective of the provisions of Civil Code, §§ 196a and 140, the action is, by reason of the inadequacy of purely legal remedies, so much a subject of equitable cognizance that it comes within the right to have a receiver appointed under the general provision for such an officer in all cases "where receivers have heretofore been appointed by the usages of courts of equity", Code Civ. Proc. § 564, subd. 7. Such was the clear and unequivocal holding in Nichols v. Superior Court, supra, 1 Cal.2d at pages 596, 597, 36 P.2d at page 383.

[4, 5] Respondent court's final contention that it is without jurisdiction to order the appointment of a receiver for the purpose of securing payment of hospital expenses of the expectant mother is unavailing. Where, as in the instant proceedings, the action is commenced prior to the birth of the child the latter is entitled to an award of hospital expenses incurred in connection with its birth. As authority for its position respondent court relies upon the case of Andrade v. Newhouse, supra. However, this case involved a situation wherein the action was commenced after the birth of the children and the plaintiff mother sought reimbursement for the expenses incurred by her for hospital and medical care rendered at the birth of the children. Since, under the statute, Civil Code, § 196a, both the father and mother are burdened with the duty to support the illegitimate child, money expended by one toward the support of such child cannot be recovered from the other. Demartini v. Marini, 45 Cal.App. 418, 419, 187 P. 985. The case of Andrade v. Newhouse, supra, is not, therefore, in our opinion, applicable to the instant proceeding. We are persuaded that the allowance of hospital expenses for the expectant mother, like the allowance of attorneys fees, is predicated upon the theory that such hospital and medical expenses are part of the child's right to support. Kyne v. Kyne, supra, 38 Cal.App.2d at page 132, 100 P.2d at page 811; Berry v. Chaplin, 74 Cal.App.2d 669, 678, 169 P.2d 453. Furthermore, maintenance of the mother is a necessary part of support of the illegitimate child, De Sylva v. Ballentine, 96 Cal.App.2d 503, 511, 215 P.2d 780.

We are therefore, satisfied that respondent court was obligated to hear and determine the petition for the appointment of a receiver. Whether or not it should appoint a receiver of course would depend upon a sufficient showing that defendant Creighton was the father of the child in question, Carbone v. Superior Court, supra, 18 Cal.2d at page 771, 117 P.2d at page 874, and the further showing that there were assets of said defendant in this state of which the receiver might take possession.

Let a peremptory writ of mandate issue as prayed.

DORAN and FOURT, JJ., concur.



147 Cal.App.2d 718

Flora L. MICKEL, Plaintiff and Appellant,

v.

Harold C. MURPHY, Defendant and Respondent.

Civ. 5535.

District Court of Appeal, Fourth District, California.

Jan. 21, 1957.

Action for damages alleged to have been caused by the unlawful practice of law by defendant who was alleged to have drawn will without advising deceased that a will required attestation of two witnesses. The Superior Court of San Bernardino County, Carl B. Hilliard, J., entered judgment dismissing complaint, and plaintiff appealed. The District Court of Appeal, Mussell, J., held that complaint, which

failed to allege any duty by defendant in advising deceased as to proper method of attestation, was insufficient to state a cause of action.

Affirmed.

1. Attorney and Client ⇐11

Generally, "practice of law" is not involved in the function of a scrivener of legal instruments.

2. Attorney and Client ⇐11

In widow's action for damages alleged to have been caused by unlawful practice of law by defendant who was alleged to have drawn will for deceased without advising deceased that will required attestation of two witnesses, complaint failing to show facts making it defendant's duty to advise decedent as to proper attestation of will, was insufficient to state a cause of action.

3. Attorney and Client ⇐11

Where will was allegedly drawn for deceased by defendant who was not a licensed attorney, defendant, if liable at all for negligence, was liable to testator alone and could not be sued for carelessness or negligence by widow.

4. Attorney and Client ⇐11

Statute providing that any person practicing law who was not an active member of the State bar is guilty of a misdemeanor did not create a cause of action in favor of widow against defendant who allegedly drew will for decedent and who failed to advise him as to the proper attestation thereof. West's Ann.Bus. & Prof.Code, § 6126.

Fred H. Almy, San Bernardino, for appellant.

Cunningham, Parry & Holcomb, San Bernardino, for respondent.

MUSSELL, Justice.

This is a tort action for damages alleged to have been caused by the unlawful practice of law by defendant. A demurrer to the second amended complaint, including by stipulation a general demurrer, was sustained and plaintiff was granted ten days to file an amended complaint. She declined to amend and appeals from the judgment thereupon entered against her.

The principal question to be here determined is whether the second amended complaint states facts sufficient to constitute a cause of action. It is alleged therein that Henry Mickel, prior to his death on September 4, 1954, was the husband of plaintiff; that his separate property at the time of his death was valued at $34,411.94; that defendant was not licensed as an attorney at law or authorized to engage in the practice of law in California; "that defendant prior to the death of said Henry Mickel, and on or about April 30, 1952, did unlawfully engage in the practice of law in the State of California as follows: did advise regarding, draw, prepare and notarize a certain instrument bearing title of 'Last Will and Testament of Henry Mickel' and bearing said date of April 30, 1952, and did not advise said Henry Mickel that a Will required attestation thereto of two witnesses"; that under the provisions of said will plaintiff was to receive the entire estate of Henry Mickel; that he died intestate on September 4, 1954, and one-half of his separate property, of the value of approximately $17,000 vested in and passed to the mother of said deceased; that the said will was not witnessed as required by law and was therefore null and void; that Henry Mickel believed said will to be valid and intended that plaintiff should receive all of his property upon his death and that as a direct and proximate result of the said unlawful practice of law by the defendant plaintiff sustained damage in the sum of $17,205.97, the reasonable value of one-half of the separate property of Henry Mickel.

The acts alleged as unlawful practice of law, and upon which plaintiff relies to state a cause of action are that defendant *did advise regarding, draw, prepare and notarize the will involved and did not advise Henry Mickel that a will required at-*

testation thereto of two witnesses. (Italics ours.) There is no allegation that defendant represented that he was an attorney or qualified to draw the will. There is no allegation that the defendant suggested or directed the disposition of the property of Henry Mickel or that Henry Mickel relied upon defendant to see that the will was witnessed as required by law and it is not alleged that defendant was engaged as an attorney to draw the will.

[1, 2] It is generally held that practice of law is not involved in the function of a "scrivenor" of legal instruments. (6 Cal.Jur., Attorneys at Law, Sec. 30.) In People v. Sipper, 61 Cal.App.2d Supp. 844, 846, 142 P.2d 960, 962, "the practice of law" is defined and discussed and it is there said that the term "practice of law" or its equivalent "the practice of the law" includes legal advice and counsel and the preparation of legal instruments and contracts by which legal rights are secured although such matter may or may not be pending in court; that "If defendant had only been called upon to perform and had only undertaken to perform the clerical service of filling in the blanks on a particular form in accordance with information furnished him by the parties, or had merely acted as a scrivener to record the stated agreement of the parties to the transaction, he would not have been guilty of practicing law without a license." In the instant case it is not alleged that defendant acted other than as a scrivener in the preparation of the will and no facts are alleged showing that it was defendant's duty under the circumstances to advise the decedent that the will required "attestation thereto of two witnesses."

In Buckley v. Gray, 110 Cal. 339, 42 P. 900, 901, 31 L.R.A. 862, in an action to recover for negligence of an attorney in drafting and executing a will, it appeared that the plaintiff's mother employed the defendant to draw her will. It was alleged that the defendant negligently drew the will and that it was so drawn that it did not legally express the desires or direction of the testatrix, and that plaintiff, although named in the will as one of the devisees thereunder, was caused by defendant to become one of the subscribing witnesses thereto, thereby rendering the provisions of the said will as to the plaintiff void. The court below sustained a demurrer to the complaint. Plaintiff failed to amend and judgment against him was affirmed on appeal. The court held that an attorney is liable for negligence in the conduct of his professional duties, arising only from ignorance or want of care, to his client alone, that is, to the one between whom and the attorney the contract of employment and service existed and not to third parties; except where an attorney has been guilty of fraud or collusion, or of a malicious or tortious act. It is further said therein that the limit of the doctrine relating to actionable negligence is that the person causing the loss must owe a duty, arising from contract or otherwise, to the person sustaining such loss and that such a restriction on the right to sue for want of care in the exercise or employments or the transaction of business is plainly necessary to restrain the remedy from being pushed to an impracticable extreme. It was further held that "The complaint proceeds solely upon the theory that it was through negligence arising either from ignorance or carelessness, or both; and this, although it may be conceded that the complaint discloses an instance of the grossest ignorance on the one hand, or unpardonable carelessness on the other, and shows very grievous injury to plaintiff as a result, does not, within the principles above announced, make a case entitling the plaintiff to maintain the action."

[3] In the instant case, presumably there was some agreement between Henry Mickel and the defendant, although there is no allegation in the complaint to that effect. The defendant, if liable at all, was liable to Henry Mickel, alone, for negligence. Plaintiff, not being a party to the transaction, cannot sue for the carelessness or negligence of defendant in failing to prepare a valid will if that is in fact what he agreed to do.

[4] Appellant argues that the violation of section 6126 of the Business and Professions Code, which provides that any person practicing law who is not an active member of the state bar is guilty of a misdemeanor, created a cause of action in favor of the plaintiff. However, in Clinkscales v. Carver, 22 Cal.2d 72, 75, 136 P.2d 777, 778, the court said: "A statute that provides for a criminal proceeding only does not create a civil liability; if there is no provision for a remedy by civil action to persons injured by a breach of the statute it is because the Legislature did not contemplate one. A suit for damages is based on the theory that the conduct inflicting the injuries is a common-law tort, * * *." (In that case the failure to exercise the care of a reasonable man at a boulevard stop.) In Coleman v. California Y. Meeting, Etc., 27 Cal.App.2d 579, 582, 81 P.2d 469, 470, it is said that a tort in contemplation of law consists in a violation of a duty imposed by general law or otherwise upon all persons occupying the relation to each other which is involved in a given transaction; that "In order to constitute an actionable tort, there must be a legal duty—imposed by statute or otherwise—owing by the defendant to the one injured, for in the absence of such a duty any damage caused is injury without wrong—*damnum absque injuria.*" And in McKeon v. Neuschwander, 209 Cal. 283, 285, 286 P. 1010, 1011, it is said that "It is essential to the statement of any cause of action that there be a primary right and corresponding duty and a violation thereof."

In the instant case plaintiff had no vested right or interest in the property involved herein until Henry Mickel's death, and then only in the event that she would be entitled to receive the property under the terms of his will. The second amended complaint does not state facts sufficient to constitute a cause of action against the defendant and the demurrer was properly sustained on that ground. Since we have reached this conclusion, it is unnecessary to consider whether the action was barred by the provisions of sections 338 and 340 of the Code of Civil Procedure.

The judgment is affirmed.

BARNARD, P. J., and GRIFFIN, J., concur.



147 Cal.App.2d 609

The PEOPLE of the State of California, Plaintiff and Respondent,

v.

Rushton PAUL, Defendant and Appellant.

Cr. 5728.

District Court of Appeal, Second District, Division 1, California.

Jan. 16, 1957.

Hearing Denied March 13, 1957.

Defendant was convicted in the Superior Court of Los Angeles County, H. Burton Noble, J., of escaping from lawful custody under felony charge, and his motion for a new trial was denied, and he appealed. The District Court of Appeal, White, P. J., held that the evidence sustained the conviction.

Affirmed.

Doran, J., dissented.

1. Escape ⇐1

It was essential to conviction for escape that defendant have been in lawful custody at time of flight. West's Ann.Pen. Code, § 4532(b).

2. Criminal Law ⇐304(1)

Court could take judicial notice that arrest occurring at 1:30 A.M. had taken place at night. West's Ann.Pen.Code, § 836, subd. 3.

3. Arrest ⇐63(4)

Arresting officer's belief that felony has been committed may be founded on credible information conveyed to him by

others, and is not limited to evidence that would necessarily be admitted at trial on issue. West's Ann.Pen.Code, § 836, subd. 3.

4. Escape ⇐10

Escape conviction was sustained by evidence. West's Ann.Pen.Code, § 4532(b).

5. Criminal Law ⇐419(3)

Whenever an utterance is offered to evidence state of mind which ensued in another person in consequence of utterance, no assertive or testimonial use is sought to be made of it, and utterance is therefore admissible, so far as hearsay rule is concerned.

6. Criminal Law ⇐419(3), 1169(5)

In escape prosecution, evidence as to conversations had by store owner, who summoned police in belief that defendant was about to commit robbery, was not admissible as to their verity, but was admissible on question of whether they contained such information as would tend to show good faith or probable cause on part of officers in arresting defendant; and, in view of instruction given with regard thereto, there could have been no prejudicial effect therefrom.

7. Arrest ⇐63(4)

In considering question of reasonable or probable cause upon part of officers for arresting defendant, court can look only to facts and circumstances presented to arresting officers at time they acted. West's Ann. Pen.Code, § 836, subd. 3.

8. Criminal Law ⇐736(1)

In prosecution for escaping from lawful custody under felony charge, jury question was presented with regard to whether arresting officers had had probable cause to believe that defendant had committed a felony and were therefore justified in placing him under arrest. West's Ann.Pen. Code, § 836, subd. 3.

Gerald J. Levie and Sam Bubrick, Los Angeles, for appellant.

Edmund G. Brown, Atty. Gen., Bonnie Lee Hansen, Deputy Atty. Gen., for respondent.

WHITE, Presiding Justice.

In an information filed by the District Attorney of Los Angeles County, defendant was accused of escaping from the lawful custody of a Deputy Sheriff of Los Angeles County while in custody under a felony charge, to-wit, Robbery, Penal Code, sec. 4532(b).

Following entry of a plea of not guilty the cause proceeded to trial before a jury resulting in a verdict finding the accused guilty as charged. His motion for a new trial was denied and he was granted conditional probation.

From the judgment of conviction and from the order denying his motion for a new trial, defendant prosecutes this appeal.

With regard to the factual background surrounding this prosecution the record reflects that on the morning of January 3, 1956, between 1 and 1:30 o'clock, Mrs. Betty Lame was working alone as night clerk at a liquor store in Los Angeles County, when defendant entered the store. He had his right hand in his pocket when he entered the door. As he walked in, Mrs. Lame greeted him, but there was no answer; he merely "gave her an angry look". The defendant walked to where the refrigerator delicatessen case begins. Mrs. Lame spoke again, and the defendant just continued walking up the customer's part of the store in an easterly direction toward the beer case. Mrs. Lame then asked if she could help him. Less than one minute elapsed before he reached the easterly end of the refrigerator case. The defendant turned into the aisleway between the delicatessen case and the beer case. As he walked out of Mrs. Lame's line of vision, where she was stationed behind the counter, she continued to observe him in the mirror.

When defendant turned into the aisle leading to the private part of the store (the owner's living quarters), Mrs. Lame said, "You can't go back there; that isn't cus-

tomer area." Defendant made a partial turn and looked at her as though, according to her testimony, to say, "Oh, I can't?" He then continued to walk to the back of the store.

Mrs. Lame became frightened because "* * * his expressions and his actions were not that of a customer * * * He had not offered to buy anything, and he was going some place where he was told not to go." She jumped over the counter, and went out the door.

Then she looked through the window of the store, but did not see the defendant. She then stopped two boys in an automobile and asked them to call the police. Mr. Fowler, the driver of a second car, was also stopped. Mrs. Lame asked him to call the police, and told him a man had entered the store, gone back to the living quarters, and was going to hold the place up.

Mr. Fowler called the police from a filling station. Deputies Vaughn and Swenson, who were on patrol, drove to the station where Mr. Fowler told them that there was a man holding up a woman at 6912 South Central, in the liquor store, or words to that effect. Mr. Fowler and the police drove to the store.

The two boys in the first car returned about three to five minutes after Mrs. Lame had talked with Mr. Fowler. They remained with Mrs. Lame until the police arrived.

During the fifteen minute interval between the time she vaulted the counter and the police arrived, she had looked in the window several times, but did not see the defendant. About three to five minutes before the police arrived, while she was standing in front of the store with the two boys, she saw the defendant in back of the beer case, and facing toward the aisle leading to the living area, where the owner frequently kept large sums of money. The defendant turned, saw Mrs. Lame outside, and then came out of the store. He told Mrs. Lame and the two boys, that he was looking for a preacher.

When the police arrived, Deputy Sheriff Swenson covered the defendant and the two boys, who were in front of the store, with a shotgun, and told them to put their hands up. He then "shook them down". The defendant was carrying no weapons.

Mrs. Lame told the police, immediately on arrival, that the defendant had come in the store, wouldn't speak, and went back into the living area where he was not supposed to go, after he had been told it was not customer area, and that he remained there approximately fifteen minutes. She also told them she thought he was going to hold up the store; and that valuables were kept in the living area in back of the store.

Mr. Fowler testified that when the defendant was told to put his hands up, he was informed that he was under arrest. The officers testified, however, that there was no arrest made at that time.

While the defendant was kept under surveillance outside the store, Deputy Swenson and Mrs. Lame went inside. There, Mrs. Lame told him that the defendant had come into the store, did not answer when she spoke to him, went into the back after she told him not to, and stayed in the store approximately fifteen minutes. Mrs. Lame went behind the counter, demonstrated her position, and showed Deputy Swenson how the defendant acted. She told him that when the defendant walked in the front door he had a "fierce" look on his face; that she had spoken to him and he had said nothing, but continued in a deliberate manner toward the rear of the store, and as he started behind the counter, she told him it was not the place for customers. Mrs. Lame also told Deputy Swenson that defendant had been in the store quite a long time and that she thought his purpose in going behind the counter was to determine if anyone else was in the store. Mrs. Lame was not sure whether anything was disturbed or missing, because the defendant had been out of her sight.

Deputy Swenson then came out of the store and told Deputy Vaughn what Mrs.

Lame had said, and that the defendant "looked like a fairly good robbery suspect". Deputy Swenson asked the defendant a number of routine questions in straight English, but the answers were incoherent. So he used slang, and said to the defendant, "There is no use shucking and jiving. We know what has been happening around here. Let's see what's shaking," and other similar statements. The defendant placed his hands down, looked through the "close of his eyelids", rolled his head back and said, "Let's dance." Deputy Swenson formed the opinion that defendant was under the influence of narcotics.

Deputy Swenson and Mrs. Lame went back inside the store, after which Deputy Vaughn questioned the defendant and also formed the opinion that the latter was under the influence of narcotics. Deputy Vaughn asked the defendant his name, and where he lived, but received no answer. When the defendant was asked what he was doing there, he replied, "I was looking for a preacher in a C-47 Cadillac." Deputy Vaughn requested the defendant to remove everything from his pockets, and found a Los Angeles County Jail property envelope stamped with an "N", which is the type given to narcotics suspects at the jail. The defendant stated that he had been arrested approximately one month prior for narcotics, and was a "poor sick hyp." He said that he had taken a "shot" that afternoon, and that he was using "that real good brown stuff." The defendant also said that he had entered the store "to do some harm".

After defendant had made these statements, he was informed that he was under arrest for suspicion of robbery and narcotics.

After defendant was informed that he was under arrest, Deputy Tittle attempted to handcuff him. The defendant grabbed the deputy's wrist, and there was a scuffle during which the former and Deputy Tittle proceeded in a northerly direction around the corner from the store to a parking lot. The defendant broke loose and ran between two rows of parked cars. Deputies Vaughn and Tittle ran after him yelling for him to halt, or they would shoot. Shots were fired by both deputies and the defendant was found wounded under a parked automobile.

On the third or fourth day of January, Sergeant Aure talked to the defendant in the hospital, and asked him, "What were you doing in back of the liquor store?", to which he replied that "he was looking at the parrot".

Sworn as a witness in his own behalf, defendant testified that on the occasion in question he entered the liquor store to make a purchase. That as he walked in, he observed the clerk who was sitting behind the counter. He wandered around the store to decide what to buy, but did not at any time walk to the west side of the beer refrigerator. That while he was in the store he looked through the glass refrigerator and saw a parrot.

During the time he was in the store, nothing was said to him.

That after he had been inside the store about two minutes, he turned around to ask the clerk about the cost of a couple of items, and found that he was alone. He noticed that the clerk and two men were standing outside the store looking in at him through the window. He immediately went outside to get a few answers as to the price of certain items. When he went outside, he did not speak to the three people outside, nor did anyone speak to him.

That there were a couple of police patrol cars present, and an officer ordered him to back up against the glass wall and put his hands over his head. One officer asked him his name.

That he took everything out of his pockets, and one of the officers looked over the items. The envelope found in his pocket was issued to him while he was in jail for a traffic violation. The defendant further testified that he had never been arrested for suspicion of violation of the narcotics laws. He denied telling anyone that he had been arrested a month before for narcotics; that he was a "hyp";

or that he was using that "brown stuff", and had had a "shot" that afternoon. He denied telling anyone he was looking for a preacher in a C-47 Cadillac and said that he did not tell anyone that he had entered the store to do the lady harm.

The defendant further testified that he overheard Officer Vaughn say to his partner, "We may as well shoot this one". He asked one of the deputies what was going on, but there was no response. He said that he was never told by anyone that he was under arrest.

That Officer Vaughn pushed him and forced him to the parking lot with a shotgun. He did not offer any resistance to being pushed, other than to shrug his shoulders and say, "Well, where are you taking me?" That after he and the two officers reached the parking lot, he was shoved against an automobile. That Officer Vaughn slapped him in the stomach and on the face, and he was kicked in the lower part of the body by one of the officers. He fell down, and Officer Vaughn told him to start running. That he ran because he was afraid.

The defendant further testified that he ran north for about 25 to 30 yards and was then shot. He continued to run after being shot, and got under a parked car. That while he was running, he did not hear either of the officers tell him to stop or halt.

In rebuttal, Officer Vaughn testified that at no time did he state to his partner, or anyone else, "We might as well shoot this one", nor did he kick, punch, slap, or strike the defendant.

Officer Tittle testified that no blows were struck while he was scuffling with the defendant, nor did he kick the latter in the groin.

The owner of the store, Mrs. Leightner, testified that it was impossible to see into the back of the store through the beer case, because the refrigerator had a steel back. That the parrot was always kept covered at night, and made no noise unless a stranger came into the back of the store. She did not know personally, whether the parrot was covered on the night in question.

Mrs. Leightner also testified that all items in the customer's part of the store are kept marked.

A fingerprint expert, Mr. Clark, identified the fingerprints of the defendant as identical with those appearing on a booking slip which indicated that there was a narcotic charge filed on December 14, 1955 against one Rushton Paul, or Paul Rushton.

[1, 2] As his first ground of appeal it is urged by appellant that the verdict rendered is contrary to the law and the evidence. In support of this contention appellant first contends that his arrest was unlawful and that he was entitled to use such force as was necessary to prevent the arrest, or to effect his escape after arrest. People v. Perry, 79 Cal.App.2d Supp. 906, 915, 916, 18 P.2d 465, and cases therein cited. It must be conceded that if the arrest was unlawful, the reason which makes flight from the custody of an officer a crime does not exist because Section 4532(b) of the Penal Code, under which appellant was accused, specifically provides that the person restrained must be in the *lawful* custody of the officer. This brings us to a discussion of the vital question of whether the arrest of appellant was lawful. Since the arrest took place at 1:30 a. m., the court may take judicial notice that it was at night. People v. Lewis, 136 Cal. App. 405, 410, 29 P.2d 305; People v. Chee Kee, 61 Cal. 404. Under Penal Code, Section 836(3) a peace officer may, without a warrant, arrest a person at night when there is reasonable cause to believe that he has committed a felony. In People v. King, 140 Cal.App.2d 1, 6, 294 P.2d 972, 975 it was said:

"'The term, reasonable or probable cause, has been defined: "By 'reasonable or probable cause' is meant such a state of facts as would lead a man of ordinary caution or prudence to believe, and conscientiously entertain a strong suspicion,

that the person accused is guilty." In re McCarty, 140 Cal.App. 473, 474, 35 P.2d 568.' "

[3] " 'The term, "probable," has been defined as meaning "having more evidence for than against; supported by evidence which inclines the mind to believe, but leaves some room for doubt." Ex parte Heacock, 8 Cal.App. 420, 421, 97 P. 77.' People v. Novell, 54 Cal.App.2d 621, 623–624, 129 P.2d 453, 454." Probable cause exists when there is present a suspicion based upon circumstances sufficiently strong to warrant a reasonable man in the belief that the charge is true. People v. Brite, 9 Cal.2d 666, 687, 72 P.2d 122. It is also now established law that the officer's belief may be founded on credible information conveyed to him by others, and is not limited to evidence that would necessarily be admitted at the trial on the issue of guilt. Trowbridge v. Superior Court, 144 Cal. App.2d 13, 300 P.2d 222, and cases therein cited; People v. Boyles, 45 Cal.2d 652, 656, 290 P.2d 535. With the foregoing rules in mind, we are satisfied that under the circumstances here present, the officers were abundantly justified in taking appellant into custody. We have herein previously narrated in some detail the facts and circumstances with which the officers were confronted and it is unnecessary to here repeat them. Suffice it to say that the information the officers had coupled with the fact that appellant appeared to be under the influence of a narcotic due to his incoherent answer to questions propounded by the officers, were more than sufficient to generate in the mind of an ordinarily cautious or prudent person a conscientious and strong suspicion that appellant was guilty of not only the crime of robbery, a felony, and also to arrest him for a misdemeanor committed in their presence, Penal Code, Sec. 836, viz., violation of Section 11721 of the Health and Safety Code which makes it an offense to be under the influence of narcotics. The cases of People v. Thymiakas, 140 Cal.App.2d 940, 296 P.2d 4; People v. Brown, 45 Cal.2d 640, 290 P.2d 528; People v. Gale, 46 Cal.2d 253, 294 P.2d 13, and People v. Harvey, 142 Cal.App.2d 728, 299 P.2d 310, relied upon by appellant are all factually distinguishable from the facts and circumstances present in the case now engaging our attention.

[4] If, as we have concluded, the arrest and detention of appellant was lawful, there can be no question but that the crime of escape was completed with the unlawful departure of the accused from the limits of his custody. People v. Quijada, 53 Cal. App. 39, 41, 199 P. 854. In the case at bar there was substantial evidence that appellant had been informed he was under arrest. Deputy Sheriff Tittle had attempted to handcuff him, whereupon he struggled with the officer, ran away and failed to stop when the officers commanded him to halt. From the foregoing it appears that appellant was in lawful custody and escaped therefrom.

[5–7] Appellant's next assignment of error concerns the claim that the court improperly admitted into evidence statements made by various persons outside his hearing or presence upon the theory that such statements were part of the *res gestae*. In this regard, our attention is directed to statements hereinbefore narrated made by Mrs. Lame describing what she saw appellant do and of her conduct in running out into the street to secure police assistance because she believed appellant was about to commit robbery. Objection is also made to the conversation between Mrs. Lame and the witness Fowler. We have concluded that the hearsay objection cannot be applied to this evidence. The correct rule is thus stated in Wigmore, 3rd Ed., Vol. VI, Sec. 1789, p. 235: "Wherever an utterance is offered to evidence the *state of mind* which ensued *in another person* in consequence of the utterance, it is obvious that no assertive or testimonial use is sought to be made of it, and the utterance is therefore admissible, so far as the Hearsay rule is concerned." (Emphasis added.)

Appellant's challenge to this evidence is unavailing. In considering the question

of reasonable or probable cause upon the part of the officers to arrest appellant, the court is to look only at the facts and circumstances presented to the arresting officers at the time they acted. The conversations in question were not admissible as to their verity, but upon the question of whether they contained such information as would tend to show the good faith or probable cause on the part of the officers in arresting appellant. Aitken v. White, 93 Cal.App.2d 134, 135, 208 P.2d 788, and cases therein cited.

In the instant case, when the taking of testimony was concluded, the court admonished the jury as follows:

"I let this evidence in, realizing it was hearsay, because I didn't know whether there would be a controversy which the jury would have to determine so far as the controversial facts are concerned. After hearing all the evidence, the Court has come to the conclusion that the officers were justified in making the arrest; that the arrest was valid; and, therefore, there is nothing for the jury to determine so far as that evidence is concerned, and I am going to instruct the jury that the evidence was received for the limited purpose, *and you are not to consider the evidence in any way whatever in determining the guilt or innocence of this defendant so far as the charge of escape is concerned.*" (Emphasis added.)

Furthermore, in view of the foregoing specific instruction given by the court, we are persuaded that no inference unfavorable to appellant could have been drawn by the jury from the conversations and that he suffered no prejudicial effect therefrom.

[8] Finally, appellant urges that the court committed reversible error in refusing to submit to the jury the question of whether the arresting officers had probable cause to believe the appellant had committed a felony and were therefore justified in placing him under arrest.

Appellant concedes that as a general proposition of law, "it is correct to state that probable cause is a question of law to be decided by the trial court rather than the jury", but contends, and rightly so, that this rule is applicable only where there is no conflict to be decided by the court. People v. Kilvington, 104 Cal. 86, 90–92, 37 P. 799; Collyer v. S. H. Kress & Co., 5 Cal.2d 175, 181, 54 P.2d 20; People v. Brite, supra, 9 Cal.2d at page 687, 72 P.2d at page 133; Murphy v. Murray, 74 Cal. App. 726, 730, 241 P. 938. As was said by this court in Aitken v. White, supra, 93 Cal.App.2d at page 141, 208 P.2d at page 791: "When the facts are controverted or the evidence conflicting, then the determination of their legal effect by the court is necessarily hypothetical, and the jury are to be told that if they find the facts in a designated way, then such facts do or do not amount to probable cause. [Citing cases.]" See also Roberson v. J. C. Penney Co., 136 Cal.App.2d 1, 4, 288 P.2d 275.

In determining whether the issue of probable cause is one for the court or for the jury care must be taken to consider what types of conflicting evidence regarding probable cause require submission to the jury for determination of the facts upon which probable cause for arrest is based. This, because it is well established in our law that in determining this question, the court looks only at the facts and circumstances *presented to the officer at the time he was required to act.* People v. Kilvington, supra, 104 Cal. at pages 92–94, 37 P. at page 801; People v. Hupp, 61 Cal.App.2d 447, 449, 143 P.2d 84; Van Fleet v. West American Insurance Co., 5 Cal.App.2d 125, 129, 42 P.2d 378, 43 P.2d 557; Murphy v. Murray, supra, 74 Cal. App. at page 730, 241 P. at page 939. The conflict must concern the existence of the facts and circumstances upon which the officer based the arrest, and not such conflicts as are created by subsequent events. A good illustration of this situation is to be found in Roberson v. J. C. Penney Co., supra, 136 Cal.App.2d at page 1, 288 P.2d at page 275, where there was a direct conflict in the facts and circumstances present at the time the plaintiff therein was de-

tained and restrained by defendants' employee, and the court held that the trial judge should have defined what facts as a matter of law constituted probable cause and then allowed the jury to determine whether these facts existed.

In the case now before us no such situation was present. Many facts, information and circumstances were presented to the officers at the time of the arrest, which were uncontradicted. For instance, the information given the officers outside the presence of appellant by Mr. Fowler and Mrs. Lame was undisputed, and would serve as sufficient to warrant an arrest. By his own testimony, appellant admitted that he told the investigating officers nothing. What appellant testified to at his trial cannot be regarded as establishing a conflict in the evidence that required submission to the jury of the question of probable cause because such testimony was not before the officers at the time they were required to determine the legality of detaining appellant and therefore could shed no light upon the question of whether the officers were justified in placing him in custody. People v. Brite, supra, 9 Cal.App. 2d at page 687, 72 P.2d at page 133. At the time of appellant's apprehension the officers had been called by Mr. Fowler who told them a man was "holding up" a liquor store. This was at night. Upon their arrival at the liquor store the officers were accosted by Mrs. Lame, the night clerk at the establishment, who informed them that the appellant had come into the store with a "fierce" look on his face; had refused to speak to her; had wandered into the living area of the store where the owner kept valuables, after being told not to. At the time of the arrest, this information was undisputed by the appellant.

Further, the police officers testified that they found a jail envelope in appellant's possession of the type issued to narcotic suspects. This too, was undisputed. Our conclusion is that under the facts and circumstances present in the case at bar, the presence or absence of probable cause presented a question of law to be decided by the court since there was no conflict in the information given to the officers at the time they were required to act, and such information, coupled with the conduct of appellant, was sufficient to generate in the mind of a man of ordinary care and prudence an honest and strong suspicion that appellant was guilty of a felony.

For the foregoing reasons, the judgment and the order denying defendant's motion for a new trial are, and each is affirmed.

FOURT, J., concurs.

DORAN, J., dissents.

Hearing denied; CARTER, J., dissenting.



147 Cal.App.2d 596

Frank W. O'NEILL, Plaintiff and Appellant,
v.
Ann F. O'NEILL, Defendant and Respondent.
Civ. 5435.

District Court of Appeal,
Fourth District, California.
Jan. 15, 1957.

Action by husband for annulment or divorce and to set aside deed conveying property to wife before marriage. Wife filed cross-complaint for divorce, alimony and attorney's fees. The Superior Court, San Diego County, Clarence Harden, J., granted divorce to both parties and husband appealed from the portion of the judgment denying husband a constructive trust on the property and ordering payment of lump sum alimony and attorney's fees to defendant. The District Court of Appeal, Mussell, J., held that evidence sustained finding that the husband intended the deed to be a gift to the wife and that, in view of the evidence,

there was no abuse of discretion by the trial court in awarding alimony and attorney's fees to the defendant.

Judgment affirmed.

1. Husband and Wife ⇐49½(8)

In action by husband for annulment or divorce and to set aside deed which conveyed property to wife before marriage where evidence relating to circumstances surrounding execution and delivery of the deed was in conflict, evidence was sufficient to support the finding that the husband intended the deed to be a gift to the wife.

2. Deeds ⇐211(3)
Husband and Wife ⇐47(4)

In action by husband for annulment or divorce and to set aside a deed conveying property to wife before marriage, evidence sustained findings that there was no agreement or understanding between the parties with respect to the conveyance and that no fraud was practiced by the wife.

3. Trusts ⇐103(3)

Where there was no fraud practiced by wife and no agreement or understanding between husband and wife with respect to the conveyance, no fiduciary duty arose out of the confidential relationship between the parties which would justify imposition of a constructive trust on property conveyed by husband to wife before marriage.

4. Evidence ⇐589

Trial court was not required to accept as true the testimony of plaintiff, even if uncontradicted.

5. Appeal and Error ⇐717

Remarks of trial judge made after an attempt to effect a settlement with respect to the property involved could not be considered for the purposes of impeaching the findings and judgment of the court.

6. Divorce ⇐241

In action for divorce where marriage had existed for approximately three months, at time of marriage wife gave up employment which paid $4,100 per year and she had relinquished alimony from a previous marriage in the amount of $1,320 per year, granting wife lump sum alimony of $2,800 and her attorney's fees was not an abuse of discretion by the trial court.

7. Divorce ⇐231

Where a divorce is granted to both parties, alimony may be awarded to either party.

Charles E. Burch, Jr., San Diego, for appellant.

Davies & Burch, Robert B. Burch, Jr., San Diego, for respondent.

MUSSELL, Justice.

On January 3, 1956, plaintiff filed this action for annulment or divorce, and to set aside a grant deed by which he had conveyed a house and lot to defendant before the marriage. The defendant, in addition to her answer, filed a cross-complaint in which she sought a divorce from the plaintiff, together with alimony and attorney's fees. The trial court in its judgment denied an annulment of the marriage; denied plaintiff a constructive trust on the property involved; adjudged it to be the sole and separate property of the defendant; and ordered plaintiff to pay defendant $2,800 alimony and attorney's fees in the sum of $1,000. Each of the parties was granted a divorce.

Plaintiff appeals from that portion of the judgment denying the relief sought by plaintiff of imposing a resulting trust upon the real property involved and that portion of the judgment awarding defendant alimony and attorney's fees.

Plaintiff, who had been an automobile dealer in Connecticut, sold his business and came to California in 1954. He had inherited from the estate of one Addie Maxwell securities of the approximate value of $350,000, a home in La Jolla, California, of the approximate value of $40,000, and other real and personal property. The annual income from the securities was approximately $17,000.

Plaintiff first met defendant in La Jolla in January, 1955. He was then living in the house involved with his mother and his nine year old daughter by a previous marriage. Defendant had obtained a divorce from her husband, Dr. Simonds, and was living with her three children, two boys, aged four and eight years, and a girl, aged six years. Defendant was receiving from her former husband the sum of $50 per month for the support of each of her children and the further sum of $110 per month alimony. Plaintiff and defendant first became engaged to marry in June, 1955, and on or about October 10, 1955, the final agreement to marry took place. Defendant was then in New York and plaintiff in San Diego. They had a long telephone conversation in which the details of the marriage were discussed and the date therefor was set for October 22, 1955. On October 12, 1955, plaintiff went to his attorney in La Jolla and had him prepare and acknowledge a grant deed to the property involved. Plaintiff was named as grantor therein and Ann F. O'Neill as grantee. Plaintiff took the deed with him to New York, and a few minutes before the wedding on October 22, 1955, Mr. Fox (defendant's father) came to plaintiff's room and handed him a wedding present from the defendant. Plaintiff handed the deed involved to Mr. Fox and told him to take it to the defendant. Fox gave the deed to defendant while she was dressing for the wedding and, with her permission, took the deed to San Diego, had it recorded, and mailed it to the defendant.

Upon their return to La Jolla, plaintiff and defendant and the four children moved into the house which was described in the deed. Plaintiff and defendant were unable to live together harmoniously and this action was filed on January 3, 1956.

The principal question for our determination is whether the evidence is sufficient to support the trial court's judgment refusing to set aside the deed in question.

[1, 2] There is a conflict in the evidence relating the circumstances surrounding the execution and delivery of this deed. Defendant testified that she first knew that defendant had deeded the property to her just prior to the marriage; that plaintiff had not discussed with her the matter of putting the house in her name and it came as a complete surprise to her; that there was no discussion of the deed and she never heard of it until her father handed it to her while she was dressing for the wedding; that after the deed had been delivered to her, she and plaintiff had a discussion about it and plaintiff told her that he wished he could have given her more but the tax situation would not permit it. Plaintiff testified that he never intended the property to be a gift and that the conveyance was to vest title in his wife for a home for the both of them. However, he further testified that no definite agreement had been reached in respect to the execution of the deed and that it was purely a voluntary act on his part; that he told his attorney that he wanted the home put in his wife's name "because there was so—so much doubt in her mind as to what would occur if it were mine and I just wanted to make it emphatically not mine."

On cross-examination plaintiff was asked the following questions and gave the following answers:

"Q. All right. Now, you have spoken about an understanding that you had with her about this property. You tied no strings on to the gift or on to the transfer of title to Mrs. O'Neill in your discussions or understanding with her, did you? A. Why should I? I expected to be married a long time.

"Q. You didn't tell her or have an understanding to the effect that you would deed her the property if she would marry you? A. Never.

"Q. You expected to give her a sense of security by transferring the title to the property to her name, did you not? A. I did not. The security, I should think, would be obvious. You don't have to deed over property for that. I think that—well, I have cov-

ered this thing. I have turned the property in her name for one purpose and one purpose only. She and I understood that purpose.

"Q. Do you—did you understand, at the time you signed the deed, this particular difference between a deed and a will, that a will can be changed any time before your death, but a deed operates upon execution and delivery; did you understand that? A. Look, I wasn't born yesterday. I know that I turned the property over to my wife."

Frank Fox testified that approximately twenty minutes before the wedding "I handed Frank the watch which was in a package. Frank reached in his pocket. I said, 'This is a gift from Ann. She can't give it to you. She is dressing.' Frank reached in his pocket and handed me a paper and I said, 'What is it?' He said, 'It's a deed to the house.' I said, 'Well, Frank, I think that is perfectly lovely. I think it's wonderful'; and, I did. He said 'Well, Ann has always talked about wanting a home of her own', and he said, 'I want her to have this.'"

The trial court found, among other things, that there was no fraud practiced by defendant upon plaintiff; that on October 12, 1955, plaintiff, as grantor, executed a grant deed to defendant, as grantee, of the real property involved and said deed was delivered to defendant with an intention on the part of plaintiff to give it effect on October 22, 1955, prior to the marriage of the parties; that

"3. Said deed so made, executed and delivered, was intended by plaintiff as a gift from plaintiff to defendant, and neither the making, execution nor delivery thereof was based upon any consideration; nor was it made, executed or delivered pursuant to any prior agreement or understanding on the part of the defendant.

"4. Defendant did not and does not hold said real property in trust for plaintiff and defendant, or in trust for plaintiff, or in trust at all."

The questions whether the deed was intended by plaintiff as a gift to defendant, whether it was executed and delivered pursuant to any prior understanding or agreement of the parties, and whether defendant held the property in trust for plaintiff and defendant were questions of fact for the trial court and its determination cannot here be disturbed since there is substantial evidence in support of its findings and judgment.

[3] Plaintiff contends that "The law applicable to the substantial evidence requires imposition of resulting trust upon the real property involved and equal division thereof between the parties." He states that the relationship between the parties was confidential from the time they were engaged and that antenuptial agreements and settlements must be fair, equitable and reasonable. In this connection he cites Steinberger v. Steinberger, 60 Cal.App.2d 116, 122, 140 P.2d 31, in which it is stated that the basis of the confidential relationship exception is that under section 2224 of the Civil Code the equity courts will prevent one person who is in a confidential relation with another from becoming unjustly enriched by reason of a breach of the trust, and that the cases are clear that where there is some sort of a status between the grantor and the grantee, and confidence is imposed, a constructive trust will be imposed. Orella v. Johnson, 38 Cal.2d 693, 242 P.2d 5, 7, is also cited. These cases do not support plaintiff's contention. In the Orella case the court said:

"If a grantor conveys property to another in reliance on the oral promise of the latter to hold the property in trust for the grantor or a third person and the grantee subsequently repudiates the trust, it is settled that a constructive trust may be enforced against the grantee if the conveyance was induced by fraud or if there was a confidential relationship between the parties. * * * Such trusts are enforced under the provisions of section 2224 of the Civil Code that 'One who

gains a thing by fraud * * * is * * * an involuntary trustee of the thing gained, for the benefit of the person who would otherwise have had it.'"

In the instant case the court found that there was no agreement or understanding on the part of the defendant and plaintiff with respect to the conveyance and that there was no fraud practiced by the defendant. Since these findings are supported by substantial evidence, there was no fiduciary duty arising out of a confidential relationship between the parties.

[4] It is contended that plaintiff would not have turned over his only home to defendant, omitting the furniture, as a complete gift when he expected to continue to live there with the defendant. This argument is without merit. Kimbro v. Kimbro, 199 Cal. 344, 348, 249 P. 180. Moreover, the trial court was not required to accept as true the testimony of plaintiff, even if uncontradicted, and, as is said in Lombardi v. Tranchina, 129 Cal.App.2d 778, 780, 277 P.2d 938, 939:

"When a trial court has declared a deed '"* * * *to be just what it purports to be, an appellant* * * can not expect a reversal unless the evidence is almost overwhelmingly the other way* * *."' Spaulding v. Jones, supra, 117 Cal.App.2d 541, 545, 256 P.2d 637, 640. In such a case the determination of the trial court 'in favor of either party upon conflicting or contradictory evidence is not open to review on appeal.' Beeler v. American Trust Co., 24 Cal.2d 1, 7, 147 P. 2d 583, 587."

[5] Plaintiff attaches importance to the remarks of the trial judge made after an attempt to effect a settlement with respect to the home involved. The remarks of the court indicated that there was no intention on the part of plaintiff to make a gift of the property and that the proper thing to do was to return it to plaintiff with an adequate award to defendant. However, in its final remarks, the court stated that defendant had made an unconditional grant deed to his wife; that it, the court, could not "do anything in view of the record but go right down the middle and decide the facts as honestly as I can because, after all, maybe what is legal is fair"; and that an analysis of the evidence "fails to show me any adequate proof to justify a decision interfering with her title to this property." These remarks of the trial court cannot be considered for the purpose of impeaching the findings and judgment. People v. One 1951 Ford Sedan, 122 Cal.App.2d 680, 683, 265 P.2d 176.

[6, 7] The court found that the deed was intended as a gift from plaintiff to defendant and that "defendant is at present without funds with which to support herself or pay attorney's fees herein. Upon the marriage of the parties the defendant gave up employment which she might have had, from which she would have earned the sum of $4,100 per year; and at said time plaintiff relinquished alimony which she was then receiving in the amount of $1,320 per year." We find no abuse of discretion in the award of alimony and attorney's fees in the circumstances shown by the record. It appears therefrom that defendant was without funds with which to support herself or pay attorney's fees. The award of alimony was based on the court's reasoning that defendant would be able to obtain another teaching position in about seven months and that the lump sum awarded would be a reasonable amount for her support during that time. Where a divorce is granted to both parties, alimony may be awarded to either party. De Burgh v. De Burgh, 39 Cal.2d 858, 874, 250 P.2d 598.

The judgment is affirmed.

BARNARD, P. J., and GRIFFIN, J., concur.

147 Cal.App.2d 751

William Keith BURDINE, a Minor, by his Guardian Ad Litem, William Burdine, and Bobby Ray Farber, a Minor, by his Guardian Ad Litem, F. E. Farber, Plaintiffs and Appellants,

v.

SEVERIN MOTORS, Inc., a Corporation, and Harry Lucas, Individually and doing business as Lucas Auto Salvage, Defendants and Respondents.

Civ. 5523.

District Court of Appeal, Fourth District, California.

Jan. 22, 1957.

Hearing Denied March 20, 1957.

Action by guardians ad litem of occupants of motor scooter against motorist, motor company, and operator of auto salvage company for injuries sustained in collision between motor scooter and automobile which motor company attempted to sell for salvage to operator through operator's alleged agent, who in turn sold the automobile to motorist. The Superior Court, Orange County, John Shea, J., in trial by court, sitting without jury, entered judgment of nonsuit in favor of operator, entered default judgment against motorist, and entered judgment that plaintiff take nothing against motor company, and plaintiff appealed from the judgment favorable to motor company and operator. The District Court of Appeal, Barnard, P. J., held that motor company was not owner of the automobile and that salvage company would not be liable in absence of evidence of operator's ownership of the automobile or any express or implied permission on part of operator to anyone to drive the automobile.

Judgments affirmed.

1. Automobiles ⇐19

Where motor company, in attempt to sell automobile, delivered to alleged agent of intended buyer the pink and white slips with endorsements on the pink slip showing a transfer of ownership signed by the original owner and by the motor company, with dealer's number and date and signature of motor company's contract clerk who had oral authorization by company's office manager to endorse certificates of ownership of automobiles, the pink slip was properly endorsed. West's Ann.Vehicle Code, § 178.

2. Principal and Agent ⇐193

In action against motorist, motor company, and operator of auto salvage company by guardian ad litem of minor passengers on motor scooter for injuries received in collision between motor scooter and automobile, which motor company had attempted to sell to operator, but which operator's alleged agent had sold to motorist, question whether alleged agent had represented to motor company that he was acting for operator was for trial judge as trier of the facts. West's Ann.Vehicle Code, §§ 178, 402.

3. Automobiles ⇐19

In action by guardians ad litem of minor occupants of motor scooter against motorist, motor company, and operator of auto salvage company for injuries sustained in collision between automobile and motor scooter, evidence was sufficient to establish a sale of the automobile by motor company within meaning of the Vehicle Code. West's Ann.Vehicle Code, §§ 178, 402.

4. Automobiles ⇐19

Where motor company had made bona fide sale of automobile and delivered possession of the automobile, together with pink and white slip endorsed by the owner, motor company was no longer owner of the automobile. West's Ann.Vehicle Code, §§ 178, 402.

5. Automobiles ⇐192(1)

Where possession of an automobile is delivered to another for a limited time, purpose, or use, a substantial deviation therefrom absolves the owner from liability arising from operation of the automobile. West's Ann.Vehicle Code, §§ 178, 402.

6. Automobiles ⇐244(22)

In action by guardians ad litem of motor scooter occupants against motorist,

motor company, and operator of auto salvage company for injuries received in collision between automobile and motor scooter, evidence was sufficient to sustain trial court's finding that motor company did not give expressed or implied permission to operator's alleged agent or anyone else to use or operate the automobile, which motor company purported to sell to operator for salvage, on the highways with possible exception of enabling the automobile to be driven to operator's yard for purpose of being junked.

7. Automobiles ⇐197(1)

Where motor company, in dealing with alleged agent of operator of auto salvage company, attempted to sell automobile to operator for junk, but alleged agent took automobile to his home and sold it to third party who was thereafter involved in collision between the automobile and motor scooter, operator would not be liable for injuries sustained by motor scooter occupants in absence of evidence of operator's ownership of the automobile or any express or implied permission on part of operator to any one to drive the automobile. West's Ann.Vehicle Code, § 402.

Eric A. Rose and Floyd H. King, Long Beach, for appellants.

Dryden, Harrington, Horgan & Swartz, Los Angeles, for respondent Severin Motors, Inc.

BARNARD, Presiding Justice.

This is an action for damages resulting from a collision between a 1936 Pontiac Coupe driven by Frank Contreras and a Motor Scooter on which the minor plaintiffs were riding, which occurred on October 5, 1954. The complaint named Contreras, Severin Motors, Inc. and Harry Lucas, doing business as Lucas Auto Salvage, as defendants. It alleged, among other things, that at the time of the accident the defendants and each of them were, and now are, the owners of the Pontiac car, and that at the time in question Contreras was driving the Pontiac with the knowledge and consent of each of the defendants. Contreras defaulted and a default judgment was entered in favor of the plaintiffs as against him. The case was tried by the court sitting without a jury. At the conclusion of the plaintiffs' case a judgment of nonsuit was entered in favor of Lucas. At the conclusion of the trial the court found, among other things, that prior to August 5, 1954, Severin Motors, Inc. was the owner of the Pontiac automobile; that on August 5, 1954, Severin Motors, Inc. sold the Pontiac to one Jacob Krause, for junk; that a few days later the pink slip and the white slip were mailed to Jacob Krause; that several days after August 5, 1954, and after the delivery of the Pontiac and the ownership and registration certificates to Krause, and before the accident happened, Krause transferred possession of the Pontiac to an unidentified Mexican man for cash, and delivered the ownership certificate to him; and that at no time did Severin Motors, Inc. either expressly or impliedly permit Contreras to use or operate this automobile. Judgment was entered that the plaintiffs take nothing against Severin Motors, Inc. The plaintiffs have appealed from that judgment and from the judgment in favor of Lucas.

It appears from the evidence that Severin Motors was a licensed dealer, selling automobiles wholesale and retail; that Lucas was a buyer of wrecked cars for junk; and that for two years prior to August 5, 1954, Lucas had bought an average of five cars each month wholesale from Severin Motors, through its sales manager S. T. Maxwell, for the purpose of junking them. In July, 1954, Severin Motors had taken this Pontiac in as part of the down payment on another car. It also received the pink slip signed by the original owner, and the white slip with an attached power of attorney signed by the original owner. On August 5, 1954, Krause came to Severin's used car lot and bought three old cars, including this Pontiac, at $10 each. A sales order was made out listing the three cars at a total price of

$30, naming Lucas Auto Salvage as the purchaser and marked "Paid". This was signed "Lucas Auto Salvage by Jacob Krause", and by Maxwell as authorized executive of Severin Motors. A copy of this purchase order was given to Krause, on which Maxwell wrote "Please deliver Pinks and Whites to Mr. Krause." Krause took possession of the cars and a day or two later he received the pink and white slips. The pink slip then contained, in addition to the signature of the original owner on line 2, an endorsement on line 3 on the back, which reads: "Severin Motors, Betty Miller Dlr No. 570 8–5–54". On August 5, Severin Motors also made out an invoice showing these three automobiles sold to Lucas Auto Salvage for $30. Severin Motors treated this as a wholesale and not a retail transaction, and no sales tax was collected. No notice of this transaction was given to the Motor Vehicle Department until after the accident.

Maxwell testified that on August 5, he sold this Pontiac to Krause who represented himself as being from Lucas; that Krause came in, asked "if I had some junk to sell", and stated that "he was buying for Lucas Auto Salvage"; that he found three cars and sold them to him for $10 apiece; and that he gave Krause a receipt for $30 made out to Lucas Auto Salvage. He also testified that on several occasions in the past a Mr. Griffin came with Mr. Lucas when he bought automobiles, and that on other occasions Griffin had bought automobiles for Lucas Auto Salvage; that on two or three occasions Mr. Krause was with Mr. Griffin; that Griffin had always signed the order when he came, but the two appeared to be coworkers; that on August 5, 1954, when Krause came in he asked Krause where his buddy was and Krause replied that he was sick; that he then asked Krause if he was still buying for Mr. Lucas, and Krause replied that he was; that he honestly believed at the time that Krause was buying these automobiles for Lucas Auto Salvage; and that he never saw the Pontiac again.

Krause testified that he bought this Pontiac and two other cars, paying $10 for each. When asked whether he drove the Pontiac off the lot, he replied: "I pulled it home." He testified that he did not tell Maxwell that he was buying these cars for Lucas or Lucas Auto Salvage; that he was given a copy of the purchase order; that he had previously been there with Mr. Griffin when Griffin was buying cars; and that he went into the office of Severin Motors a day or two later and received the pink and white slips. When asked whether he had read the words "Lucas Auto Salvage" on the purchase order when he signed it, he replied: "Well, I really didn't pay any attention to that." He further testified that shortly after August 5, he sold the Pontiac to an unidentified Mexican. The pink and white slips, in the form in which they had been delivered to Krause, were found in the possession of Contreras after the accident.

Betty Miller testified that on August 5, 1954, she was employed by Severin Motors as a contract clerk; that she wrote the endorsement "Severin Motors, Betty Miller" which appears on the back of the pink slip which was delivered to Krause; that she was not an executive officer of the corporation; that she had oral authorization by the office manager of Severin Motors to endorse certificates of ownership of automobiles, but that such authorization was not in writing; that she had no recollection of this particular transaction; and that in the course of business it was her practice to deliver pink and white slips to the purchaser after endorsing them on behalf of Severin Motors. Lucas testified that "I run a wrecking yard"; that he was in the business of buying used cars that are ready to be wrecked "for junk"; that he never "restored" such cars; that he never saw this Pontiac car, did not buy it from Severin Motors, and did not authorize any one to buy it on his behalf.

[1] In contending that Severin Motors, Inc. was liable as owner of the Pontiac car under Section 402 of the Vehicle Code, the

appellants contend that the evidence was insufficient to show a sale of this car from Severin Motors to any one, because the requirements of the Vehicle Code for transfers of motor vehicles were not complied with by Severin Motors. It is first argued that Section 178 of the Vehicle Code was not complied with. That section provides that an owner who has made a bona fide sale or transfer of a vehicle and has delivered possession to a purchaser shall not, by reason of other provisions of that code, be deemed the owner of the vehicle so as to be subject to civil liability for the operation of the vehicle by another when such owner has either made proper endorsements and delivery of the certificate of ownership and delivered a certificate of registration, or when said owner has delivered or mailed to the department either a certain notice or appropriate documents for registration of such vehicle. While it appears here that Severin Motors sold this car and delivered possession of it, and that it delivered to Krause the pink and white slips with endorsements on the pink slip showing a transfer of ownership signed by the original owner and by "Severin Motors, Betty Miller" with the dealer's number and the date, it is argued that this was not a proper endorsement by Severin Motors within the meaning of Section 178 because Betty Miller was not authorized in writing to make the endorsement on that certificate of ownership. Appellants rely on the case of W. P. Herbert Co. v. Powell, 90 Cal.App. 782, 266 P. 620, where it was claimed that a partner had given his former partner authority to sell an automobile and to endorse the pink slip, and it was held that the former partner had no authority to sign a different name to the registration certificate. That case involved the giving of authority by an owner to a third party to sell and transfer a car under peculiar circumstances. In this case the transfer was regularly made by the owner, Severin Motors, and the only authority in question was the authority of Betty Miller to sign her employer's name on the certificate after the employer had made the sale. This was a purely mechanical act and falls within the principles followed in Kadota Fig Ass'n of Producers v. Case-Swayne Co., 73 Cal.App.2d 815, 167 P.2d 523 and Murphy v. Munson, 95 Cal.App.2d 306, 212 P.2d 603. The evidence is sufficient to support the implied finding that the pink slip here was properly endorsed by Severin Motors, Inc. within the meaning, purpose and intent of Section 178 of the Vehicle Code.

[2–4] It is further argued in connection with the showing of a sale from Severin Motors, Inc. that no title to the Pontiac passed because Severin Motors thought they were selling to Krause as agent of Lucas when, in fact, he was not the agent of Lucas. The evidence was conflicting as to whether or not Krause represented that he was acting for Lucas, and the trial judge could resolve that conflict either way. While the transfer to Krause was undoubtedly brought about by his misrepresentation that he was acting for Lucas, the title to the car was actually transferred to Krause and he was given possession of the car and also given the certificate of registration and certificate of ownership, which would enable him to re-register the car with the Motor Vehicle Department. It cannot reasonably be held that the evidence was not sufficient to show a sale from Severin Motors within the meaning of the pertinent provisions of the Vehicle Code. Severin Motors, having made a bona fide sale of this car and delivered possession of the car together with the pink and white slips endorsed by the owner, was not thereafter to be deemed the owner of the car. Vehicle Code, Sec. 178; Piacun v. Hexem, 18 Cal.App.2d 145, 63 P.2d 315; Weinberg v. Whitebone, 87 Cal. App.2d 319, 196 P.2d 963; Woods v. Eastridge, 99 Cal.App.2d 625, 222 P.2d 296.

[5, 6] It is next contended that Severin Motors impliedly permitted Contreras to use and operate this automobile and that the evidence is insufficient to support the court's contrary finding. It is argued that Krause was given possession of this car without restrictions of any kind; that Con-

treras was a permittee of Krause; and that Severin Motors by reason of its unlimited permission to Krause is estopped from asserting that it had not given its permission to his subpermittee to operate the car. It is well established that when possession of an automobile is delivered to another for a limited time, purpose or use, a substantial deviation therefrom absolves the owner from liability. Henrietta v. Evans, 10 Cal. 2d 526, 75 P.2d 1051; Engstrom v. Auburn Auto Sales Corp., 11 Cal.2d 64, 77 P.2d 1059; Barcus v. Campbell, 90 Cal.App.2d 768, 204 P.2d 65; Rose v. Porter, 101 Cal. App.2d 333, 225 P.2d 245. In the Engstrom case it was pointed out that an inference of permissive use could not reasonably be drawn from evidence that the car was being operated by one who had stolen it. Beyond question, this Pontiac car was sold for $10, and sold with the understanding that it was to be junked, and the same principles should be applied here as in a case where a car was stolen. There is ample evidence that the sale of the car was brought about by misrepresentations made by Krause which would reasonably lead Severin Motors to believe and understand that the car was to be junked; that Severin Motors did so believe; and that it sold the car for that purpose only. The facts fully justified the court in finding that Severin Motors did not expressly or impliedly give its permission to Krause or to any one else to use or operate this car on the highways, with the possible exception of driving it to Lucas' junk yard for the purpose of being junked. In Hobbs v. Transport Motor Co., 22 Cal.2d 773, 141 P.2d 738, the court approved the giving of instructions as to an owner's liability where its assent was obtained by fraudulent representations, trick or device. The question was one of fact for the trial court and the evidence, with the reasonable inferences therefrom, support the findings and conclusions to the effect that the car was not delivered without restrictions of any kind, and that there was no implied permission for its operation on the highway two or three months later. Under the evidence, it is fully apparent that this case does not come within the meaning, purpose and intent of Section 402 of the Vehicle Code.

[7] It is further contended by the appellants that the court erred in granting the motion for nonsuit as to the defendant Lucas because there was a conflict between the testimony of Lucas and the testimony of Maxwell, to the effect that he sold the automobile to Krause in the belief that he was acting for Lucas Auto Salvage. There was no evidence showing any ownership of the Pontiac car by Lucas or any express or implied permission by him to any one to operate the car.

The judgments appealed from are affirmed.

GRIFFIN and MUSSELL, JJ., concur.



147 Cal.App.2d 732

Myron E. HANSEN, Petitioner and Appellant,

v.

CIVIL SERVICE BOARD OF the CITY OF ALAMEDA, State of California, Markham B. Happ, Thomas L. Ferro, Albert Ridley, James Quinn, Richard Houck, members thereof, Carl Froerer, Manager of the City of Alameda, et al., Respondents.

No. 17034.

District Court of Appeal, First District, Division 1, California.

Jan. 22, 1957.

Proceeding to review order of city civil service board upholding dismissal of fireman by city manager. The Superior Court, County of Alameda, James R. Agee, J., upheld dismissal and fireman appealed. The District Court of Appeal, Fred B. Wood, J., held that civil service board made sufficient findings of fact and such findings

were supported by substantial evidence in light of whole record.

Affirmed.

1. Municipal Corporations ⇐216(1)

Alameda Civil Service Board is governed by the charter and ordinances of the City of Alameda and is not one of those agencies to which adjudication provisions of the administrative procedure act apply. West's Ann.Gov.Code, §§ 11500, 11501, 11518; City Charter of Alameda, § 13–3, St. 1937, p. 2896.

2. Administrative Law and Procedure ⇐485

Statute respecting proceedings in mandamus to review actions of administrative agencies and providing that an abuse of discretion is established if the order or decision under review is not supported by the findings or the findings are not supported by the evidence, does not require that every administrative agency, state or local, must formulate specific findings of fact and record them in writing. West's Ann.Code Civ.Proc., § 1094.5.

3. Municipal Corporations ⇐198(3)

Where decision of city civil service board upholding dismissal of fireman by city manager incorporated by reference letters by city manager giving reasons for dismissal, there were sufficient findings by board to meet requirements of applicable provisions of law. West's Ann.Code Civ. Proc., § 1094.5.

4. Municipal Corporations ⇐198(4)

In proceeding to review decision of city civil service board upholding city manager's dismissal of fireman because of fireman's admissions of intoxication both while on and off duty, findings were supported by substantial evidence in light of whole record.

5. Municipal Corporations ⇐198(4)

In reviewing decision of city civil service board upholding city manager's dismissal of fireman, court was not authorized to exercise its independent judgment on the evidence.

6. Municipal Corporations ⇐218(9)

Civil service hearing to review discharge of employee is an administrative proceeding which is civil, not criminal in nature, and a declaration against interest is admissible as tending to prove the existence of the facts declared or admitted.

7. Municipal Corporations ⇐198(4)

In proceeding to review decision of civil service board upholding dismissal of fireman by city manager on the ground of fireman's intoxication both on and off the job, where court found that allegations were true, there was manifestly included a finding that the conduct of the fireman did impair the efficiency and discipline of the department.

8. Municipal Corporations ⇐198(2)

In proceeding to review decision of city civil service board upholding dismissal of fireman by city manager because of intoxication while both on and off duty, dismissal of fireman from service of department in which he had served over 10 years, was not an excessive penalty.

9. Municipal Corporations ⇐198(4)

Court in reviewing decision of city civil service board upholding decision of city manager dismissing fireman because of certain acts and conduct while both on and off job, had no authority to determine or to redetermine the penalty imposed.

Dickey & Dickey, Alameda, James H. Phillips, Sacramento, for appellant.

Frank Annibale, City Atty., Alameda, for respondents.

FRED B. WOOD, Justice.

Dismissed by the city manager after serving as a city fireman for over ten years, Myron E. Hansen appealed to the city's Civil Service Board which after a hearing upheld the dismissal. Upon a review pursuant to section 1094.5 of the Code of Civil Procedure the superior court upheld the dismissal and Hansen has appealed.

(1) *Appellant assigns as error the asserted failure of the Civil Service Board to make findings of fact.*

[1] This, a local board, is governed by the charter and ordinances of the City of Alameda and they do not require the board to make findings.[1] It is not one of the agencies to which the adjudication provisions (such as § 11518, Government Code) of the administrative procedure act apply. See Gov.Code, §§ 11500, 11501; Bertch v. Social Welfare Dept., 45 Cal.2d 524, 527–529, 289 P.2d 485.

[2] Appellant says that section 1094.5 of the Code of Civil Procedure, which governs the instant proceeding in mandamus, requires that the board, whose order is under review, make specific findings of fact in writing. He refers to the statement that abuse of discretion is established if the order or decision under review "is not supported by the findings, or the findings are not supported by the evidence", subd. (b) of § 1094.5, and the statement of the circumstances under which the superior court shall, and when it shall not, weigh the evidence where "it is claimed that the findings are not supported by the evidence", subd. (c) of § 1094.5.

This does not read like a mandate that every administrative agency, state or local, must formulate specific findings of fact and record them in writing. It merely assumes, naturally, that an administrative agency makes findings of fact in the process of conducting a hearing, receiving evidence and rendering a decision. It does not lay down any formal requirements as to the making of such findings; e. g., it does not say that they need be in writing or, if in writing, that they must be separately stated.

[3] Our examination of the record convinces us that the Civil Service Board did make findings which meet all of the requirements of the applicable provisions of law. This the board did by reference to the action taken by the city manager when

1. Section 13–3 of the charter states that any member of the police or fire department who shall have been in the service of the city for three years shall, if dismissed, have the right to appeal to the Civil Service Board "which shall have the power to hear the charges and determine the penalty. The procedure for such appeal shall be determined by the Civil Service Ordinance, or in default thereof, by the Civil Service Board." Stats.1937, Ch. 86 of Res. p. 2896.

Section 12 of the Civil Service ordinance reads as follows:

"Section 12. A permanent civil service employee may be dismissed, demoted, fined more than one month's salary, or suspended without pay for more than thirty days by the appointing power of such employee only by notice in writing specifying the penalty and served personally on such employee. Within five days after receipt of such notice the employee affected may by notice in writing demand of such appointing power, and shall be entitled to receive within five days thereafter, a statement in general terms of the causes of such dismissal, demotion, fine or suspension. Such notice shall be signed by and shall state the address of such employee.

"Within not to exceed ten days after service of such statement such employee shall have power to appeal to the Civil Service Board by filing with such board a written notice of appeal signed by him and stating the grounds on which such appeal is taken.

"At the earliest practicable date, but not more than sixty days after filing of notice of appeal, and after such notice to the employee and the appointing power as such board shall establish by rule, such board shall proceed to hear such appeal. At all such hearings the burden of proof shall be upon the appealing party.

"Subject only to the provisions of Section 13–3 of the Charter of the City of Alameda, the dismissal, demotion, fine or suspension shall be affirmed by the Civil Service Board unless it shall appear that such dismissal, demotion, fine or suspension was made or imposed for political motives or for motives other than the maintenance of efficiency, competency or discipline in the governmental service of the City of Alameda, in which case the action appealed from shall be annulled.

"The decision of the Civil Service Board on all appeals shall be final, conclusive and not subject to review. No right of appeal shall exist from fines not exceeding one month's salary or from suspensions without pay not exceeding thirty days." (Ordinance No. 642, N.S. adopted May 24, 1938.)

he dismissed appellant and stated the reasons for the dismissal.

The complaint alleged and the answer admitted that the respondent "'Board' notified petitioner [appellant herein] as follows: 'It was the unanimous vote of the Civil Service Board that the action of the City Manager in dismissing you from the Alameda Fire Department, effective 3:45 p. m. September 30, 1954, be upheld.'"[2]

The action of the city manager thus referred to was expressed in two letters from him to appellant, the first of which as alleged in the complaint and admitted by the answer was as follows: "* * * [dated September 30, 1954; 3:45 P.M.] * * * Dear Sir: It has come to my attention that under date of September 21, 1954, you were placed under arrest by an officer of the Alameda Police Department on a charge of drunkenness.

"There is in my possession further information to the effect that you have admitted being in a state of intoxication in and about the fire houses of the City of Alameda while on duty as well as while off duty.

"This is conduct on the part of a member of the Alameda Fire Department which cannot be tolerated. It is therefore my order that you be and you are hereby dismissed from the Alameda Fire Department effective immediately by reason of your acts and conduct, which impaired the efficiency and discipline of the Department. * * * [Signed by the city manager] * * *"

The other letter from the city manager to appellant dated October 8, 1954, read as follows: "In response to your request of October 1, 1954, received at my office by registered mail on October 4, 1954, the following is the statement of the reasons for your dismissal from the Alameda Fire Department on September 30, 1954.

"1. Your admission, made on or about September 23rd, 1954, that during the months of June and July of this year you were in the fire station to which you were assigned for duty in an intoxicated condition while on duty as well as while off duty.

"2. Your public arrest by an officer of the Alameda Police Department on or about September 21st, 1954, on a charge of drunkenness, during the course of which arrest you became violent and abusive to the extent that it was necessary for the officer initiating the arrest to call upon another member of the Alameda Police Department to subdue you and take you into custody."

The facts stated in these letters and incorporated by reference in the Civil Service Board decision became the board's findings and thus satisfied every requirement of the law concerning administrative findings. They are very like the findings approved in Swars v. Council of City of Vallejo, 33 Cal.2d 867, 206 P.2d 355, where the city Civil Service Commission adopted a motion stating "'* * * we * * * uphold the action taken by the City Council in the adoption of Resolution 28191 N.S., dated October 10th, 1942, wherein the office of Police Sargeant held by William J. Swars is hereby declared vacant and he is hereby dismissed from the services of the City of Vallejo effective the 10th day of October, 1942.'" 33 Cal.2d at page 870, 206 P.2d at page 357. Of this the Supreme Court said: "The use by the commission of the words, '* * * we * * * uphold the action taken by the City Council * * *' is sufficiently clear to meet the informal standards required of administrative agencies. A part of the action upheld was the dismissal of Swars '* * * for conduct unbecoming an officer; said misconduct consisting of unnecessarily and unmercifully beating an intoxicated person'.

"The resolution of the City Council made clear to Swars and all concerned the basis for the charge of misconduct and specifically stated the facts in regard to it. The written statement of Swars shows that he was well aware of the identity of the person whom he was charged with beating.

2. Although this was an indirect method of alleging what the board did, it is a fair inference that the parties intended this as a positive statement (not as a mere recital) and that they and the trial court so regarded and treated it.

Administrative findings may be general as long as they satisfy the dual requirements of making intelligent review by the courts possible and apprising the parties of the basis for administrative action. The findings of the Civil Service Commission were sufficient to meet these tests * * *." 33 Cal.2d at page 873, 206 P.2d at page 358.

Significant also is the holding in the Swars case that in connection with "the action of an administrative board, the fact that certain action is taken or recommendation made may raise a presumption that the existence of the necessary facts was ascertained and found." At page 872 of 33 Cal. 2d, at page 358 of 206 P.2d. Followed in Miller v. Planning Commission, 138 Cal. App.2d 598, 603, 292 P.2d 278; Bailey v. County of Los Angeles, 46 Cal.2d 132, 135–136, 293 P.2d 449.

(2) *Does the evidence support the board's findings?*

[4, 5] The test is whether or not the findings are supported by substantial evidence in the light of the whole record. In the case of a local board such as this the court is not authorized to exercise its independent judgment on the evidence. It does not weigh the evidence.

At the hearing before the board, Harold Hove, an attorney engaged by the City of Alameda to conduct an investigation on its behalf, testified that on September 23, 1954, the appellant stated to him that he had been drinking quite heavily during he past 30 or 60 days. The appellant during this conversation also admitted that during the months of June and July of 1954, he had been in the Fire Department both on duty and off duty in an intoxicated condition. Jack Fink, an inspector in the Alameda Police Department, who was present at this conversation, also testified that the appellant had admitted being intoxicated in the fire house while on duty during the two months preceding September 23, 1954. Gaetano Magliocco, a member of the Alameda Police Department, testified that on September 21, 1954, the appellant was arrested for drunkenness in front of his home. Mr. Magliocco asked the assistance of another officer on the street to put handcuffs on the appellant. The appellant had sought the assistance of the police because he believed his daughter had been abducted. The daughter was later found cleaning the neighbor's garage.

The appellant, testifying in his own behalf, denied making the admissions that he had been in a state of intoxication in and about the fire houses, and stated that he had not been drunk around the fire house in June or July of 1954. Mr. Forrest V. Routt, Jr., secretary to the Civil Service Board, testified that the appellant's service rating, including the one filed September 30, 1954, had been good.

[6] Appellant claims that those facts which depend entirely upon his out-of-court admissions can not be regarded as having been proved. His theory is that the law requires independent evidence of conduct warranting dismissal; i.e., like the corpus delicti in a criminal case (see 8 Cal. Jur. 167, Crim. Law § 248), such conduct can not be established by the extrajudicial admissions or confessions of the person charged. But this is not a criminal case. It is an administrative proceeding, civil not criminal in nature, in which a declaration against interest is admissible as tending to prove the existence of the facts declared or admitted.

Appellant stresses the fact that performance rating made by his superior officer showed exemplary conduct. That, at most, produced a conflict in the evidence for the board, not a court, to weigh and resolve.

He says he was not dismissed for his drinking habits; instead, that he was dismissed for being arrested at his home for intoxication while off duty and for being in an intoxicated condition in and about the fire house during June and July, 1954, and that such conduct was insufficient support for a finding that his conduct impaired the efficiency and discipline of the fire department. We are not persuaded. We are not the trier of the facts and we can not say as a matter of law that the inferences and con-

clusions drawn by the Civil Service Board were unreasonable. Moreover, there is no basis for selecting a few of the several facts proved and saying that standing alone they are insufficient. They do not stand alone. We must view all of the facts mentioned by the city manager and found by the Civil Service Board. Viewing them as a whole, we can not say it was unreasonable or incompetent for the city manager to conclude that appellant's conduct impaired the efficiency and discipline of the department or for the Civil Service Board to concur and confirm.

We conclude that the evidence supports the findings of the board.

(3) *Did the trial court fail to make a finding on a material fact? No.*

[7] Appellant says the findings of the trial court fail to state whether or not the "acts and conduct" of appellant mentioned in the letter of dismissal did "impair the efficiency and discipline of the department."

The court, among other things, found that the allegations of certain paragraphs of the complaint (including those which set forth in haec verba the letter of dismissal and the board's notice to appellant of its action) are true; that the board affirmed the action of the city manager in dismissing appellant; and that there was substantial evidence offered and received to support the findings of the respondent board. Manifestly, that included a finding that the board, upon sufficient evidence, found that the acts and conduct described impaired the efficiency and discipline of the department.

(4) *Was the penalty excessive?*

[8] Under this heading appellant presents substantially the same argument that he did in support of his contention, that the evidence is insufficient to support the findings.

In view of the findings of the board and of the trial court and the evidence which supports those findings, we can not say that the dismissal from the service of the department is an excessive penalty.

[9] We, of course, have no authority to determine or redetermine the penalty and find no basis for sending the cause back to the respondent board for redetermination of the penalty. See Bonham v. McConnell, 45 Cal.2d 304, 288 P.2d 502; Black v. Personnel Board, 136 Cal.App.2d 904, 912, 289 P.2d 863.

The judgment is affirmed.

PETERS, P. J., and BRAY, J., concur.



Norman R. PORTER and Betty M. Porter, Plaintiffs and Respondents,

v.

MONTGOMERY WARD AND CO., Inc., and T. S. Jackson, Defendants and Appellants.*

Civ. 8855.

District Court of Appeal, Third District, California.

Jan. 17, 1957.

As Amended Jan. 22, 1957.

Rehearing Denied Feb. 5, 1957.

Hearing Granted March 13, 1957.

Action against store owner for injuries sustained by plaintiff when she fell, while descending staircase in store, allegedly because of presence of liquid on stairs. From judgment for plaintiff rendered by the Superior Court, Tehama County, Curtiss E. Wetter, J., defendant appealed. The District Court of Appeal, Peek, J., held that evidence was sufficient for jury to infer that wet spot on stairway was either tracked from floor at base of fountain near stairs or that child standing on first or second step of stairway to drink splashed water and that wet spot was result of negligence either in failing to keep fountain in proper repair or in placing it too close to stairway.

Judgment affirmed.

1. Negligence ⇐134(5)

In action against store owner for injuries sustained in fall down stairway which

* Opinion vacated 313 P.2d 854.

plaintiff had been descending while taking three year old son by hand, allegedly due to presence of liquid on stair near drinking fountain, evidence was sufficient for jury to infer that wet spot on stairway was either tracked from floor at base of fountain or that child standing on first or second step of stairway to drink splashed water and that wet spot was result of negligence either in failing to keep fountain in proper repair or in placing it too close to stairway.

2. Negligence ⇐124(1), 138(2)

Division of industrial safety order relative to maintenance of center railings on stairways of certain widths was applicable with respect to store to members of general public as well as employees so that it was proper in action for injuries sustained by member of public in stairway fall to receive regulation in evidence and to instruct that rebuttable presumption arose from any violation of such rule that store was negligent. West's Ann.Const. art. 20, §§ 17½, 21; West's Ann.Health & Safety Code, §§ 16400, 16413; West's Ann.Labor Code, §§ 6312, 6500.

Chenoweth & Leininger, Redding, for appellants.

John Halpin, Jr., John A. Spann, Redding, for respondents.

PEEK, Justice.

This is an appeal by defendants from a judgment in favor of plaintiffs in an action brought to recover damages for personal injuries suffered by Mrs. Porter when she fell on a stairway in the defendant company's Red Bluff store.

Mrs. Porter, accompanied by her three-year-old son, was descending the stairway from the mezzanine to the main floor. There was a handrail on each side of the stairway, however the intermediate railing had been removed. As they walked down the steps Mrs. Porter held her son's left hand in her right hand, and he held the right hand rail with his right hand. Under her left arm she carried a small, eight-by eleven-inch purse which had no handle. At either the third or fourth step from the bottom she slipped and fell, landing with her right leg extended in front of her and her left leg bent back and to one side. When she got up she was asked by a clerk if she wished to inform the manager of her fall. She replied that she did not; that she didn't believe she was hurt. After shopping for 20 or 25 minutes, Mrs. Porter requested the same clerk to call the manager. She then informed Mr. Jackson, the store manager, that she had slipped and fallen on a step and complained of pain in her knee and back. Mr. Jackson suggested that she see the defendant company's physician, giving her a standard form card on which he wrote her name, that of the doctor as well as his own and gave her directions to the doctor's office. While the manager was making out the card, Mrs. Porter inspected the step where she had slipped and found there a clear liquid which felt moist and looked like water. There was also a three- or four-inch-long black heel mark from her shoe on the step. She did not call the attention of the manager or any other of defendant company's employees to the spot on the step. Much of her testimony in this regard was contradicted by employees of the defendant company. At the bottom of the stairway, and immediately to the north or left-hand side, there was a drinking fountain. The fountain was of standard design, about three feet, five inches high and 15 inches square. From the third step up, the stairway was enclosed on both sides by a wall extending from the floor to the ceiling. Pursuant to a request of plaintiffs' counsel, two witnesses visited the store approximately seven and a half months after Mrs. Porter's accident. Both witnesses observed that there was moisture on the floor at the base of the drinking fountain, and that when a person drank from the fountain water went outside of the basin. One of these witnesses further testified that while he was observing customers who used the fountain, he saw one woman press the valve and water squirted out upon the floor. The store

manager testified that the fountain was in the same condition on the day of the accident as it was when it was examined by the plaintiffs' witnesses; that he had never observed, nor had it been reported to him, that the fountain was splashing over; however he did state that he had noticed the dampness around the fountain when children played with it; that there was no step for children to stand on; and that he had noticed that small children, in order to gain the necessary height to drink from the fountain, would stand either on the first or second step of the stairway.

[1] It is defendants' first contention that the evidence fails to disclose any negligence attributable to them in connection with Mrs. Porter's slipping on the stairs. It would appear, however, that from the summary of the facts disclosed by the record, the jury could infer that the wet spot on the stairway was either tracked from the floor at the base of the fountain, or that a child standing on the first or second step splashed water while drinking from the fountain, and thus the wet spot was the result of defendants' negligence, under either the theory that they failed to keep the fountain in proper repair, or that they were negligent in placing the fountain so near and adjacent to the stairway. Furthermore, the jury was entitled to find negligence from defendants' failure to maintain a center railing on the stairway in conformance with certain safety regulations which form the basis of defendants' second contention.

[2] Defendants' argument in support of said contention is that the trial court erred in admitting into evidence, over their objection, a certain order of the Division of Industrial Safety relative to the maintenance of a railing on a stairway 88 inches or more in width, and the giving of an instruction embodying the same safety order. The order in question, number 3232, was issued in conformity with the provisions of sections 6312 and 6500 of the Labor Code. The instruction followed substantially the order in question and was in part as follows:

> "If a party to this action violated the rule just read to you, a presumption arises that he was negligent. This presumption is not a conclusive one. It may be over come by other evidence showing that under all the circumstances surrounding the event the conduct in question was excusable, justifiable and such as might reasonably have been expected from a person of ordinary prudence."

It is defendants' argument that under sections 17½ and 21 of Article 20 of the California Constitution, the Legislature has been empowered to provide a system of compensation and protection for employees; that the Division of Industrial Safety has only the authority to make regulations affecting the relationship of the employer and employee; that any such regulation cannot affect third persons; and that Mrs. Porter being a member of the general public is not one of the class entitled to benefits from such order. It is further contended that the Legislature, by enacting sections 16400 and 16413 of the Health and Safety Code, providing for intermediate stair railings in apartment houses and hotels when a stairway exceeds 88 inches in width, conclusively showed that there is no connection between the legislative enactments covering the general public and the safety orders of the Division of Industrial Safety relating to industry and employer and employee exclusively.

Were this a question of first impression, the earnest argument of defendants' counsel would be much more persuasive. But it is not. Our reviewing courts, in several recent cases, have had the identical question presented, and in each instance have approved instructions comparable to the one given in the present case. In the case of Pierson v. Holly Sugar Corp., 1951, 107 Cal.App.2d 298, 237 P.2d 28; Supreme Court hearing denied, the party injured by the fall of an elevator was not an employee

of the defendant but was a business invitee, the same as plaintiff Mrs. Porter in the present case. Defendant there contended, as do defendants in this case, that the court erred in giving instructions to the jury containing orders of the Division of Industrial Safety. In affirming the judgment for plaintiff the court held: "We conclude that the safety orders and the provisions of the Labor Code referred to were intended not only to protect employees of defendant corporation but also as safeguards for the public generally against injury or loss of life and that it was proper to instruct the jury as to such rules and regulations and provisions in the instant case." 107 Cal.App.2d at page 302, 237 P. 2d at page 31. Thereafter in Armenta v. Churchill, 1954, 42 Cal.2d 448, 453, 267 P.2d 303, wherein a judgment of the trial court was reversed for failure to receive in evidence and include in its instructions to the jury certain construction safety orders, the Pierson case was cited with approval. In the later case of Nungaray v. Pleasant Valley, etc., Ass'n, 1956, 142 Cal. App.2d 653, 300 P.2d 285, again the contention was made that the constitutional authority only related to the employer-employee relationship and that any regulations made by the Division of Industrial Safety could not affect third persons. However the court held that the point was "untenable" and in support thereof cited and relied upon the Pierson case. Lastly in Bragg v. Mobilhome Co., 1956, 145 Cal.App.2d 326, 302 P.2d 424, a similar contention was made, and although a judgment in favor of the plaintiff was reversed on other grounds, specific approval was given to a like instruction.

In view of the rule as now established in this State, the contentions of defendants cannot be sustained.

The judgment is affirmed.

VAN DYKE, P. J., and SCHOTTKY, J., concur.

147 Cal.App.2d Supp. 833

Ada COLEMAN, etc., Plaintiff and Appellant,

v.

Dr. MIDDLESTAFF, Defendant and Respondent.

C.A. 9058.

Appellate Department, Superior Court, Los Angeles County, California.

Jan. 8, 1957.

Action by Negro minor through guardian ad litem against dentist for damages under equal right's statute. The Municipal Court of the Santa Anita Judicial District, John A. H. Sturgeon, J., entered order sustaining demurrer to complaint without leave to amend and plaintiff appealed. The Appellate Department of the Superior Court, Kauffman, J., held that dentist office was not one of the "other places of public accommodation or amusement," within the statute rendering persons denying admission on account of race to certain enumerated places and other public places of amusement or accommodation, liable in damages.

Affirmed.

1. Pleading ⇐225(2)

If complaint could be amended to state a cause of action, it was an abuse of discretion to sustain demurrer without leave to amend.

2. Physicians and Surgeons ⇐10

A dentist, in absence of statute, is under no legal obligation to render professional services to all who apply or seek to engage his services.

3. Civil Rights ⇐4

A dentist office, is not "other public place of amusement or accommodation" within meaning of equal rights statute rendering person liable in damages for refusal to admit persons because of color or race to certain enumerated places or other public place of amusement or ac-

commodation. West's Ann.Civ.Code, §§ 51, 52; U.S.C.A.Const. Amend. 14.

See publication Words and Phrases, for other judicial constructions and definitions of "Other Public Place of Amusement or Accommodation".

4. Civil Rights ⇐7, 8

In enacting statutes respecting equal rights of citizens to admission to places of public accommodation or amusement, legislature has enacted provisions which are specifically designed to cover discrimination by individuals in particular places enumerated therein and has included the places, such as inns and public conveyances, where discrimination was proscribed at common law. West's Ann.Civ.Code, §§ 51, 52.

Charles B. Johnson, Pasadena, for appellant.

A. L. Wirin and Allan M. Carson, Los Angeles, for amicus curiae.

Draper, Porter & Kramer, Monrovia, for respondent.

KAUFFMAN, Judge.

This is an appeal by plaintiff from a judgment that plaintiff take nothing, entered after an order sustaining a demurrer to the complaint without leave to amend.

Plaintiff, Christopher Coleman, a minor, sued through his guardian ad litem, Ada Coleman, his mother. In the first cause of action the complaint alleged that plaintiff is a Negro and a citizen of the United States; that at all times defendant operated and maintained a dental office in Duarte, California, which was open to the use of the general public, at which defendant offered services for the extraction of teeth among other things; that on or about the 10th of March, 1955, plaintiff was suffering from a toothache and called defendant's office and made an appointment to have a tooth extracted; that upon arriving at defendant's office he was informed that defendant did not give dental service to Negroes. Plaintiff further alleged that by reason of the conduct of defendant he was deprived of rights guaranteed by Sections 51 and 52 of the Civil Code, the Fourteenth Amendment to the United States Constitution, and Article I, Section I, of the California Constitution, and prayed for $2,000 in damages. The second cause of action by incorporation substantially restated the first cause of action.

[1] We must determine whether the complaint does, or may be amended to, state a cause of action, since if it can be so amended it was an abuse of discretion to sustain the demurrer without leave to amend. Gaglione v. Coolidge, 1955, 134 Cal.App.2d 518, 522, 286 P.2d 568.

The first question is whether a dentist's office is to be considered as one of the "other places of public accommodation or amusement" within Section 51 of the Civil Code, or is to be included within the meaning of similar language in Section 52 of the Civil Code.

In Long v. Mountain View Cemetery Ass'n, 1955, 130 Cal.App.2d 328, 329, 278 P.2d 945, the court held that the words "all other places of public accommodation or amusement" within Section 51 of the Civil Code mean all other places of like nature to those enumerated, and that it does not include cemeteries. The particular places enumerated are inns, restaurants, hotels, eating-houses, places where ice cream or soft drinks of any kind are sold for consumption on the premises, barber shops, bath houses, theaters, skating rinks, and public conveyances. A similar enumeration is made in Civil Code, Section 52. We do not consider that a dentist's office is a place of like nature to those enumerated. In Rice v. Rinaldo, Ohio App., 119 N.E.2d 657, the court was faced with a factual situation similar to the one before us, and it held that a dentist's office is not a place of public accommodation or amusement. The court stated, supra, 119 N.E. 2d at page 659: "A dentist may be classified as one of the learned professions

like unto a physician or surgeon. An office of a physician or surgeon does not connote that it is a place of public accommodation."

[2] The court also quoted the following statement from 41 Am.Jur. 135: "In the absence of statute, a physician or surgeon is under no legal obligation to render professional services to everyone who applies to him or seeks to engage him. Physicians are not public servants who are bound to serve all who seek them, as are innkeepers, common carriers, and the like." This is the law of this state. McNamara v. Emmons, 1939, 36 Cal.App.2d 199, 97 P.2d 503. We believe that this statement may also be applied to dentists. Carnahan, "The Dentist and the Law," p. 42, citing Roberts v. Parker, 1932, 121 Cal.App. 264, 8 P.2d 908. In view of the foregoing, plaintiff cannot state a cause of action under Sections 51 and 52 of the Civil Code. Cf. 14 C.J.S., Civil Rights, § 6, pp. 1165–1166.

[3, 4] Appellant also argues that the public policy of California is opposed to racial discrimination, and that this policy applies to private as well as public action, and may be enforced without the necessity of a statute. Although a policy against racial discrimination exists in this state, the cases which recognized that a statute is not necessary to enforce such a policy involved discrimination by organizations, to wit: labor unions which are unincorporated associations. James v. Marinship Corp., 1944, 25 Cal.2d 721, 155 P.2d 329, 160 A.L.R. 900; Williams v. International Brotherhood of Boilermakers, 1946, 27 Cal.2d 586, 165 P.2d 903. In establishing this principle, the Supreme Court relied upon the analogy between a labor union and public service businesses, such as innkeepers and common carriers, who, at common law, could not discriminate on the grounds of race, subject to the "separate but equal" doctrine. See James v. Marinship Corp., supra, 25 Cal.2d at page 740, 155 P.2d at page 339. In the James and Williams cases, supra, there was no applicable statute under the terms of which the discrimination complained of was prohibited. On the other hand, in the case at bar the discrimination is alleged to have been committed by a particular individual in a particular location. In Civil Code Sections 51 and 52 the legislature has enacted provisions which are specifically designed to cover discrimination by individuals in particular places enumerated therein; and it has included the places where discrimination was proscribed at common law, i. e. inns and public conveyances. As we have noted, there is no established public policy that compels a dentist to treat anyone who comes to him, see also McNamara v. Emmons, supra, 1939, 36 Cal.App.2d 199, 97 P.2d 503, and since the legislature has specifically declared the public policy of the state in regard to discrimination in particular locations, and has not included "dentists", it is the office of the legislature, and not this court to make any additional enumerations which may be desirable.

We conclude, therefore, that the trial court's order sustaining the demurrer to the complaint without leave to amend was correct.

The judgment is affirmed.

BISHOP, P. J., and SWAIN, J., concur.

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47 Cal.2d 792

AUTOMOTRIZ DEL GOLFO DE CALIFORNIA S. A. DE C. V., Plaintiff and Respondent,

v.

Erwin G. RESNICK, W. D. Cowan and R. William Cowan, Defendants and Appellants.

L. A. 24232.

Supreme Court of California, In Bank.

Jan. 30, 1957.

Rehearing Denied Feb. 27, 1957.

Action by foreign corporation for balance due on price of automobiles allegedly sold to defendants. The Superior Court, Los Angeles County, Clarence M. Hanson, J., entered judgment for foreign corporation, and defendants appealed. The Supreme Court, Gibson, C. J., held that evidence was sufficient to sustain trial court's conclusions that defendants had failed to meet burden of proving that the sale was an intrastate transaction and that evidence was sufficient to sustain trial court's finding that defendants were doing business as individuals, rather than through a corporation.

Judgment affirmed.

Opinions, 292 P.2d 578, 297 P.2d 109, 298 P.2d 33, vacated.

Carter, J., dissented.

1. Commerce ⇦46

Burden of proving that Corporations Code provision, which precludes foreign corporation from maintaining any action or proceeding in California court, upon any intrastate business without compliance with certain statutory provisions, precludes the maintenance of a particular action is upon party pleading the bar of such statute. West's Ann.Corp.Code, §§ 6400 et seq., 6801.

2. Commerce ⇦46

Where automobiles would be sent to Los Angeles by Mexican seller, which was a foreign corporation, and California buyer would pay cost of transporting the automobiles from Mexico, sales made in such manner were not intrastate transactions within Corporations Code provision forbidding foreign corporation from maintaining any action or proceeding in California court upon any intrastate business unless foreign corporation had complied with certain provisions of the Corporations Code. West's Ann.Corp.Code, §§ 6400 et seq., 6801.

3. Commerce ⇦46

In action by foreign corporation for balance due on price of automobiles allegedly sold defendants, evidence was sufficient to sustain trial court's conclusions that defendants had failed to meet burden of proving that the sale was an intrastate transaction. West's Ann.Corp.Code, §§ 6400 et seq., 6801.

4. Corporations ⇦1

In action for balance due on price of automobiles allegedly sold by plaintiff to defendant, evidence was sufficient to sustain trial court's finding that defendants were doing business as individuals, rather than through a corporation.

5. Corporations ⇦1

Generally, conditions under which a corporate entity may be disregarded vary

according to the circumstances of each case, but two requirements for disregard of the corporate entity are that there be such unity of interest and ownership that the separate personalities of the corporation and the individual no longer exist and that, if the acts are treated as those of the corporation alone, an inequitable result will follow.

6. Corporations ⇦1

Failure to issue stock or to apply at any time for a permit is an indication, although not conclusive evidence, that persons purportedly doing business through a corporation are doing business as individuals.

7. Corporations ⇦1

Factor to be considered in determining whether individuals dealing through a corporation should be held personally responsible for the corporate obligations is whether there was an attempt to provide adequate capitalization for the corporation.

8. Corporations ⇦1

In determining whether defendants should be allowed to escape personal liability for debts due plaintiff, on ground that defendants were operating through corporation, trial court was entitled to consider defendants' failure to issue any stock for such corporation or apply for permission to do so, defendants' creation and operation of the corporation with little or no capital, and all the relevant facts concerning the manner in which the business was operated.

Levy, Bernard & Jaffe, Los Angeles, and Geo. W. Rochester, Beverly Hills, for appellants.

C. P. Von Herzen and Samuel L. Laidig, Los Angeles, as amici curiae, on behalf of appellants.

Francis B. Cobb, Los Angeles, for respondent.

GIBSON, Chief Justice.

Plaintiff, a Mexican corporation, brought this action for the balance due on the price of eight automobiles which it alleges were sold to defendants E. G. Resnick, W. D. Cowan and R. W. Cowan. The trial court found for plaintiff, and defendants have appealed from the judgment.

Defendants contend first that plaintiff cannot maintain this action because, they assert, the transaction was intrastate and plaintiff did not allege or prove that it had qualified to do business in California by complying with chapter 3 of the Corporations Code, § 6400 et seq. Section 6801 of the Corporations Code provides in part: "A foreign corporation subject to the provisions of Chapter 3 of this part which transacts intrastate business in this State without complying therewith shall not maintain any action or proceeding upon any intrastate business so transacted in any court of this State, commenced prior to compliance with Chapter 3 until it has complied with the provisions thereof, * * *."

[1–3] The burden of proving that section 6801 precludes maintenance of an action is upon the party pleading the bar of the statute. W. W. Kimball Co. v. Read, 43 Cal.App. 342, 346, 185 P. 192; see McMillan Process Co. v. Brown, 33 Cal.App.2d 279, 284, 91 P.2d 613; Indian Refining Co., Inc., v. Royal Oil Co., Inc., 102 Cal.App. 710, 716, 283 P. 856. Defendants, in order to prove that the statute applies, were required to show that the particular transaction involved here was an intrastate sale. There is evidence that, prior to the sale of the eight automobiles, several similar transactions had been arranged by telephone between plaintiff in Mexico and Resnick in Los Angeles. After agreement on the price, the cars would be sent to Los Angeles, and the buyer would pay the cost of transporting them from Mexico. Sales made in that manner were not intrastate transactions. Plaintiff sometimes shipped cars to the "L. A. automobile auction," and, on occasion, if they were not sold there, its agent would offer them to Resnick, usually negotiating by telephone from Mexico. The only evidence as to how the transaction for the sale of the eight cars was handled was the testimony of plain-

tiff's sales representative that "it could be possible" that they were "picked up" at the "L. A. automobile auction." In this state of the record the trial court was clearly justified in concluding that defendants had failed to meet the burden of proving that the sale involved here was an intrastate transaction.

[4] Defendants next contend that the evidence is insufficient to support the trial court's finding that they were doing business as individuals. We do not agree.

In September of 1952 Resnick and several other persons formed Erbel, Inc., a California corporation. After obtaining releases from his associates of their interest in the corporation, Resnick arranged with W. D. Cowan and his son, R. W. Cowan, to establish a car company. It was orally agreed that Resnick, who was to manage the business, was to receive 50% of the "profits" and that each of the Cowans was to receive 25%, and the three of them became officers and directors of Erbel, Inc. The corporation never issued stock or applied for a permit to issue stock, and, although defendants testified that they contributed $5,000 to the capital of Erbel, Inc., the court did not find that this was true, and such a finding was not compelled by the record. There is no evidence that any bank account was ever maintained in the name of Erbel, Inc., but a checking account was opened by defendants with the Bank of America under the name "Erbel, Inc. dba Bi-Rite Auto Sales."

The volume of sales from the automobile business conducted by defendants ran between $100,000 and $150,000 a month. The method used to finance the purchase of cars which were to be offered for sale was complex, but it is clear that the funds required for this purpose were supplied by the Cowans and not by the corporation. According to defendants, they bought cars for resale with money furnished by the Cowans, and title was held by the Cowans until a purchaser for a car was found. The proceeds of resale were apparently deposited in the Bank of America account, and checks were drawn on that account by Resnick to reimburse the Cowans for the money advanced. In this connection, the trial court found that the Cowans made advances in the amount of $223,445 which were used by defendants to operate the business and which were repaid in part from time to time.

Erbel, Inc. filed a voluntary petition in bankruptcy, listing liabilities of $146,247.43 and assets which were subsequently liquidated by the trustee in bankruptcy for approximately $16,000. The record shows that about a month and a half before initiation of the bankruptcy proceedings, when it was apparent that the business was in financial difficulties, the Cowans transferred to Erbel, Inc. the automobile titles which they were then holding.

Prior to entering into any transactions with defendants, plaintiff informed Resnick that it would not accept his check or draft, and it agreed to deal with him only after it was assured that W. D. Cowan was "going into business" and would be "backing the business up." In previous transactions plaintiff had been given checks drawn on the Bank of America account, and the present action is based upon two checks which were drawn by Resnick on that account and later dishonored by the bank.

[5] It is the general rule that the conditions under which a corporate entity may be disregarded vary according to the circumstances in each case. See H. A. S. Loan Service, Inc., v. McColgan, 21 Cal.2d 518, 523, 133 P.2d 391, 145 A.L.R. 349; Stark v. Coker, 20 Cal.2d 839, 846, 129 P.2d 390. It has been stated that the two requirements for application of this doctrine are (1) that there be such unity of interest and ownership that the separate personalities of the corporation and the individual no longer exist and (2) that, if the acts are treated as those of the corporation alone, an inequitable result will follow. Stark v. Coker, 20 Cal.2d 839, 846, 129 P.2d 390; Watson v. Commonwealth Ins. Co., 8 Cal. 2d 61, 68, 63 P.2d 295.

[6] The failure to issue stock or to apply at any time for a permit, although not conclusive evidence, is an indication that defendants were doing business as individuals. Geisenhoff v. Mabrey, 58 Cal.App.2d 481, 137 P.2d 36; see Marr v. Postal Union Life Insurance Co., 40 Cal.App.2d 673, 105 P.2d 649. In the Marr case the court stated: "While the fact standing alone that a corporation remains inchoate without stockholders or stock is not of itself determinative of an *alter ego* relationship upon its part, nevertheless it does indicate that such corporation may exist merely to serve the interests of another—a corporation or an individual." 40 Cal.App.2d at page 682, 105 P.2d at page 654.

[7] Another factor to be considered in determining whether individuals dealing through a corporation should be held personally responsible for the corporate obligations is whether there was an attempt to provide adequate capitalization for the corporation. In Ballantine on Corporations (rev. ed., 1946), at pages 302–303, it is stated: "If a corporation is organized and carries on business without substantial capital in such a way that the corporation is likely to have no sufficient assets available to meet its debts, it is inequitable that shareholders should set up such a flimsy organization to escape personal liability. The attempt to do corporate business without providing any sufficient basis of financial responsibility to creditors is an abuse of the separate entity and will be ineffectual to exempt the shareholders from corporate debts. It is coming to be recognized as the policy of the law that shareholders should in good faith put at the risk of the business unincumbered capital reasonably adequate for its prospective liabilities. If the capital is illusory or trifling compared with the business to be done and the risks of loss, this is a ground for denying the separate entity privilege."

The rule that inadequate capitalization may be considered as a factor in determining whether the corporate entity should be disregarded was followed in Shea v. Leonis, 14 Cal.2d 666, 96 P.2d 332, 334, where a lessee attempted to escape liability for rent due under a lease by assigning his interest in the lease to a corporation which was without other assets. The court held that the owners of the corporate stock were liable for the rental payments, pointing out that it is proper to disregard corporate existence "where, as in the instant case, the device adopted is * * * an attempt to avoid liability for benefits enjoyed by means of taking the obligation in the name of a specially organized corporation which has no other assets." In Carlesimo v. Schwebel, 87 Cal.App.2d 482, 197 P.2d 167, 174, it was recognized that "the proper rule is that inadequate financing, where such appears, is a factor, and an important factor, in determining whether to remove the insulation to stockholders normally created by the corporate method of operation." See also Mosher v. Salt River Valley Water Users' Ass'n, 39 Ariz. 567, 8 P.2d 1077; Ballantine, Corporations: "Disregarding the Corporate Entity" as a Regulatory Process (1943), 31 Cal.L.Rev. 426, 427; Fuller, The Incorporated Individual: A Study of the One-Man Company (1938), 51 Harv.L.Rev. 1373, 1381–1383; cf. Dixie Coal Min. & Mfg. Co. v. Williams, 221 Ala. 331, 128 So. 799. Although defendants testified that the sum of $5,000 became a part of the capital of the corporation, the trial court, as we have seen, was not compelled to accept that testimony as being true. Moreover, even if the court believed defendants' testimony in this regard, it could have inferred that $5,000 was an insufficient capital investment in view of the volume of business conducted.

[8] In determining whether defendants should be allowed to escape personal liability for the debts due plaintiff, the trial court was entitled to consider the failure to issue any stock or apply for permission to do so and the creation and operation of Erbel, Inc. with little or no capital, as well as all relevant facts concerning the manner in which the business was operated.

There is ample support in the record for the finding of the trial court that defendants were doing business as individuals.

The judgment is affirmed.

SHENK, TRAYNOR, SCHAUER SPENCE and McCOMB, JJ., concur.

CARTER, Justice (dissenting).

I dissent.

As I read the majority opinion, it holds that the corporate entity may be disregarded where the corporation has not issued any stock and is undercapitalized.

As to the first point, it is difficult to see how there can be a liability imposed upon the stockholders for an obligation of the corporation when there are no stockholders to hold liable. The theory of piercing the corporate veil is based on the concept that the shareholders of the corporation are liable although the obligation was ostensibly incurred by the corporation because on one basis or another the shareholders and corporation will not be distinguished; the separation of the corporate entity from its stockholders will not be observed. This is to be distinguished from the case such as may exist here where the individuals interested in the corporation are, rather than the corporation, the ones who incurred the obligation or the obligation was incurred by both. In the instant case it is true that no stock was issued nor was a permit for issuance obtained from the Corporation Commissioner, yet the evidence is undisputed that it was agreed that defendant Resnick would own half the corporation and the Cowans the other half and the business was just getting started. With such facts present it is difficult to see why the mere failure to issue stock could be a factor in determining whether the corporate entity should be disregarded. In Geisenhoff v. Mabrey, 58 Cal.App.2d 481, 137 P.2d 36, relied upon by the majority, the trial court had found that the persons who formed the corporation were doing business as joint venturers and as such incurred the obligation in the name of the corporation. That case seems to hold that individual liability may not be escaped by the formation of a corporation unless and until stock is issued. No authority is cited for that proposition and I find none which supports it. It would indeed be a novel theory in corporation law. As said on the subject by the District Court of Appeal in this case: "While the Corporations Code authorizes corporate directors to organize by the election of officers, yet, they may in the name of and in behalf of the corporation apply for a permit to issue its shares. Corp.Code, secs. 25154, 25153. However, these sections do not prohibit the transaction of corporate business or the performance of any act by the corporation other than the issue or sale of securities. Prior to the enactment of the last cited sections, the courts had held that a partnership is not necessarily the result of an abortive attempt to organize a corporation or of a mere failure to issue corporate shares. Blanchard v. Kaull, 44 Cal. 440, 451; Williams Co. v. Leong Sue Ah Quin, 44 Cal. App. 296, 298, 186 P. 401. The idea that the organizers of a corporation would be penalized in any way for the transaction of corporate business prior to the issuance of its stock does not appear to have occurred to the authors of section 25154. The only penalties to accrue against directors with reference to the issuance of shares are those which result from the enforcement of the statutes for violations of the Corporate Securities Act. Corp.Code, sec. 25000 et seq. It makes felonious many acts of corporate officers in attempting to issue their company's securities without first having obtained a permit so to do. But nowhere is it there suggested that a corporation is emasculated by virtue of its failure to procure a permit to issue its shares. Nor is there any authority for holding that the failure of directors to obtain a permit makes of them a copartnership or a joint adventure except the Geisenhoff decision, supra, which imposed a sanction without legislative authorization. On the contrary, the point was before this court in Vogel v. Bankers Building Corporation, 112 Cal.App.2d 160, 168, 245 P.2d 1069. It was there held in effect that non-issuance of stock does not as a matter of law fasten upon promoters the status of joint adventurers; that the creation of that relationship depends upon the

intent of the parties." Automotriz del Golfo de California v. Resnick, Cal.App., 297 P.2d 109, 114.

The other factor relied upon by the majority is no more persuasive either alone or in conjunction with the first factor. It is said that undercapitalization of a corporation is an indication that the corporate entity should be disregarded. Precisely what is meant by undercapitalization is not explained. The mere structure of the capital stock is not important. For the idea to be meaningful it must refer to the assets of the corporation—its financial standing. But the majority opinion mentions the "capital stock" authorization of $5,000 and compares that with a business of $100,000 to $150,000 per month. However, as stated in the majority opinion, the Cowans were advancing money to operate the business and as far as appears that was advanced to the corporation as its asset. The monthly business was gross sales and thus there was sufficient income to handle the business; that monthly income did not result in an expense or incurrence of obligations by the corporation. In fact, there is no evidence which reflects the financial status of the corporation other than its authorized capital stock which is no criterion of its financial health. Hence it follows that it was not shown that the assets were so inadequate that the corporate entity must be disregarded even if we assume that its financial worth is a factor in determining whether the entity is to be disregarded. Moreover, that assumption is of very doubtful validity because otherwise only well financed corporations may maintain their entity. In fact it may be said that every corporation which fails because it is unable to pay its obligations is underfinanced, but certainly that should not be a test of whether the entity should be disregarded. In a rapidly changing economy what might seem to be adequate financing today would be inadequate tomorrow, and it should be obvious that risky business ventures could not be undertaken by use of the corporate device without subjecting the participants to personal liability. I know of no such rule. What may appear hazardous by hindsight may not seem so at the outset. If the corporate entity may be disregarded in a case such as this it will not be safe for anyone to use the corporate device for the promotion of a business enterprise even though he acts in the utmost good faith and pursues a course of unquestionable fair dealing.

In my opinion there is no factual basis here to justify piercing the corporate veil and disregarding the corporate entity. To justify such holding it should be made to appear that the corporate entity was employed as a mere shield for the purpose of evading obligations incurred for the benefit of those who created the corporate entity. No such showing is made here.

For the foregoing reasons, I would reverse the judgment.

Rehearing denied; CARTER, J., dissenting.



47 Cal.2d 716

HAYWARD LUMBER & INVESTMENT COMPANY, a corporation, Plaintiff and Appellant,

v.

E. W. BISCAILUZ, American Bonding Company of Baltimore, a corporation, J. D. Brady, and Lumbermens Mutual Casualty Company, a corporation, Defendants and Respondents.

L.A. 24226.

Supreme Court of California, In Bank.

Jan. 25, 1957.

Corporation brought action against sheriff, his deputies, and their sureties, to recover money allegedly lost by corporation by reason of alleged breach of duty on part of sheriff and deputies. The Superior Court, Los Angeles County, Louis H. Burke, J., entered judgment adverse to the corporation, and the corporation appealed. The Supreme Court, Schauer, J., held that where court, in action by corpora-

tion against construction company for breach of contract, entered order purporting to release attachment of construction company's money in bank in excess of $2,000, and clerk issued certificate to that effect eleven days later, and sheriff, in reliance on such certificate, sent a release order to bank, which released all money in excess of $2,000, and thereafter corporation was awarded judgment of $5,000 against construction company, which was bankrupt, sheriff was not liable for loss sustained by corporation.

Judgment affirmed.

Carter, J., dissented.

Opinion 297 P.2d 46, vacated.

1. Sheriffs and Constables ⇐98(1)

Where court, in action by corporation against construction company for breach of contract, entered order purporting to release attachment of construction company's money in bank in excess of $2,000, and clerk issued certificate to that effect eleven days later, and sheriff, in reliance on such certificate, sent a release order to bank, which released all money in excess of $2,000, and thereafter corporation was awarded judgment of $5,000 against construction company, which was bankrupt, sheriff's duty in the premises was not absolute and could be satisfied by due diligence. West's Ann.Gov.Code, §§ 26603, 26608, 26660.

2. Sheriffs and Constables ⇐98(1)

Court order purporting to release attachment in excess of $2,000 in bank account came within definition of "process" in statute providing that word "process," as used in reference to duties of the sheriff, includes all writs, warrants, summons, and orders of courts of justice or judicial officers. West's Ann.Gov.Code, § 26660.

See publication Words and Phrases, for other judicial constructions and definitions of "Process".

3. Sheriffs and Constables ⇐97

Generally, a sheriff assuming to act virtute officii warrants that he is possessed of such authority, and, if not authorized, is liable to persons who have suffered damage from steps taken under the belief that he was. West's Ann.Gov.Code, §§ 26603, 26608, 26660.

4. Sheriffs and Constables ⇐98(2, 5)

A sheriff is a ministerial officer, not a judicial officer, and is justified in executing all process and orders regular on their face and issued by competent authority, whatever may be the defect in the proceedings on which they were issued. West's Ann. Code Civ.Proc., § 262.1.

5. Appeal and Error ⇐663(1)

Where duty is imposed by law on clerk of court to certify copies of records and papers in his keeping, his certificate may be accepted as conclusive of the facts recited therein. West's Ann.Gov.Code, §§ 26800, 26803, 26831–26833; West's Ann.Code Civ. Proc., § 153, subd. 5; §§ 1892, 1893, 1904, 1905.

6. Appeal and Error ⇐446

An appeal does not continue an attachment in force unless appeal is perfected within five days after written notice of entry of order appealed from. West's Ann.Code Civ.Proc., § 946.

7. Sheriffs and Constables ⇐98(1)

Where court, in action by corporation against construction company for breach of contract, entered order purporting to release attachment of construction company's money in bank in excess of $2,000, and clerk issued certificate to that effect eleven days later, and sheriff, in reliance on such certificate, sent a release order to bank, which released all money in excess of $2,000, and thereafter corporation was awarded judgment of $5,000 against construction company, which was bankrupt, sheriff was not liable for loss sustained by corporation. West's Ann.Code Civ.Proc., §§ 153, subd. 5, 539a, 540, 542, 543, 546, 554, 556, 558, 682, 682a, 946, 1892, 1893, 1904, 1905, 1962, subd. 3; West's Ann.Gov. Code, §§ 26603, 26608, 26609, 26660, 26800, 26803, 26831–26833.

Philip T. Lyons, Los Angeles, and Leroy B. Lorenz, San Gabriel, for appellant. Morrison, Foerster, Holloway, Shuman & Clark, J. F. Shuman and Scott L. Harrington, San Francisco, as amici curiae on behalf of appellant.

Harold W. Kennedy, County Counsel, Wm. E. Lamoreaux, Asst. County Counsel, Crider, Tilson & Ruppe, Donald E. Ruppe, Sims & Wallbert and James H. Sims, Los Angeles, for respondents.

SCHAUER, Justice.

Plaintiff appeals from an adverse judgment, rendered by the court sitting without a jury, in its action to recover from defendant sheriff of Los Angeles County, two of his deputies,[1] and the sureties upon their respective bonds, a sum of money which plaintiff claims to have lost by reason of an alleged breach of duty by the defendant officers acting in their official capacity.

Plaintiff contends that the sheriff, acting through his deputies, wrongfully ordered the Bank of America, hereinafter referred to as the bank, to release from attachment certain funds held by the bank, and that the bank complied with the sheriff's order to the ensuing damage of plaintiff, who was unable to satisfy a judgment subsequently obtained against the judgment debtor whose funds had been attached. Plaintiff expressly disavows negligence of the sheriff as a theory of recovery; it relies, rather, upon asserted breach of official duty, absolute in nature, from which breach liability would follow as a matter of law. We have concluded, for reasons hereinafter shown, that the sheriff was not guilty of a breach of absolute duty in ordering release of the funds and so, upon plaintiff's theory, is not liable for any loss which resulted therefrom, and that the judgment should be affirmed.

Plaintiff had brought an action seeking recovery of a money judgment against Construction Products Corporation, hereinafter sometimes termed the corporation. A writ of attachment was issued in that action and levied by defendant sheriff upon the account of the corporation in the bank. The bank reported to the sheriff that it held in the account $6,858.14.

The following chronology of events then occurred:

June 1, 1951: Upon motion of the corporation, the superior court ordered a release of the attachment as to all moneys held by the bank and owing to the corporation in excess of $2,000. (The minutes of the court do not expressly state whether a formal written and signed order was, was not, or was to be filed. See Rule 2(b), Rules on Appeal.)

June 8, 1951: The above described order was entered in the permanent minutes of the court.

June 11, 1951: Plaintiff appealed from the above mentioned order and filed an undertaking to continue the attachment in force pending the appeal. (This was timely, within five days after entry of the order, in compliance with section 946 of the Code of Civil Procedure.)

June 12, 1951: The clerk of the superior court issued the following certificate:

"I, Harold J. Ostly, County Clerk and Clerk of the Superior Court of the State of California, in and for the County of Los Angeles, do hereby certify:

"That the Court, in Department 35 thereof, on June 1, 1951, ordered:

"'* * * Motion of Defendant to Discharge, Dissolve and/or reduce in amount Writ of Attachment come on for hearing; [listing appearances] * * *. Motion to dissolve attachment is granted in part; Attachment released as to all property except $2,000.00 in bank account with [particular branch of Bank of America].'

"That Notice of said Order was served upon [attorneys for plaintiff] on June 4, 1951;

1. The complaint names both J. D. Brady and C. G. Traughber as deputy sheriffs; the action appears to have been dismissed as to Deputy Traughber before trial.

"That no Bond Continuing lien has been filed in this action within 5 days of the date of said order, and that more than 5 days have elapsed from the date of service of said Order;

"In Witness Whereof, I have hereunto set my hand and affixed the Seal of said Superior Court this 12th day of June, 1951.

"Harold J. Ostly, * * *

By [signed] H. J. Wilson Deputy. [Seal of Court.]"

June 12, 1951: Also on this date the sheriff, in reliance upon the clerk's above set forth certificate, sent the following "order to release" to the bank:

"[Official letterhead of the sheriff's office. Name of case. Addressed to Bank of America, particular branch involved.] You are hereby notified that I have this day released the following described personal property held by you, and attached by virtue of writ(s) issued in the above entitled action, to-wit: All monies over and above the sum of $2,000.00.

"E. W. Biscailuz, Sheriff

By [signed] J. D. Brady Deputy Sheriff.

Upon receipt of this release the bank permitted the attachment debtor to withdraw from its account all moneys in excess of $2,000. Subsequently, the attaching creditor (plaintiff) obtained a reversal of the order partially releasing the attachment, and thereafter recovered a judgment of approximately $5,000 against Construction Products Corporation. Under the writ of execution on this judgment the sheriff collected $2,000 from the bank but advised plaintiff that he had released all funds in excess of that sum. In the meantime the debtor had become bankrupt.

[1] Plaintiff then filed the present action against the sheriff, his deputies, and the sureties upon their respective bonds, to recover the unsatisfied portion of the judgment. As above indicated, the court entered judgment in favor of all defendants, and this appeal followed. The controlling question is the nature of the sheriff's duty in the premises. Is it absolute or may it be satisfied by due diligence? We conclude that it is not absolute and, hence, may be satisfied by due diligence.

[2] The following duties are specifically enjoined on the sheriff: He "shall attend all superior courts held within his county and obey all lawful orders and directions of all courts held within his county" (Gov.Code, § 26603) and he "shall serve all process and notices in the manner prescribed by law" (Gov.Code, § 26608). As used in reference to the duties of the sheriff, "'Process' includes all writs, warrants, summons, and *orders of courts of justice,* or judicial officers." (Gov.Code, § 26660; italics added.) The order of the court purporting to release the attachment "as to all property except $2,000.00 in bank account" comes within the definition of "process" above quoted.

[3] As a general rule "A sheriff assuming to act virtute officii warrants that he is possessed of such authority, and if not authorized, is liable to persons who have suffered damage from steps taken under the belief that he was." (47 Am.Jur. 848, § 37; see also, id., 855, § 46.) In respect to attachment levies it has been held in California that "The Sheriff's liability rests on his breach of official duty. As he is bound to perform his duty, so is he responsible to every one who may be injured by his failure to discharge it. In respect to the execution of process these official duties are well defined by law. The law is reasonable in this, as in all other things. It holds public officers to a strict performance of their respective duties. It tolerates no wanton disregard of these duties. It sanctions no negligence; but it requires no impossibilities and imposes no unconscionable exactions. When process of attachment or execution comes to the hands of the Sheriff, he must obey the exigency of the writ * * * But he is not held to the duty of starting on the instant after receiving a writ, to execute it, without regard to anything else than its instant execution. *Reasonable diligence is all that is required of him* in such in-

stances. But this *reasonable diligence depends upon the particular facts in connection with the duty.* [Italics added.] * * * We have seen that the Sheriff is not absolutely responsible for not executing process of this sort. He is responsible for unreasonably or not reasonably executing such process." (Whitney v. Butterfield (1859), 13 Cal. 335, 338, 340; see also Ayres v. Burr (1901), 132 Cal. 125, 130, 64 P. 120; Sheehy v. Graves (1881), 58 Cal. 449, 455.) While the statements above quoted were made in relation to the failure of the sheriff to originally levy an attachment in time to secure sufficient of the defendants' property to satisfy plaintiffs' claim because a writ subsequently issued in the action of another creditor was levied first, the reasoning of the court is applicable here. That reasoning leads to the conclusion that the conduct of the sheriff here was not as a matter of law a breach of an absolute duty but, rather, presents a question of mixed law and fact as to whether the standard of diligence required of sheriffs in the exigency of the case was observed, i. e., a question of negligence. Such conclusion finds further support in the cases hereinafter discussed.

[4] It is established that a sheriff is a ministerial officer, not a judicial one (Vallindras v. Massachusetts Bonding & Ins. Co. (1954), 42 Cal.2d 149, 154, 265 P.2d 907), and is justified in executing "all process and orders regular on their face and issued by competent authority, whatever may be the defect in the proceedings upon which they were issued." (Code Civ.Proc., § 262.1) "In determining whether process and orders are 'regular on their face' so far as the liability of such an officer is concerned, the following statement from Aetna Ins. Co. v. Blumenthal (1943), 129 Conn. 545, 553, 29 A.2d 751, is pertinent: 'When we speak of process "valid on its face," in considering whether it is sufficient to protect an officer, we do not mean that its validity is to be determined upon the basis of scrutiny by a trained legal mind; nor is it to be judged in light of facts outside its provisions which the officer may know. [Citations.] Unless there is a clear absence of jurisdiction it is sufficient if upon its face it appears to be valid in the judgment of an ordinarily intelligent and informed layman. To hold otherwise would mean that an officer must often act at his peril or delay until he has had an opportunity to search out legal niceties of procedure, and * * * "a result subjecting him to constant danger of liability would be an intolerable hardship to him, and inevitably detract from the prompt and efficient performance of his public duty."' " (Vallindras v. Massachusetts Bonding & Ins. Co. (1954), supra, 42 Cal.2d 149, 154[7], 265 P.2d 907.)

[5] The sheriff here relied on a certificate of the clerk of court which appeared complete and regular on its face, to the effect that by order of the court the attachment was partially dissolved and (to an "ordinarily intelligent and informed layman") that the order dissolving and releasing it in part was final. It is a part of the clerk's duties (see Gov.Code, §§ 26800, 26803, 26831, 26832, 26833; Code Civ.Proc., §§ 153(5), 1892, 1893, 1904, 1905) to make and certify copies of the records and papers in his keeping, and where such a duty is imposed on him by law, his certificate may be accepted as conclusive of the facts recited therein. (Code Civ.Proc., § 1893; Baker v. Snyder (1881), 58 Cal. 617, 618.)

In O'Brien v. Thomas (1937), 21 Cal.App. 2d (Supp.) 765, 769, 65 P.2d 1370, the court stated: "[T]he order for release of the property * * * was jurisdictionally within the power of the court, was regular on its face and the marshal was justified in obeying it regardless of the fact that eventually it was upon appeal from the judgment resultantly determined to be erroneous." In that case the order directed the marshal to release the money held in attachment. Pursuant to this order and without awaiting expiration of the time for appeal, the marshal in good faith surrendered the money to the claimant. The appellant made no attempt to stay the order

but successfully appealed from a judgment determining title to the money to be in a third person. Regardless of appellant's inefficiency in the latter respect, the marshal was held not liable for acting before the appeal period had expired, where he acted in reliance on the court's order which was valid on its face.

In First Nat. Bank of Marysville v. McCoy (1931), 112 Cal.App. 665, 297 P. 571, plaintiff recovered judgment, notice of appeal was filed, but no bond staying execution was provided. Execution was issued and levied by the sheriff. The judgment debtor then filed a bond for the purpose of staying execution, and the court, reciting that the defendant had filed a "good and sufficient bond," ordered the sheriff to return the property to the judgment debtor. The sheriff promptly returned the property. The next day the plaintiff filed notice excepting to the sureties on the stay bond, and the sureties failed to justify, so the court ordered the sheriff to proceed to satisfy the judgment by execution. But the sheriff was unable to recover the property he had released, and the plaintiff sued the sheriff for the resultant loss. The court stated (at pages 669–671 of 112 Cal.App., at pages 572–573 of 297 P.): "Even when this bond to stay execution has been filed, the sheriff is not authorized to release property in his possession upon which he has regularly levied an execution unless the judgment creditor fails for a period of five days after the filing thereof to object to the sufficiency of the sureties thereon. * * *

"Pursuant to the statute last quoted [Code Civ.Proc., § 946] it is apparent the foregoing order of court directing the sheriff to return the property to the judgment debtor was premature and unauthorized. But the court did have jurisdiction of the subject matter. * * * Although the order was based upon an erroneous assumption of the law and an incorrect statement of facts, it nevertheless furnishes a complete justification for the sheriff to return the property since no evidence of its invalidity appears upon the face of the order. * * * When the order or process appears to be regular and valid upon its face and to have been executed by competent authority, it is the duty of a sheriff to execute it. * * * The sheriff may limit his inquiries to an inspection of the writ * * *.

"In the present case the sheriff appears to have acted in perfect good faith. Since the order of the court stated that 'a good and sufficient bond * * * to stay the writ of execution,' had been filed, and since the order fails to state when the undertaking was filed, the sheriff was justified in assuming that the bond conformed in every way to the requirements of the law, and that the five days allowed by statute for excepting to the sufficiency of the sureties had elapsed. The order also specifically directed the sheriff 'to return any and all property to the judgment debtor which he may have in his custody.' This order was valid on its face. The sheriff is a mere ministerial officer. He is not required, at his peril, to search the records to dispute specific statements which are recited in a court order directing him to perform a ministerial duty."

The language quoted from the last two cases is persuasive. It is true that in those cases the court specifically ordered the sheriff to release the property, while here the court ordered the release of the attachment in part but gave no orders directed to the sheriff. However, as has been hereinabove indicated, the sheriff is the officer who is charged with the duty of executing such orders; i. e., he levies and releases attachments and executions, serves all "process" of the court placed in his hands, and returns to the court an account of his actions. (See Code Civ.Proc., §§ 539a, 540, 542, 543, 546, 554, 556, 558, 682, 682a, 946; Gov.Code, §§ 26608, 26609.) The sheriff would be bound to respect and carry out the court's order releasing the attachment when a duly authenticated copy was placed in his hands (if he was entitled to rely on it at all) just as he is bound where the order is specifically addressed to him. (See

Clark v. Superior Court (1918), 37 Cal.App. 732, 734, 174 P. 681.)

[6] An appeal does not continue an attachment in force unless it is perfected within five days after written notice of the entry of the order appealed from. (Code Civ.Proc., § 946.) The certificate of the clerk in this case stated that "Notice of said Order [releasing the attachment in part] was served upon" the attorneys for plaintiff, and that "more than 5 days have elapsed from the date of service of said Order." It could reasonably have been believed by the sheriff that the notice served was the "written notice of the entry of the order" provided for by section 946 of the Code of Civil Procedure, and that the time for effective appeal from the order had passed. The further statement in the certificate that "no Bond Continuing lien has been filed * * within 5 days of the date of said order" would further support the conclusion that the order had become final. (See First Nat. Bank of Marysville v. McCoy (1931), supra, 112 Cal.App. 665, 671, 297 P. 571.)

[7] For the reasons above stated, we conclude that the sheriff was justified as a matter of law in ordering the release, or that, at the most, there is presented a question of negligence (a question of mixed law and fact as to the exercise of due diligence in the performance of official duty) and that in either event this appeal must result in affirmance.[2]

Other questions are argued or suggested by the parties but for reasons indicated need not be resolved. Inasmuch as the bank is not a party to the action we need not consider whether the bank was justified in relying on the sheriff's release or whether as against the bank the sheriff would be estopped to deny his authority to release the funds.[3] (See Code Civ.Proc., § 1962, par. 3; Davenport v. Stratton (1944), 24 Cal.2d 232, 243[6], 149 P.2d 4.) For a similar reason—the county clerk not having been made a party—it is not necessary to consider whether liability should devolve upon the clerk for issuing a certificate which, although perhaps accurate in all that it *did* state, stated only part of the pertinent facts when the records of the clerk disclosed other facts which had a material bearing on the matter to which the certificate related (i. e., that the order was entered in the permanent minutes on June 8, 1951, and that a notice of appeal and undertaking to continue the attachment were filed on June 11, 1951, all prior to the date of the certificate).

For the reasons above stated, the judgment is affirmed.

GIBSON, C. J., and SHENK, TRAYNOR and SPENCE, JJ., concur.

McCOMB, J., concurs in the judgment.

CARTER, Justice.

I dissent.

The majority opinion concludes that there can be no liability imposed upon the sheriff and his deputy because there was no breach of official duty by the deputy by reason of his unauthorized order releasing the garnisheed account. It is submitted that this conclusion is erroneous and without support in the authorities cited in the majority opinion.

First, the cases which are cited for the proposition that a sheriff is justified in relying upon a court order if the latter is "valid on its face" have no bearing under the instant circumstances. In each of those cases, the officer involved acted under a court

2. Plaintiff in its brief expressly disclaims reliance on any theory of negligence; it says, "Nowhere in the pleadings or the evidence in this case is there any mention of any negligence or any act which, in itself, would constitute negligence * * As heretofore indicated, negligence is not involved in this case, by either pleading or evidence * * *"

3. The sheriff, through his deputy, sent an "order to release" to the bank, on an official form used for the specific purpose of releasing garnishments, pursuant to what had been a long standing practice. It appears that the sheriff expected and intended that the bank should rely and act on the order to release and change its position, as it did.

order which specifically directed him to act. In Vallindras v. Massachusetts Bonding & Ins. Co., 42 Cal.2d 149, 265 P.2d 907, the court issued an order directing the sheriff to imprison Vallindras for contempt. The order was later determined to be erroneous and Vallindras sought recovery from the sheriff for false imprisonment. Recovery was denied on the ground that the sheriff was entitled to rely upon an order, regular on its face and issued by competent authority, without conducting an investigation as to possible defects in the proceeding giving rise to the order. In O'Brien v. Thomas, 21 Cal.App.2d Supp. 765, 65 P.2d 1370, the court ordered the marshal to release money held under an attachment. The marshal released the money without awaiting expiration of the time for appeal. It was held that he was justified in relying upon the court order. In First Nat. Bank of Marysville v. McCoy, 112 Cal.App. 665, 297 P. 571, the court ordered the sheriff to return attached property to the defendant after the latter had filed a stay bond. The sheriff returned the property before the time in which plaintiff had to except to the sureties on the bond had expired. Thereafter, the sureties failed to justify. The sheriff was held justified although the court order was premature. Here there was no order directing the sheriff to release the garnisheed account, hence, there was no compulsion upon the sheriff to act as in the cited cases. In each of those cases, if the court order had not been erroneous, the officer would have been subject to liability had he failed to obey, hence, the result there reached which relieves the officer from the duty of examining the order beyond a determination that it is "valid on its face."

Secondly, there was no compulsion upon the sheriff by virtue of any statutory provision. Government Code section 26608 which provides that: "The sheriff shall serve all process and notices in the manner prescribed by law" and Code of Civil Procedure section 262.1 which provides that: "A sheriff * * * is justified in the execution of, and shall execute, all process and orders regular on their face and issued by competent authority, whatever may be the defect in the proceedings upon which they were issued" cannot justify the action of the deputy here for the reason that the court order did not call for "service" or "execution" by the sheriff. As previously noted, it did not direct the sheriff to take action. Neither did it bring into play any code section requiring the sheriff to act. In this latter respect the instant case differs from Clark v. Superior Court, 37 Cal.App. 732, 174 P. 681, cited by the majority for the proposition that: "The sheriff would be bound to respect and carry out the court's order releasing the attachment when a duly authenticated copy was placed in his hands * * * just as he is bound where the order is specifically addressed to him." In the Clark case, the sheriff refused to release on the record an attachment of real property after the trial court ordered a nonsuit and the plaintiff failed to appeal within the prescribed time. It was held that the sheriff could be compelled, by a writ of mandate, to release the attachment because of a code section (Pol.Code, § 4157 subd. 7, now Govt. Code, § 26606) which declares that: "The sheriff shall release on the record all attachments of *real property* when the attachment placed in his hand has been released or discharged." (Emphasis added.) There is no comparable section, however, requiring the sheriff to order the release of a garnishment, Johnston v. Jones, 78 Cal.App. 84, 85, 248 P. 286, therefore, the statement in the majority opinion that the sheriff in this case was bound to carry out the court's order releasing the attachment is completely lacking in support.

It seems clear, then, that under the general rule quoted in the majority opinion ("'A sheriff assuming to act virtute officii warrants that he is possessed of such authority, and if not authorized, is liable to persons who have suffered damage from steps taken under the belief that he was'"), the plaintiff is entitled to recover from the sheriff and his deputy for the loss occasioned by their unauthorized conduct. This conclusion is further supported by the case law in this state to the effect that a sheriff

who releases attached property without authority commits a breach of his duty and is responsible to the plaintiff for the resultant loss. Sanford v. Boring, 12 Cal. 539, 541; Hesser v. Rowley, 139 Cal. 410, 413, 73 P. 156; Reynolds v. Lerman, 138 Cal.App.2d 586, 592, 292 P.2d 559. Although these cases dealt with the wrongful release of attached property in the sheriff's custody, the principles expressed therein would apply to the wrongful release of garnisheed property.

The indication in the majority opinion that the only possible basis of liability is that of negligence (which theory plaintiff expressly disclaimed) is likewise without support. This question arose in Reynolds v. Lerman, supra, 138 Cal.App.2d 586, 292 P.2d 559, in connection with the applicability of Government Code section 1981 which requires the filing of a claim as a prerequisite to the maintenance of an action for the negligence of a public officer. In that case the sheriff had attached certain personal property and, without authority, sold it for storage charges. The owner sued the sheriff for damages for failure to "safely keep" the property. The contention that this amounted to a charge of negligence by the sheriff requiring the filing of a claim was rejected. The court held that it was not a question of the "safety" of the keeping but of a violation of the plaintiff's right to have the sheriff "keep" the property and that the unauthorized violation of this duty amounted to conversion, an intentional, not a negligent tort. Similarly, the unauthorized release of the attached funds was intentional, not negligent. In Sarafini v. City and County of San Francisco, 143 Cal.App.2d 570, 300 P.2d 44, the plaintiff sued police officers who, acting upon erroneous information, had broken into her apartment. It was held that the claim statute was inapplicable because the act was deliberate although it was based upon the negligent belief that illegal activities were being conducted in the apartment. Here, defendant Brady's conduct in ordering the release was a deliberate, voluntary act although he apparently acted under the negligently acquired belief that the release was authorized. Accordingly, relief should not be denied on the ground that his conduct was merely negligent.

Further arguments of the defendants, referred to in the majority opinion, are likewise without merit. Inasmuch as the court order, even as it appeared on the clerk's certificate, did not require any action by the sheriff, by force of the order or of any statute, the question of the liability of the clerk for issuing an incomplete certificate is irrelevant. As to the argument that the bank was not justified in relying upon the purported release order, it suffices to say that such a result would cast a burden upon the garnishee to continuously examine the myriad court records to ascertain the effectiveness of any attachments upon property held by him. To conclude that the garnishee may not rely upon an order, served by an officer of the court, could only result in confusion of the heretofore workable practices regarding the release of attachments.

For the reason that the release order was unjustified by either court order or statute, I am of the opinion that the sheriff is liable for the loss resulting from his deputy's breach of official duty and, accordingly, I would reverse the judgment.

148 Cal.App.2d 135

J. P. MADISON and James Kral, Plaintiffs,

v.

L. M. MOON et al., Defendants,
L. M. Moon, S. E. Chiapella and J. P. Madison, Appellants,
W. T. Norman and William S. Malin, Respondents.

Civ. 5510.

District Court of Appeal, Fourth District, California.

Jan. 29, 1957.

Action by partner and co-partner against third partner and third partner's assignee to obtain judgment declaring partner to be sole owner of mining claims developed by partnership, an accounting, and cancellation of assignments made by third partner of interest in the mining property or its proceeds, to compel third partner to convey interest in partnership and mining property to co-partner, and to quiet title. Assignee cross-complained to quiet title and to obtain an accounting and his share of profits. Intervenor cross-complained in ejectment and to quiet title in himself and third partner as locaters and owners of the mining property operated by partnership. The Superior Court, Inyo County, Walter R. Evans, J., entered judgment adverse to partner, third partner, and intervenor, and such parties appealed. The District Court of Appeal, Barnard, P. J., held, inter alia, that evidence was sufficient to sustain the trial court's finding that no valid location was made by intervenor and third partner at the time claimed by them.

Judgment affirmed.

1. Mines and Minerals ⇐38(16)

In action by partner and co-partner against third partner and third partner's assignee to determine their rights in certain mining property and obtain an accounting, cancellation of certain sums, and conveyance of other interests in mining property, wherein intervenor cross-complained in ejectment and to quiet title in himself and third partner as locaters and owners of the mining property, evidence was sufficient to sustain the trial court's finding that no valid location was made by intervenor and third partner at the time claimed by them.

2. Licenses ⇐39.17

Where nothing was being offered to the general public and if, interest transferred under contracts for percentage of net profits from mines operated by partnership were a security, such security was issued by one partner on behalf of operators and owners of the mine with their knowledge and for their benefit, they would not be allowed to take advantage of their failure to obtain permit from the Corporation Commissioner for issuance of a security, and contracts would not be held void for such reason. West's Ann.Corp.Code, §§ 25008, 25100(*l*), 25500, 26100.

3. Assignments ⇐19

Where, as compensation for building of road and bunkers on mining property operated by partnership, contractor was given a contract which called for payment to him of 25 percent of net profits of mine for determinable period, assignment of such contract was not void on ground that it called for personal services, in view of fact that the construction was not such matter as could not be assigned and that there was strong evidence that the assignment had been consented to and acted upon and benefits accepted by all the interested parties.

4. Assignments ⇐19

A contract for personal services may be assigned with the consent and approval of the other party.

5. Licenses ⇐18½(27)

Conveyance of 15 percent interest in mining claims to obtain money for development purposes constituted a conveyance of a specific interest in particular land, not a security within meaning of the Securities Act, and was not void, even

though permit authorizing sale of a security had not been obtained, in view of fact that person to whom such interest was conveyed acted as member of partnership engaged in operating the mining claims. West's Ann.Corp.Code, §§ 25008, 26100.

6. Appeal and Error ⇐991

In action by partner and co-partners against third partner and third partner's assignee to determine interests in mining claims and to obtain accountings and cancellation of certain assignments and another conveyance, objections to audit and report of auditor and referee and question whether referee's reports should be set aside raised questions of fact for the trial court.

7. Costs ⇐191, 283

Where parties stipulated that certified public accountant should be appointed as referee for purpose of making an accounting and audit, and court thereupon entered written order providing that referee's compensation was to be fixed by court and the reference involved all controversies being determined in action between the parties, referee's compensation was properly charged to the parties and could be made a lien against their interest in the property involved in the litigation. West's Ann.Code Civ.Proc., §§ 638, 1023.

P. E. Cavaney, Los Angeles, for appellants Moon and Chiapella.

Richardson & Henderson, Palm Springs, for appellant Madison.

H. H. Slate, Los Angeles, for respondent Norman.

William S. Malin, in pro. per.

BARNARD, Presiding Justice.

These are appeals from a judgment determining certain rights of the parties arising from and growing out of the location of two mining claims and certain mining operations in connection therewith.

J. P. Madison and L. M. Moon located these claims in Inyo County in October, 1949. In order to get money for development purposes they sold an interest in the claims to James Kral on December 8, 1949. On September 1, 1950, Moon and Kral executed a contract with H. A. Pimlott under which Pimlott agreed to construct a road to the mining property and certain bunkers. As compensation for the building of the road and the bunkers Pimlott was to receive 25% of the net profits from the mine as long as talc was produced in paying quantities. This contract further provided that as a means of determining these net profits a complete set of books should be kept, which should be available to the inspection of Pimlott; and that Pimlott should "supervise" the production of talc and would be entitled to be paid for such supervision, at an amount to be agreed to from time to time, such payment to be charged "as an expense of operation." Pimlott built the road and the bunkers and on December 20, 1950, he assigned that contract to W. T. Norman. On November 28, 1950, Moon and Norman had entered into a contract whereby Norman was to receive 12½% of the net profits derived from the mine as long as it produced talc in paying quantities, and as consideration therefor Norman paid $300 and agreed to assist in securing additional funds with which to operate the mine; to keep the books and record of the mine; to render services as salesman for talc; and to do everything in his power to make the operation of the mine a success. The production of talc seems to have started about that time under the supervision of Norman, who performed many services in the development and operation of the mine.

Madison and Kral brought this action on October 24, 1951. The first cause of action prayed for declaratory relief as against Moon and a determination that Madison was the sole owner of these claims because of Moon's failure to provide the money with which to build the road and bunkers, and place the mine on production; for an accounting; for an order cancelling

all documents made by Moon selling or assigning fractional interests in the mining property or its proceeds; to reform the recorded notices of location so as to show Madison the sole owner and locator of said claims; for an injunction and the appointment of a receiver; and for damages. A second cause of action alleged that Moon on December 8, 1949, acting for the partnership, agreed to assign a 15% interest in "said partnership and the mining property" to Kral for $3,000, which was paid; that Madison, at Moon's request, had given Kral a quitclaim deed to 15% of the property; that Moon had promised to give Kral such a deed but had refused to do so; and prayed that Moon be compelled to execute such a deed. A third cause of action was for judgment quieting title as against all defendants, and that the court declare and determine that Madison is the owner of an 85% interest in these claims and Kral is the owner of a 15% interest therein.

Moon answered the complaint alleging that he and Madison had jointly located these claims; that he had collected $3,000 from Kral and expended the same on these claims in the interest of himself, Madison and Kral; and that he, Madison and Kral owned these claims as tenants in common, he and Madison each owning 42½% and Kral owning a 15%. He also filed a cross-complaint as against Madison and Kral alleging that he had expended certain money in the operation of the mining claims and asking judgment therefor, together with a monthly salary for the time alleged to have been spent in the operation of the mine. The material allegations of this cross-complaint were denied.

Norman filed an answer to the complaint and also filed a cross-complaint to quiet title, for an accounting and judgment for his share of the profits from the mining operation based upon his contract and the Pimlott contract which had been assigned to him.

S. E. Chiapella, by leave of court, intervened in the action and filed an answer denying all the material allegations of the plaintiffs' complaint. He also filed a cross-complaint in ejectment and quiet title as against Madison and Kral, in which he alleged that he and Moon had filed on these same claims on May 20, 1949; that they made a discovery of talc, erected monuments and did other work, and made and filed the required notices of location; that Madison and Moon subsequently wrongfully appropriated and used the discovery monuments and boundary markings which had been previously placed on the property by intervener and Moon; and that the land was not open for location after May 20, 1949. He prayed for a judgment that he and Moon are the owners of the property, and that they are working the same as partners. The material allegations of this cross-complaint were denied by the cross-defendants.

The action was tried before the court without a jury, and the record is voluminous. The trial started on June 24, 1952. On November 28, 1952, the court entered an interlocutory judgment and preliminary findings in which it is stated that all parties had stipulated in open court that an accounting would be necessary, and that the matter should be referred to an accountant to report on all of the financial transactions involved in the proceeding. In addition to certain findings made therein it was ordered that an accounting be had, an auditor was appointed, and all parties were ordered to produce for the accountant all books, papers and information in their possession relating to the various controversies before the court. The auditor later filed a long report in which it was stated, among other things, that some of the claims made by various parties could not be substantiated by receipts or other supporting evidence, and that some of the parties, particularly one, had refused to cooperate or furnish information with respect to certain material things. A hearing on the report of the auditor was held on two days in July, 1954. After a hearing on the report the court made its final findings of fact and conclusions of law, and entered the

judgment from which these appeals are taken.

The court found, among other things, that Madison and Moon entered into an oral agreement to locate talc mining claims together, and to carry on mining operations as copartners; that pursuant to this agreement and in October, 1949, they jointly located these two claims, constructed location and boundary monuments, posted notices of said locations in the discovery monuments, and jointly recorded notices of location in the office of the county recorder; that both of said claims were then open and unappropriated and a part of the public domain; that they then performed the location and assessment work required by the statutes and jointly recorded notices thereof; that they fully complied with the statutes of this state and of the United States; that thereafter, in order to raise funds for the development of the property, they sold a 15% interest in and to said mining property of said partnership to Kral for $3,000; and that at all times since, title to the mining properties has been vested 42½% interest in Madison, 42½% interest in Moon and 15% interest in Kral.

It was then found that, after the sale to Kral, Madison refused to contribute in any way or take part in the subsequent development and operation of said properties; that Kral and Moon then formed a mining partnership for the purpose of developing and operating the same; that on September 1, 1950, Moon and Kral, acting for the mining partnership, entered into a written contract with Pimlott for the construction of a road and bunkers, for which Pimlott was to receive 25% of the net profits from the operation of the mine so long as talc was produced; that Pimlott fully performed his obligation under said contract; that on December 20, 1950, Pimlott sold and assigned his rights under said contract to Norman; that the work and acts of Pimlott in fulfilling that contract were performed with the full knowledge at all times of Madison, Moon and Kral; that said works and acts were done for the benefit of the mining partnership, for the benefit of the mining properties, and for the benefit of the owning partnership consisting of Madison, Moon and Kral; and that Madison, Moon and Kral and each of them were aware and had full knowledge of the work and acts of Pimlott, acquiesced in his performance of the same and accepted the benefit of said work and acts, and are estopped to deny the consideration flowing to Pimlott and by him assigned to Norman.

That on November 28, 1950, a contract was entered into between Moon, acting for himself and as agent of the operating mining partnership, with Norman, by the terms of which the mining partnership assigned to Norman 12½% of the net profits from the operation of the mining properties, and Norman agreed to assist Moon in the partnership in securing additional funds for operation, to take full charge of the books of account, to render services as a salesman, and to do everything in his power to make the operation of the mine a success; that Norman has at all times since fully performed and complied with his obligations under that contract; and that said acts and conduct of Norman in fulfillment of that contract were performed by him with the full knowledge at all times of Madison, Moon and Kral, were done for the benefit of the mining partnership and for the benefit of the mining properties and the owning partnership, and Madison, Moon and Kral acquiesced in his performance of said work and accepted the benefits thereof.

That after November 28, 1950, the mining partnership carried on mining operations for a period of about one year; that 4,000 tons of talc were mined and sold; that during that period various sums were advanced by the parties for the benefit of the mining partnership; that in that connection Moon is indebted to the mining partnership in a certain amount; that the mining partnership is indebted to Kral in a certain amount; that the mining partnership is indebted to Norman in a certain amount;

and that the mining partnership is indebted to Madison in a certain amount as his pro rata share of the sum due the owning partnership for depletion of the mining properties during the period of operation.

It was further found that it is not true that Chiapella and Moon discovered and located these claims in May, 1949, or at any other date; that it is not true that they constructed discovery monuments or marked the boundaries or placed notices of location in any discovery monument; that it is not true that they performed work or recorded notice of location for these claims, that they remained in possession or that they worked and developed the same; that it is not true that they caused a roadway to be constructed to permit access to the claims or paid for the same; and that the said Chiapella has no right, title or interest of any nature in and to said claims.

It was further found that pursuant to the stipulation of all parties in open court and in writing the court appointed William S. Malin, a certified public accountant, as referee to make an audit and accounting of the affairs of the mining partnership; that the said referee has made a complete analysis of the financial affairs of the mining partnership and of the records of the various parties affecting the operation of these properties, and has submitted his audit and report; that the said referee has filed a petition for the allowance of fees on account of his work and expenses; that $9,000 is a reasonable sum to be allowed him for said services; and that this amount in his favor shall be a judgment lien upon said mining properties until paid.

As conclusions of law it was found that Madison is entitled to judgment that he is the owner of 42½% interest in these mining properties, subject to the interests of Norman; that in like manner Moon is entitled to judgment that he is the owner of 42½% interest in the mining properties, and Kral is entitled to judgment that he is the owner of 15% in said properties; that Norman is entitled to receive 37½% of the net profits from the operation of said mining properties as long as talc is produced in paying quantities; that Madison, Kral and Norman, respectively, are entitled to judgment against various individuals for certain amounts heretofore mentioned in the findings; that Chiapella is not entitled to judgment; and that Malin is entitled to judgment against Madison, Kral and Moon for $9,000 for his services as auditor, said judgment to be a lien against both of said mining claims. Judgment was entered accordingly, and a motion for a new trial was denied. Notice of appeal was filed by Moon and Chiapella jointly, and another notice of appeal by Madison.

The main contention of appellants Moon and Chiapella is that the evidence conclusively shows that they located these two mining claims on May 20, 1949; that they built a discovery monument thereon, and recorded the respective notices of locations; that these claims were not open to location when Madison and Moon claim to have located them; that the locations made by Madison and Moon were not made in good faith since Madison and Moon knew that the said land had been previously located and appropriated; that Madison had no authority to convey any interest in said claims to Kral; and that it conclusively appears that the findings of the court, to the effect that Chiapella and Moon did not locate these claims in May, 1949, that they did not post certain notices or do certain work, that they did not remain in possession, that Chiapella has no right, title or interest in said claims, and that the locations made by Madison and Moon in October 1949, are valid, with the proper notices posted and recorded and work done, are not supported by the evidence.

[1] While it is repeatedly stated in the brief of these appellants that the evidence conclusively shows a valid location of these claims by them in May, 1949, the only evidence pointed out in support of this contention is the two notices of location dated May 20, 1949 and recorded on June 21, 1949. The only description of the land

claimed as it appears in each of these notices is that 1500 feet is claimed along a vein or lode, together with 300 feet on each side of the center of the lode or vein; that the general course of the vein or lode is northerly and southerly; and that "said claim is situate in the Ibex Mining District, Inyo County, State of California, in an undetermined section of said area, and is approximately four miles westerly from U. S. Highway No. 127." No proper description of the land claimed was given and no evidence is pointed out showing that the other requirements of a valid mining location were met. The record discloses that the evidence was conflicting with respect to practically every material point in the case. In addition to the other evidence supporting the respondents' contentions a witness who owns other claims in this general district testified that he went on these claims in July and September, 1949; that he went there again on October 1, 1949 with Madison and Moon; that in July he saw no evidence of any work having been done on the property; that in September and October he saw no evidence of any location or discovery work on these claims; and that after October 1 he and another man helped Madison dig an open cut about 15 or 16 feet into the mountain and about 12 feet high. There was other evidence amply sufficient to support the court's finding with respect to the validity of the Madison-Moon locations in October, 1949. The question as to the prior location by Chiapella and Moon in May, 1949, was one of fact for the trial court, and the evidence fully supports the court's finding to the effect that no valid location was then made.

The main contention of the appellant Madison is that the alleged interests of Norman, based upon his contract for 12½% of the net profits from the mines and the Pimlott contract for 25% of the net profits which was assigned to him, are void under the Corporate Securities Act, and that those parts of the judgment which are in favor of Norman and based upon those contracts should be reversed. It is argued that these contracts are securities within the meaning of Section 25008 of the Corporate Securities Act in the Corporations Code; that Section 25500 of that act forbids the issuance of a security without a permit from the Corporation Commissioner; that no such permit was here issued; and that under Section 26100 both contracts are void. In this connection the appellants Moon and Chiapella also contend that the Pimlott contract, which was assigned to Norman, was void because it was a contract for personal service which could not be assigned.

[2–4] The Pimlott contract was mainly a contract for the building of a road to be paid for out of a certain fund, and the portion for "supervision" was apparently intended, along with the provision for examination of the books, as a means of protecting the proper collection of the amount due for services already performed. The latter part of that contract, to some extent at least, gave Pimlott an interest in a general partnership and also called for his personal services. If it was an interest in a general partnership, the partnership which was formed for the operation of the mine, the prohibition of the Corporate Securities Act did not apply as Section 25100 (*l*) of that code provides that any partnership interest in a general partnership, except one offered to the public, is exempted from the application of the act. If that contract be considered as one calling for personal services a permit was not required. In People v. Davenport, 13 Cal.2d 681, 91 P.2d 892, it was pointed out that the purpose of the blue sky laws is to protect investments and securities whereby a profit is promised and expected without active efforts on the part of the investor, and that these laws are not intended to apply to contracts containing mutual obligations. In Austin v. Hallmark Oil Co., 21 Cal.2d 718, 134 P.2d 777, 782, the court said: "Where, however, as in the present case, the assignee is to share in the conduct of the enterprise, the instrument representing an assignment of a fractional interest in the production of oil is not a security within the act." Moreover, if this was a security it was issued by Moon on behalf

of the operators and owners of the mine and for their benefit, they knowingly received the benefits thereof, and the appellants should be considered as being in the position of an issuer, and should not be allowed to take advantage of their own failure to obtain a permit. Garnette v. Mankel, 71 Cal.App.2d 783, 163 P.2d 466; Mindenberg v. Carmel Film Productions, 132 Cal.App.2d 598, 282 P.2d 1024. In this equitable action, in view of all the circumstances, including the way these parties were working and agreeing among themselves, and where nothing was being offered to the general public, the court was justified in holding that these contracts were not void for this reason. In view of the evidence it cannot be held that the Pimlott contract was void in that since it called for personal services it could not be assigned. The construction of the road and bunkers was not such a matter as could not be assigned and, if the portion of the contract providing for supervision be considered one for personal services, there is strong evidence that the assignment of that contract was consented to and acted on, and the benefits accepted by all of the parties hereto, except the intervener who had no rights in the entire matter as found by the court. A contract for personal services may be assigned with the consent and approval of the other party, Tantum v. Keller, 95 N.J.Eq. 466, 123 A. 299, and many cases in this state have recognized this rule in holding that such a contract may not be assigned in the absence of the consent of the other party.

[5] The appellants Moon and Chiapella also contend that the 15% interest conveyed to Kral was void as in violation of Sections 25008 and 26100 of the Corporations Code. This was a conveyance of a specific interest in particular land, and not a security within the meaning of the Securities Act. Moreover, if it be deemed to be such a security, Kral was acting as a member of the partnership and took a large part in carrying on its business and operating the mine. There was strong evidence of the active participation of both Norman and Kral in developing the mine and carrying on production therein.

[6] The appellants Moon and Chiapella set forth a large number of objections to the audit and report of the referee and auditor, and ask that the report of the referee be set aside and annulled. These objections were filed in the trial court, were heard and passed upon in a two-day hearing, and no argument other than the statement of the objections is here made. The matter was one of fact for the trial court and nothing appears in the record which would justify an interference with the court's rulings thereon. In this connection, the appellant Madison filed objections to the audit and referee's report in the trial court on the ground that he had nothing to do with that matter, and that the charge of the referee and auditor should not be made a lien against these mining claims. On this appeal he argues that the amount allowed to the auditor and referee should be charged to the other parties to the action and not to him, and should not have been made a lien against the mining properties.

[7] In his complaint Madison alleged an oral agreement between Moon and himself for the purpose of locating and filing on certain talc mining claims, repeatedly referred to that as a partnership agreement, and alleged that Moon had violated certain parts of "said partnership agreement" and that he had acted in behalf of that partnership in agreeing to convey a 15% interest in the claims to Kral. He also alleged that his interest in the property had been damaged through improper mining operations, and asked that the defendants be enjoined from asserting any claims with respect to the property. Madison and Kral asked for an accounting in their complaint, and Moon asked for an accounting in his cross-complaint. Thereafter, a stipulation was filed by all parties to the action (except Chiapella) that Malin, a certified public accountant, should be appointed as referee for the purpose of making an accounting and audit. On the same day, the court entered a written order to that effect, direct-

ing all the parties to the action to furnish all necessary books, papers, accounts and records, and other information in connection with this controversy, and further providing that the amount of compensation of the said referee be determined and fixed by the court after completion of the audit and the submission of the referee's report to the court. Section 638 of the Code of Civil Procedure provides that a reference for certain purposes may be ordered on the agreement of the parties, and Section 1023 provides that the fees of the referees are such reasonable sum as the court may fix for the time spent in the business of the reference. This audit and reference involved all phases of the various controversies being tried in this action, and under the stipulation and the facts it cannot be held that the compensation was not properly charged to Madison, Moon and Kral, or that it could not properly be made a lien against the interests of these parties in the physical property involved.

The judgment is affirmed.

GRIFFIN and MUSSELL, JJ., concur.



147 Cal.App.2d 714

RIVERSIDE COUNTY FLOOD CONTROL AND WATER CONSERVATION DISTRICT, Plaintiff and Respondent,

v.

JOSEPH W. WOLFSKILL COMPANY, a corporation, Defendant and Appellant.

Civ. 5507.

District Court of Appeal, Fourth District, California.

Jan. 1, 1957.

Condemnation action by flood control and water conservation district against county and certain landowners. The Superior Court, Riverside County, Russell S. Waite, J., entered order denying one landowner's motion for change of venue on ground that a fair and impartial trial could not be had in the county and that county was a party to the action, and such landowner appealed. The District Court of Appeal, Coughlin, J., pro tem., held that question whether publication of newspaper articles casting landowner in an unsympathetic role, the feeling of people in project area which approximated one-tenth of the county's population, and court proceedings incident to determination of the amount of the security deposit afforded any reason to believe that condemnee could not obtain an impartial trial in the county was for the trial court and that the county and the district were distinct entities, and, therefore, fact that district was party plaintiff would not entitle landowner to a change of venue.

Order affirmed.

1. Appeal and Error ⇐965
Venue ⇐42

Question whether change of venue should be granted because of reason to believe that an impartial trial cannot be had in county in which the action is properly commenced is one first addressed to trial court's sound discretion, and, on appeal, the District Court of Appeal may review such ruling only to extent of inquiring whether it constitutes an abuse of such discretion. West's Ann.Code Civ.Proc., §§ 394, 397, subd. 2.

2. Appeal and Error ⇐948, 965

The District Court of Appeal cannot say that trial court has abused its discretion in determining whether change of venue should be granted on ground that an impartial trial cannot be had in county in which action has been properly commenced, unless it clearly appears that the evidence adduced at hearing on motion for change of venue does not, as matter of law, justify trial court's determination, and burden of pointing out such deficiency is upon party appealing from the determination.

3. Appeal and Error ⇐912

Upon appeal from order denying change of venue, those allegations of the conflicting affidavits which sustained the order and those inferences in support thereof would be accepted by the District Court of Appeal. West's Ann.Code Civ. Proc., §§ 394, 397, subd. 2.

4. Eminent Domain ⇐262(4)

Upon condemnee's motion for change of venue in condemnation action by flood control and water conservation district for purpose of obtaining realty for flood control channel, question whether publication of newspaper articles casting condemnee in an unsympathetic role, the feeling of people in project area which approximated one-tenth of the county's population, and court proceedings incident to determination of the amount of the security deposit afforded any reason to believe that condemnee could not obtain an impartial trial in the county was for the trial court.

5. Eminent Domain ⇐215
Venue ⇐45

Fact that costs awarded in condemnation actions by flood control and water conservation district to obtain property for a flood control channel might be paid by some of taxpayers in the district would not disqualify them as jurors in the action and would not constitute reason for believing that an impartial trial of the action could not be had and therefore that change of venue should be granted. West's Ann.Code Civ.Proc., §§ 394, 397, subd. 2.

6. Venue ⇐45

Fact that county was a party defendant to condemnation action by flood control and water conservation district to obtain land for flood control channel would not authorize change of venue to another county under Code of Civil Procedure provision that action against county may be tried in such county unless action is brought by the county and that action by county against corporation doing business in another county must be transferred to county other than plaintiff's county or one in which defendant is doing business. West's Ann.Code Civ.Proc., § 394.

7. Venue ⇐45

A county and a flood control and water conservation district were distinct entities, and therefore fact that district was party plaintiff in condemnation proceeding would not entitle defendant in such proceeding to a change of venue under Code of Civil Procedure provision which would have entitled defendant to such change in venue if county had been plaintiff. West's Ann.Code Civ.Proc., § 394; Riverside County Flood Control and Water Conservation District Act, § 48–1 et seq., West's Ann.Water Code, Appendix.

8. Venue ⇐33

Power to provide for a change of venue in actions involving either a county or a flood control and water conservation district or both is with the Legislature. West's Ann.Code Civ.Proc., § 394.

Trent G. Anderson, Jr., Los Angeles, for appellant.

Ray T. Sullivan, Jr., County Counsel, Riverside, for respondent.

COUGHLIN, Justice pro tem.

This is an action in eminent domain seeking the condemnation of real property in the county of Riverside for a flood control channel. Besides appellant, which was a corporation with offices in the county of Los Angeles, the named defendants are John M. Coudures, Jr. and the county of Riverside. In due course, appellant moved for a change of venue upon the ground that "a fair and impartial trial cannot be had in the county of Riverside and * * * the county of Riverside is a party to said action." The motion was made upon an affidavit; opposed by a further affidavit; submitted thereon; and denied.

This appeal is from the order of denial. For reversal, reliance is placed upon the provisions of subparagraph 2 of section 397 and section 394 of the Code of Civil Procedure. The former code section provides that "The court may, on motion, change the place of trial * * * 2.

When there is reason to believe that an impartial trial can not be had therein."

The affidavit in support of the motion alleges that it will be impossible to have a fair and impartial trial in the county of Riverside because the property proposed to be taken in this action is intended for use as part of a flood control project in the Perris and San Jacinto valleys; that the cities of Perris, San Jacinto and Hemet, which are located therein, have a total population approximating 20,000 people; that the advantages of the project in question have been widely publicized; that appellant tried to obtain the issuance of an injunction to prevent the diversion of flood waters onto its lands as a part of the proposed plan, which action was the source of considerable comment in the newspapers of the cities of Riverside, Perris, San Jacinto and Hemet, wherein appellant was portrayed as trying to prevent construction of the flood control channels which are a part of the project; that the cost of purchasing appellant's property will be paid out of county funds and, for this reason, every person who is a taxpayer has an adverse interest; and that in a proceeding to fix the deposit security required by law, the plaintiff filed affidavits, which are public records, containing allegations with respect to the purchase price of other lands acquired for the project.

The opposing affidavit alleged that none of the newspaper articles were of an inflammatory nature, but objectively presented the issue; that the purchase of the property will not be financed by county funds, but by an ad valorem tax against property in zone four of the plaintiff district wherein the population approximates only one-tenth of the total population of Riverside county; and that jurors are drawn from the whole county.

[1–5] In support of its position that the motion for change of venue should have been granted under section 397 of the Code of Civil Procedure, appellant cites the case of People v. Ocean Shore Railroad, Inc., 24 Cal.App.2d 420, 427, 75 P.2d 560, 564, wherein an order of the trial court granting such a motion was affirmed. In that case the court said:

> "Whether or not a change of venue should be granted because of reason to believe that an impartial trial cannot be had in the county where the action is properly commenced is a question first addressed to the sound discretion of the trial court. On appeal this court may review such ruling only to the extent of inquiring whether the same constituted an abuse of that discretion. * * * We cannot say that the trial court abused the discretion which is by law vested in it unless it clearly appears that the evidence adduced at the hearing of the motion does not as a matter of law justify such determination. * * * The burden of pointing out such deficiency in the evidence is upon appellant. This burden appellant has here failed to sustain."

This statement of the law, basic to the affirmance of the order in the cited case, impels affirmance of the order in the case at bar on the point in issue. Those allegations of the conflicting affidavits which sustain the order and those inferences in support thereof must be accepted by this court. Gordon v. Perkins, 203 Cal. 183, 186, 263 P. 231; Blumer v. Kirkman Corp., 38 Cal.2d 480, 484, 241 P.2d 17. Whether the publication of articles in the newspaper casting the appellant in an unsympathetic roll, the feeling of the people in the project area, approximating one-tenth of the county's population, and the court proceedings incident to a determination of the amount of the security deposit, afforded any reason to believe that an impartial trial could not be had in the county of Riverside was a question of fact. The decision of the trial court thereon is supported by the record. The fact that the costs awarded in the condemnation proceedings may be paid by some of the taxpayers in the district did not disqualify them as jurors, People v. Spring Valley Co., 109 Cal.App.2d 656, 663, 241 P.2d 1069, and would constitute no reason for believing that an im-

partial trial of the action could not be had in the county.

[6] Section 394 of the Code of Civil Procedure, also relied upon by appellant, provides that an action against a county may be tried in such county unless such action is brought by a county, in which case it may be tried in any county not a party thereto, and when an action is brought by a county against a corporation doing business in another county, the action must be transferred for trial to a county other than the plaintiff or in which the defendant is doing business. It is apparent that the fact that the county of Riverside is a party defendant does not authorize a change of venue under this code section.

Appellant contends that the plaintiff Riverside County Flood Control and Water Conservation District "is in essence and nature a county within the meaning of" said section 394. It is argued that the district is in all respects the arm and agency of the county because it exercises functions which historically have been county functions, and the board of supervisors of the county is ex-officio its governing body. However, the district was created by the legislature, Stats.1945, Ch. 1122, West's Ann.Water Code, Appendix, and is an agency of the state. People ex rel. Chapman v. Sacramento Drainage Dist., 155 Cal. 373, 382, 103 P. 207; Argyle Dredging Co. v. Chambers, 40 Cal.App. 332, 340, 181 P. 84.

The real burden of appellant's argument is that the reasons for granting a change of venue of an action in which a county is plaintiff are equally cogent reasons for granting a change of venue of an action in which such a district is plaintiff. This is a legislative and not a judicial problem. In People v. Spring Valley Co., 109 Cal.App.2d 656, 669–670, 241 P.2d 1069, 1077, the court said:

"The Legislature, in many instances, has not provided for change of venue in cases where the plaintiff public entity has the complete financial responsibility. Such situations, for example, are reclamation, irrigation, and other special districts. * * * If the Legislature had intended the section to apply whenever a county has an indirect interest in an action, it could easily have said so."

[7,8] A county and a flood control and water conservation district are distinct entities. The power to provide for a change of venue of actions involving either or both of these entities is with the legislature.

The order appealed from is affirmed.

BARNARD, P. J., and MUSSELL, J., concur.



147 Cal.App.2d 828

JOSEPH W. WOLFSKILL COMPANY, a corporation, Plaintiff and Appellant,

v.

RIVERSIDE COUNTY FLOOD CONTROL AND WATER CONSERVATION DISTRICT, a body politic and incorporate, and Board of Supervisors of Riverside County, Defendants and Respondents.

Civ. 5506.

District Court of Appeal, Fourth District, California.

Jan. 21, 1957.

Appeal from an order of the Superior Court of Riverside County denying motion for change of venue; Russell S. Waite, Judge.

Trent G. Anderson, Jr., Los Angeles, for appellant.

Ray T. Sullivan, Jr., County Counsel, Riverside, for respondents.

COUGHLIN, Justice pro tem.

This is an appeal from an order denying plaintiff's motion for change of venue in an action brought to enjoin the defendants

from causing water to flow over its land, and from proceeding with an action in eminent domain to obtain land for the construction of ditches to be used for such purpose.

The grounds for the motion and the contentions upon which appellant relies for reversal are the same as those urged in an action between the same parties this day decided by this court, i. e., Riverside Flood Control and Water Conservation District v. Joseph W. Wolfskill Company, a corporation, 306 P.2d 22.

For the reasons therein stated, the order is affirmed.

BARNARD, P. J., and MUSSELL, J., concur.



GLOBE & RUTGERS FIRE INSURANCE COMPANY, a corporation, Plaintiff and Respondent,

v.

AIRBORNE FLOWER & FREIGHT TRAFFIC, Inc., a corporation, Defendant and Appellant. *

Civ. 21977.

District Court of Appeal, Second District, Division 1, California.

Jan. 28, 1957.

Rehearing Denied Feb. 20, 1957.

Hearing Granted March 27, 1957.

Action by subrogee of shipper of 10 cartons of furs shipped under an airbill from Los Angeles to San Francisco, for value of contents of one carton which was lost or stolen during ground delivery by defendant. The Superior Court, Los Angeles County, Burnett Wolfson, J., entered judgment for subrogee and defendant appealed. The District Court of Appeal, White, P. J., held, inter alia, that where shipper induced ground carrier to accept a consignment of 10 cartons by declaring value thereof to be $50, after one of the cartons had been lost or stolen, shipper would not be permitted to collect damages in excess of the value so declared.

Judgment modified and as modified affirmed.

1. Carriers ⇐180(5)

Where an air carrier, as agent of shipper, and upon shipper's express instructions, delivered certain cartons flown by it from one city to another under an airbill to a ground delivery company, ground delivery company became agent of shipper and not a subagent of air carrier, and ground delivery company was therefore not entitled to benefit of air carrier's tariffs limiting liability to declared value of such merchandise on airbill.

2. Carriers ⇐158(1)

The declaration of declared and agreed value in an airbill is not an agreement limiting liability of the carrier, but is an agreement that the value of the property shipped is a certain amount.

3. Evidence ⇐20(2)

District Court of Appeals would take judicial knowledge of the fact that transportation of 10 cartons containing merchandise worth $50 would not normally be handled with the same equipment, personnel and methods as would the same 10 cartons containing merchandise worth between $50,000 and $100,000.

4. Carriers ⇐158(1)

Where shipper induced carrier to accept a consignment of 10 cartons by declaring value thereof to be $50, after one of the cartons had been lost or stolen, shipper would not be permitted to collect damages in excess of the value so declared.

Wallace, Garrison, Norton & Ray, Maynard Garrison, San Francisco, for appellant.

* Opinion vacated 314 P.2d 741.

Joseph F. Rank and Russell K. Lambeau, Los Angeles, for respondent.

WHITE, Presiding Justice.

Defendant Airborne Flower & Freight Traffic, Inc. appeals from the judgment that it pay to respondent $11,755 and costs. Respondent is the subrogee of Saks Fifth Avenue, the consignor and consignee of ten cartons shipped by United Airlines from Los Angeles to San Francisco.

The airbill was prepared in sextuplicate, signed by the agent of Saks who kept the original or "No. 1 Copy". The other five copies were delivered by Saks with the ten cartons to United Airlines at the airport near Los Angeles. The value of the ten cartons was therein declared to be $50. Charge for air transport by United, airport to airport, based upon weight and declared value was $13.19.

All parties agree that if United had lost the entire shipment before delivering it to appellant, United's total liability for the ten cartons would have been $50.

Upon arrival of the cartons at the San Francisco airport, United, in the absence of instructions, would have delivered them to the consignee at the airport, or would have sent notice of arrival to the consignee and kept the cartons until called for, Civil Code, §§ 2118–2121. The airbill signed by Saks and delivered to United with the cartons however, contains other instructions, to wit: "Delivery will be made to the consignee at points where delivery service is available unless otherwise specified below". Not only did Saks fail to otherwise specify, but its agent encircled the word "delivery", inserted the street address of Saks' San Francisco store, and under the printed words "instructions to carrier" added "Pls A.M. Delivery", meaning please deliver to the San Francisco store before noon. On the instant appeal, it is unquestioned that both Saks and United understood this airbill to mean that United was requested by Saks to deliver the cartons to a surface carrier for transportation from the San Francisco airport to Saks' San Francisco store. United followed those instructions. The receipt for the cartons, on the fourth copy of the airbill, signed by appellant's driver as the agent of the consignee, was kept by United. United's responsibility ended when the ten cartons and the fifth copy of the airbill were then delivered by it to appellant's driver, Civil Code, § 2201.

The airbill constituted appellant's only information or instructions from Saks. Prominently displayed on the face thereof was the following: "Declared value $———" in printing, with the amount "$50.00" inserted therein with pencil, on the line next to the signature of Saks' agent who initiated the shipment.

Appellant's driver delivered to Saks' San Francisco store only nine of the ten cartons, one having been lost or stolen. Appellant's delivery charge was $1.79 based upon weight. It was billed to and paid by Saks. Later Saks made claim for $11,755 and started the instant action to recover from appellant that amount as the reasonable market value of the contents of the lost carton.

[1] It is conceded that appellant is liable for the loss of the carton. However, appellant urges that its liability is limited by the declaration of value made by Saks to United on the airbill signed by Saks and United at the beginning of the shipment and by appellant's driver when he accepted the cartons for hauling. The first and third grounds urged by appellant in support of its position are that appellant was acting as the agent of United and the airbill was a "through bill" to Saks' San Francisco store; and that appellant is entitled to the benefit of United's tariff. United, as the agent of Saks and upon Saks' express instructions, delivered the cartons to appellant, who, in turn, became the agent of Saks—not a subagent of United. Cavallaro v. Texas & P. Ry. Co., 110 Cal. 348, 355, 42 P. 918. Therefore, ap-

pellant Airborne is not entitled to the benefit of United's tariffs.

Appellant's second affirmative defense is "That at the time said defendant received and accepted said ten cartons, plaintiff's assignor represented to defendant that all of them were of a value totalling $50.00."

Appellant's contract is evidenced by its driver's signature upon the fourth and fifth copies of the airbill (retained by United and appellant, respectively) indicating appellant's receipt of the ten cartons. Respondent contends and the trial court found and concluded that appellant "had no published tariff schedules or other published rates providing for limits of its liability, and that there was no special contract in the instant case between said defendant and the consignor or consignee of said shipment providing any basis for limits of defendant's liability * * *"

[2] The law of California is that a carrier's liability may be limited by an express contract, Civil Code, §§ 2174–2176; Donlon Bros. v. Southern Pacific Co., 151 Cal. 763, 776, 91 P. 603, 11 L.R.A.,N.S., 811. The Donlon case and many others following it hold that an agreement such as the airbill in the instant action is not one limiting the liability of the carrier, but is an agreement that the value of the property shipped is a certain amount. In the instant action, respondent contends and the trial court held that appellant cannot benefit from the declared and agreed value of the cartons because appellant "failed to offer the shipper a rate differential in consideration of a limited liability" and because appellant's "charge was based exclusively on weight". In support of these contentions, respondent cites: Donlon Bros. v. Southern Pacific Co., supra; Pierce v. Southern Pacific Co., 120 Cal. 156, 166, 47 P. 874, 52 P. 302, 40 L.R.A. 350; and Michalitschke Bros. & Co. v. Wells, Fargo & Co., 118 Cal. 683, 50 P. 847. It is true that in each of the three cases last above cited the carrier did offer, and the shipper declared the value of the goods shipped in order to procure, a lower freight rate based upon such declaration of value. In each of those cases, it is said that the freight differential was sufficient consideration to create a valid agreement as to the value of the goods shipped for all purposes. It does not follow, however, that such rate differential based on value is the only consideration which will support such an agreement as to the value of the goods shipped.

In the instant action, appellant's manager of claims and insurance, in answer to questions by respondent's attorney, Mr. Lambeau; testified as follows:

"Mr. Lambeau: Q. In what respect did the airbill govern the charges that you made in this case, Mr. Cetchen? A. Well, our charge, as previously stated, was based on the weight and the fact that there was only a $50 declared value involved, and $50 was less than the least valuation; so the only charge we could make was for carrying 268 pounds.

"Q. Well, suppose the airbill had shown $5,000, what would be your charge? A. We wouldn't have accepted it off of United's bill. They would have been required to negotiate our shipping documents. We would have cut our own waybill and charged according to our published tariff and rates.

"Q. You mean that you would have refused a shipment valued at $5,000 of this same weight and size? A. Well, we wouldn't have refused it. We would have required them to negotiate our own shipping documents because of the value.

"Q. You would have required whom to negotiate your shipping documents? A. Whoever was tendering us the shipment.

"Q. Let us assume that United tendered to you a shipment on which the declared value was $5,000 or $10,000:

"Mr. Garrison (Attorney for appellant): Why don't you take the figures involved in this case and say $100,000?

"Mr. Lambeau: All right, let us take $100,000.

"Mr. Garrison: One box was worth $10,000, and there were ten boxes. They were all furs.

"Mr. Lambeau: I don't know what the other nine would be. Let us say $50,000.

"The Witness: We would not ordinarily accept a shipment of that value because we have a limitation of value that we will accept under the terms of our tariff. We could accept such a shipment, but only on prior advance arrangements, and then we would have to agree to accept it and they would have to pay the applicable charges.

"Mr. Lambeau: Q. Well, let us go at that a little more slowly. You say you would refuse a shipment of a declared value of $50,000? A. Well, it depends on how you interpret the word 'refuse'. Our tariff stipulates that we will not accept a shipment having a value over a certain limit, and $50,000 would be over that limit; so it would be at our option to refuse the shipment or arrange to handle it.

"Q. You are referring again to your tariffs on file with the Civil Aeronautics Board? A. I am."

The appellant in the instant action had no tariff governing intrastate shipments on file with the Public Utilities Commission. Its tariff filed with the Civil Aeronautics Board is not in the record on appeal. However, a common carrier is not required to accept and carry any freight offered to it except "of a kind that he undertakes or is accustomed to carry", Civil Code, § 2169. None of the cases cited in the briefs, and none we have located by our own search, concern the transportation of goods of a kind or value not ordinarily transported by the carrier.

[3] This court may take judicial knowledge of the fact that transportation of ten cartons containing merchandise worth $50 would not normally be handled with the same equipment, personnel and methods as would the same ten cartons containing merchandise worth between $50,000 and $100,000.

[4] In our opinion it is not legally or equitably just or fair to permit a shipper to induce a carrier to accept a consignment of ten cartons by declaring the value thereof to be $50 and then—after one of the cartons has been lost, or stolen, perhaps by some one having knowledge of the actual value of its contents so misrepresented to the carrier—to permit the shipper to collect damages in excess of the value so declared. Under the facts of the instant action, appellant having been induced to accept and carry said consignment by the representation of respondent that the value thereof was $50, the judgment in favor of respondent should be for no more than that amount.

The judgment is modified by reducing the same to the sum of $50, and as so modified is affirmed. Appellant to recover costs on appeal.

DORAN and FOURT, JJ., concur.

147 Cal.App.2d 742

Shirley RAY, Plaintiff and Appellant,

v.

Marion J. HANISCH, Defendant and Respondent.

Civ. 21821.

District Court of Appeal, Second District, Division 3, California.

Jan. 22, 1957.

Rehearing Denied Feb. 20, 1957.

Action for injuries sustained by an owner in her automobile while it was being driven by the defendant on a pleasure trip participated in by both parties. Judgment sustaining demurrers to the complaint in the Superior Court of Los Angeles County, Bayard Rhone, J., and the plaintiff appealed. The District Court of Appeal, Vallée, J., held that where the second count was insufficient to state a cause of action because failing to disclose that defendant gave compensation for her ride, so that the driver was liable for ordinary negligence, sustaining of demurrer to the second count required the sustaining of demurrer to the first count.

Affirmed.

1. Automobiles ⇐181(1)

The statute providing that no person who as a guest accepts a ride in a vehicle without giving compensation therefor, shall recover against the driver unless injury resulting from intoxication or wilful misconduct is limited to guests. West's Ann. Vehicle Code, § 403.

2. Automobiles ⇐181(1, 2)

The terms "passenger" and "guest" have been adopted in the automobile guest statute for the purpose of distinguishing a person who has given compensation within the meaning of statute from one carried gratuitously, and if one is a passenger, the driver is liable for ordinary negligence causing injuries. West's Ann.Vehicle Code, § 403.

See publication Words and Phrases, for other judicial constructions and definitions of "Guest" and "Passenger".

3. Automobiles ⇐242(1)

There is an inference in absence of evidence to the contrary, that an owner present in his automobile has the power to control it, and in absence of such contrary evidence, an owner allowing a friend to drive his automobile has the right to govern the manner of its operation, and at any time to terminate the permission given and to operate the automobile himself. West's Ann.Vehicle Code, § 403.

4. Automobiles ⇐181(1)

Primary policy underlying the automobile guest law is to prevent recovery for ordinary negligence by a guest in a vehicle who has accepted the hospitality of the owner. West's Ann.Vehicle Code, § 403.

5. Automobiles ⇐181(2)

Mere fact that plaintiff was riding in her own automobile while it was being driven by her friend, did not classify her as a "guest" within the automobile guest statute. West's Ann.Vehicle Code, § 403.

6. Automobiles ⇐181(2)

If an occupant gives compensation for a ride in an automobile he is a "passenger" otherwise he is a "guest" within the automobile guest statute. West's Ann.Vehicle Code, § 403.

7. Automobiles ⇐181(2)

Where driver of automobile receives a tangible benefit, monetary or otherwise, which is a motivating influence for furnishing the transportation, rider is a "passenger" and driver is liable for ordinary negligence and this is so whether the trip is for a joint pleasure of the participants or is of a nonsocial nature. West's Ann. Vehicle Code, § 403.

8. Automobiles ⇐181(2)

Benefits to driver of an automobile other than cash or its equivalent may be "compensation" within the automobile guest statute and compensation is given if the occupant accepts a ride at the behest of the driver to assist the latter in arriving at his destination or fulfilling the object of

the journey, or where a special benefit to the driver is the motivating influence for furnishing the transportation. West's Ann. Vehicle Code, § 403.

See publication Words and Phrases, for other judicial constructions and definitions of "Compensation".

9. Automobiles ⇐244(20)

Where the inference of a tangible benefit amounting to motivating influence rests wholly on conjecture, it is not sufficient to constitute "compensation" so as to make the rider, a "passenger" within the automobile guest statute, and the driver liable for ordinary negligence. West's Ann.Vehicle Code, § 403.

10. Automobiles ⇐181(2)

A person does not cease to be a guest and become a passenger within the automobile guest statute by extending customary courtesies of the road. West's Ann. Vehicle Code, § 403.

11. Automobiles ⇐181(2)

Where purpose of an automobile trip is social or for the joint pleasure of the participants, the exchange of social amenities or reciprocal hospitality such as sharing the cost of operation is merely incidental and does not constitute "compensation" and the rider is a guest and the driver is liable for ordinary negligence under the guest statute. West's Ann.Vehicle Code, § 403.

12. Automobiles ⇐245(24)

If the admitted facts give rise to but one reasonable conclusion, the question whether compensation was given for an automobile ride so as to make the rider a passenger and the driver liable for ordinary negligence is one of law. West's Ann. Vehicle Code, § 403.

13. Automobiles ⇐244(20)

In action for injuries sustained by owner in her automobile which left the road while being driven by defendant, where both parties were on a pleasure trip, evidence did not establish that plaintiff gave compensation for the ride so as to make the owner a "passenger" in her automobile and make the defendant driver liable for ordinary negligence. West's Ann.Vehicle Code, § 403.

14. Pleading ⇐54

A count in a complaint premised on detailed factual allegations in another count must stand or fall with the other count.

15. Pleading ⇐204(3)

In action for injuries sustained by owner in her automobile when it left the road while being driven by defendant, who was on a pleasure trip with the owner, where second count was insufficient to state a cause of action because of failing to establish that plaintiff gave compensation for ride so as to make the owner a passenger in automobile and defendant liable for ordinary negligence and first count was based on same facts as were averred in second count, sustaining of demurrer to second count required the sustaining of demurrer to the first count, though standing alone it stated facts sufficient to constitute a cause of action for ordinary negligence.

Rothman, Goodman & Hirschberg and Louis N. Wolf, Los Angeles, for appellant.

Jarrett & Morgan and Joseph W. Jarrett, Los Angeles, for respondent.

VALLÉE, Justice.

Appeal from a judgment of dismissal in an action for damages for personal injuries.

The complaint is in two counts. The first alleges that on July 11, 1954, while defendant was driving an automobile owned by plaintiff in which she (plaintiff) was riding, defendant negligently drove the automobile into a ditch, resulting in injuries to plaintiff. The second count realleges these facts; and that three days before the accident plaintiff and defendant agreed to take a vacation for pleasure in plaintiff's automobile under a definite oral agreement whereby they would "share the travel expenses entailed by the said trip," and that plaintiff would not have "consented to" or "undertaken" the trip "if she did not have such an agreement with the defendant." A general demurrer to both

counts was sustained with leave. Plaintiff declined to amend and she appeals from the judgment which ensued.

The parties, by agreement, supplement the complaint with these additional facts: "Mrs. Hanisch [defendant] when visiting in Los Angeles contacted Mrs. Ray [plaintiff], her old friend, and the former accepted the hospitality of Mrs. Ray to drive Mrs. Hanisch to Palm Springs to show her the sights and on one stretch of the road Mrs. Hanisch voluntarily and without prearrangement had temporarily taken over the driving when the unfortunate accident occurred in leaving the highway while negotiating a curve in the road."

[1] Vehicle Code, section 403, commonly called the "guest law," reads:

> "No person who as a guest accepts a ride in any vehicle upon a highway without giving compensation for such ride, nor any other person, has any right of action for civil damages against the driver of such vehicle or against any other person legally liable for the conduct of such driver on account of personal injury to or the death of such guest during such ride, unless the plaintiff in any such action establishes that such injury or death proximately resulted from the intoxication or wilful misconduct of said driver."

Section 403 is limited to guests. Fernandez v. Consolidated Fisheries, Inc., 98 Cal.App.2d 91, 98, 219 P.2d 73. Since plaintiff does not allege her injuries resulted from the intoxication or wilful misconduct of defendant, the conditions for the exemption from liability granted by the statute applicable here are: 1. A guest shall accept a ride in any vehicle upon a highway. 2. No compensation must be given for such ride.

No fact is alleged in the first count from which an inference can be drawn that plaintiff was a guest, unless the fact follows from the averment that she was the owner of the car. The question therefore is: Do the facts alleged in the first count show that plaintiff was a guest? Whether an owner riding in a vehicle driven by another is a guest, is one of first impression in this state.

[2] The terms "passenger" and "guest" have been adopted for the purpose of distinguishing a person who has given compensation within the meaning of section 403 from one carried gratuitously. Martinez v. Southern Pacific Co., 45 Cal.2d 244, 249–250, 288 P.2d 868. If one is a passenger, the driver is liable for ordinary negligence causing the injuries or death. Follansbee v. Benzenberg, 122 Cal.App.2d 466, 470, 265 P.2d 183, 42 A.L.R.2d 832.

The guest statute of Connecticut read:

> "No person transported by the owner or operator of a motor vehicle as his guest without payment for such transportation shall have a cause of action for damages against such owner or operator for injury, death or loss, in case of accident, unless such accident shall have been intentional on the part of such owner or operator or caused by his heedlessness or his reckless disregard of the rights of others."

Conn.Gen.Stat.1930, § 1628. Gledhill v. Connecticut Co., 121 Conn. 102, 183 A. 379, was an action by the administratrix of the estate of Gledhill against Graham. Graham, while on vacation, was visiting with Gledhill. They went on a fishing trip in an automobile owned by Gledhill in which he was seated upon the front seat. Graham was driving at the request of Gledhill. Graham negligently drove the car into a pole on the side of the road, causing injuries to Gledhill from which the latter died. There was no claim that there was any intentional misconduct on the part of Graham, or that the accident was caused by his heedlessness or his reckless disregard of the rights of others. The court refused to charge the jury that Gledhill was a guest in the automobile. A verdict was returned in favor of the plaintiff against Graham. The Supreme Court of Errors of Connecticut held, 183 A. 380:

"As used in the statute the term [guest] imports that the person riding in a motor vehicle is a recipient of the hospitality of the owner or driver. * * *

"Upon the facts claimed, there is nothing which would have warranted the jury in concluding that at the time of the accident Gledhill was the guest of Graham. The two were riding in Gledhill's automobile. They were going fishing together. The automobile was being driven by Graham at Gledhill's request, and the latter was sitting on the front seat with the driver. There is nothing from which the inference could be drawn that Gledhill was enjoying the hospitality of Graham. The most that is indicated is that Graham was performing a gratuitous service for Gledhill. Proof of this fact does not make Gledhill the guest of Graham. To hold that if the owner of an automobile is riding therein and a friend is driving, the owner is the guest of the friend simply because the friend is driving, would be to import into the statute a meaning not expressed by the Legislature."

Anderson v. Burkardt, 275 N.Y. 281, 9 N.E. 2d 929, says the so-called "guest rule" does not apply "to the owner who is being driven in his own car; he is no guest."

A Virginia "guest law" read:

"No person transported by the owner or operator of any motor vehicle as a guest without payment for such transportation * * * shall be entitled to recover damages against such owner or operator for * * * injuries to the person * * * of such guest resulting from the operation of such motor vehicle, unless such * * * injury was caused or resulted from the gross negligence or willful and wanton disregard of the safety of the person * * * being so transported on the part of such owner or operator."

Code 1950 Va. § 8-646.1. The Supreme Court of Pennsylvania, construing the Virginia statute and answering the contention that the plaintiff who was riding in his own car could not recover from his driver friend without proof the driver was grossly negligent or guilty of a wilful and wanton disregard of the plaintiff's safety, in Lorch v. Eglin, 369 Pa. 314, 85 A.2d 841, at page 843, concluded:

"The reason, however, why this contention is without merit is that Lorch [the plaintiff owner] was not a *guest* in the car. He was riding in his own automobile, and, while apparently there is no direct decision of a Virginia court covering such a situation, there can be no doubt as to the proper judicial interpretation of the statute applicable to the present circumstances. It was said in our own case of Beam v. Pittsburgh Rys. Co., 366 Pa. 360, 372, 77 A.2d 634, 640: 'It would be flying in the face of all the authorities to hold that merely by allowing Shook [the friend of the owner] to drive the car Beam [the owner] made him a bailee of the automobile and completely abnegated his right of control over the operation of his own car. Plaintiff's statement of claim alleged that Beam was a "guest passenger," but there is not a word of testimony to indicate that Beam had relegated himself to the status of a "guest" in his own automobile and had actually bailed or turned over to Shook the car and the exclusive charge and control thereof.' "

[3] There is an inference, in the absence of evidence to the contrary, that an owner present in his car has power to control it. And in the absence of such contrary evidence, an owner allowing a friend to drive his car has the right to govern the manner of its operation, as well as at any time to terminate the permission given and to operate the car himself. Grover v. Sharp & Fellows Contracting Co., 66 Cal. App.2d 736, 741, 153 P.2d 83; Haigh v. Hill, 65 Cal.App. 517, 520, 224 P. 474; Beam v. Pittsburgh Rys. Co., 366 Pa. 360, 77 A.2d 634, 639.

[4] The primary policy underlying the guest law is to prevent recovery for ordinary negligence by a guest in a vehicle who has accepted the hospitality of the owner. Kruzie v. Sanders, 23 Cal.2d 237, 242, 143 P.2d 704. We think the reasoning of the Gledhill and Lorch cases is logical and unanswerable.

[5] We conclude that the mere fact plaintiff was riding in her own car while it was driven by defendant, her friend, does not classify her as a guest within the meaning of section 403; and that the first count, standing alone, states facts sufficient to constitute a cause of action for ordinary negligence.

[6] The sufficiency of the second count depends on whether plaintiff gave compensation for the ride. Whether an occupant of a vehicle is a guest or a passenger depends on the answer to the query: Did he or someone in his behalf give "compensation for such ride" within the meaning of section 403? Whitechat v. Guyette, 19 Cal.2d 428, 430, 122 P.2d 47. If an occupant gives compensation for the ride he is a passenger.

[7–9] Where the driver receives a tangible benefit, monetary or otherwise, which is a motivating influence for furnishing the transportation, the rider is a passenger and the driver is liable for ordinary negligence; and this is so whether the trip is for the joint pleasure of the participants or is of a nonsocial nature. Whitmore v. French, 37 Cal.2d 744, 746, 235 P.2d 3. Benefits to the driver other than cash or its equivalent may be "compensation." Kruzie v. Sanders, 23 Cal.2d 237, 241, 143 P.2d 704. Compensation is given if the occupant accepts a ride "at the behest of the driver to assist the latter in arriving at his destination or fulfilling the object of the journey," or where a special benefit to the driver is "the motivating influence for furnishing the transportation." McCann v. Hoffman, 9 Cal.2d 279, 283, 286, 70 P.2d 909, 912, 913. In Druzanich v. Criley, 19 Cal.2d 439, 122 P.2d 53, the sole benefit received by the driver was the promise of the passenger to share in the driving. Where the inference of a tangible benefit amounting to a motivating influence rests wholly on conjecture, it is not sufficient to constitute compensation. Martinez v. Southern Pacific Co., 45 Cal.2d 244, 251, 288 P.2d 868.

[10, 11] A person does not cease to be a guest and become a passenger by extending customary courtesies of the road. Whitmore v. French, 37 Cal.2d 744, 746, 235 P.2d 3; Rest., Torts, § 490. Where the circumstances surrounding the parties indicate that the considerations inducing the defendant to extend transportation to the plaintiff were primarily those of hospitality or sociability, it has been held that the mere fact the plaintiff assisted with the driving, even where such assistance was contemplated from the beginning of the trip, is insufficient to change the status of the plaintiff from that of guest to that of passenger. Such assistance is regarded as merely a reciprocal gesture of hospitality or a social amenity, and not compensation for the ride. Dibble v. Harper's Estate, 294 Mich. 453, 293 N.W. 715; Mayer v. Puryear, 4 Cir., 115 F.2d 675; Hoover v. Harris, 177 Tenn. 467, 151 S.W.2d 152. Unless it appears that the driving assistance was the inducing cause in the extension of the transportation to the occupant, such services are not regarded as compensation. Cf. Druzanich v. Criley, 19 Cal.2d 439, 122 P.2d 53. When the purpose of an automobile trip is social or for the joint pleasure of the participants, the exchange of social amenities or reciprocal hospitality such as sharing the cost of gasoline or oil is merely incidental and does not constitute compensation. They are a mere extension of the courtesies of the road. Martinez v. Southern Pacific Co., 45 Cal. 2d 244, 250–251, 288 P.2d 868; McCann v. Hoffman, 9 Cal.2d 279, 285, 70 P.2d 909; Hart v. Chaffin, 144 Cal.App. 2d 326, 300 P.2d 905; Duff v. Schaefer Ambulance Service, Inc., 132 Cal.App.2d

655, 666–667, 283 P.2d 91; Brandis v. Goldanski, 117 Cal.App.2d 42, 46, 255 P. 2d 36; Phillips v. Harper, 60 Cal.App.2d 298, 301, 140 P.2d 686; Yates v. J. H. Krumlinde & Co., 22 Cal.App.2d 387, 389–390, 71 P.2d 298.

A judgment in favor of the occupant was reversed in Stephen v. Spaulding, 32 Cal.App.2d 326, 89 P.2d 683, where the rider paid his share of the gasoline bill on the way to a bridge party. The payment was held to be not compensation but, on a pleasure trip, a mere exchange of social amenities. In Fiske v. Wilkie, 67 Cal.App.2d 440, 154 P.2d 725, payment for the gasoline by the riders in a car driven by the owner on a trip to Palm Springs and Idyllwild to study gardens, flowers, trees, and shrubs was held as a matter of law not to constitute compensation for the ride.

[12] If the admitted facts give rise to but one reasonable conclusion the question whether compensation was given for an automobile ride is one of law. Winn v. Ferguson, 132 Cal.App.2d 539, 543, 282 P.2d 515.

[13] The second count alleges nothing more than an exchange of social amenities and reciprocal hospitalities. The trip was in no sense an integral part of a business venture for the mutual advantage of the parties. See Walker v. Adamson, 9 Cal.2d 287, 70 P.2d 914; Doherty v. Edwards, 227 Iowa 1264, 290 N. W. 672. The transportation was furnished by plaintiff. She had the power of control, and apparently did most of the driving. Defendant just happened to be driving at the time of the accident. The complaint itself is silent as to how or why defendant happened to be driving at the time of the accident. There is no allegation of a previous agreement to share in the driving. There is no allegation that the making of the trip by plaintiff was conditional on defendant's driving, which was the case in Druzanich v. Criley, 19 Cal.2d 439, 122 P.2d 53. It appears from the agreement of the parties that defendant's driving at the time of the accident was a "mere courtesy of the road."

Payment of part of the travel expenses and driving the car part of the time were "merely incidental and [did] not constitute the moving influence for the transportation." McCann v. Hoffman, 9 Cal.2d 279, 286, 70 P.2d 909, 913. The fact there was a prearrangement with respect to the payment of the travel expenses and that plaintiff would not have made the trip had the arrangement not been made, does not take her out of the category of a guest. No inference can be drawn from the facts alleged that plaintiff gave compensation for the ride. Only ordinary negligence is alleged.

[14, 15] We conclude that the second count does not state facts sufficient to constitute a cause of action. In view of that fact there remains to consider whether the court erred in sustaining the demurrer to the first count. The second count pleads in detail the facts on which plaintiff relies. These facts are supplemented as to both counts by the facts agreed to by the parties. The first count is concededly based on the same facts as are averred in the second count and those agreed to. The first count must be considered in connection with the facts averred in the second count and the facts agreed to. A count in a complaint premised on detailed factual allegations in another count must stand or fall with the other count. Ephraim v. Metropolitan Trust Co., 28 Cal.2d 824, 833, 172 P.2d 501; Orloff v. Metropolitan Trust Co., 17 Cal.2d 484, 489, 110 P.2d 396; Neal v. Bank of America, 93 Cal.App.2d 678, 681, 209 P.2d 825; Bos v. United States Rubber Co., 100 Cal.App.2d 565, 570–571, 224 P.2d 386; Stafford v. Russell, 117 Cal.App.2d 326, 327, 255 P.2d 814. The first count therefore was equally vulnerable to the demurrer and it must fall. The demurrer was properly sustained as to both counts.

Affirmed.

SHINN, P. J., and PARKER WOOD, J., concur.

147 Cal.App.2d 770

Marilyn Louise ROYKO et al., Plaintiffs and Appellants,

v.

GRIFFITH COMPANY et al., Defendants. Griffith Company, Respondent.

Civ. 21939.

District Court of Appeal, Second District, Division 2, California.

Jan. 23, 1957.

Rehearing Denied Feb. 14, 1957.

Hearing Denied March 20, 1957.

Action against contractor for wrongful death of passenger in automobile which collided at night with defendant's grader parked on portion of street under construction. The Superior Court of Los Angeles County, Joseph M. Maltby, J., entered judgment on a verdict for defendant contractor, and plaintiffs appealed. The District Court of Appeal, Ashburn, J., held that action of trial court in giving and refusing various instructions disclosed no error or none of which plaintiffs could complain.

Judgment affirmed.

1. Automobiles ⇐309(2)
Trial ⇐261

In action against contractor for wrongful death of passenger in automobile which collided at night with defendant's grader, parked without lights or reflectors on portion of street under construction while other half thereof was open for traffic, plaintiffs were entitled to instruction, if drawn in proper form, directing attention to foreseeability as the basic test of negligence, but refusal to give requested instruction which would leave to jury question of whether the realizable likelihood that a third person might act in a particular manner was the hazard or one of the hazards which would make actor negligent was not error, and trial court was not required to modify and give such instruction as corrected.

2. Negligence ⇐136(14)

Whether failure to recognize hazard that a third person may act in a particular manner constitutes negligence is a question of law for court and should not be left to jury.

3. Automobiles ⇐309(4)

In action against contractor for wrongful death of passenger in automobile which collided at night with defendant's grader, parked without lights or reflectors on portion of street under construction, requested instruction that deceased did not assume the risk of any injury that could have come to him through the negligence of defendant or its agents or employees did not correctly state the law and was properly refused.

4. Negligence ⇐105

The elements of defense of "assumption of risk" are a knowledge and appreciation of the danger involved and voluntary acceptance of the risk.

See publication Words and Phrases, for other judicial constructions and definitions of "Assumption of Risk".

5. Negligence ⇐105

A person, if he is fully informed, may assume a risk even though the dangerous condition is caused by the negligence of others.

6. Action ⇐27(2)

A contractual duty to use care for protection of the public may properly form the basis of a tort action.

7. Appeal and Error ⇐1033(5)

In action against contractor for wrongful death of passenger in automobile which collided at night with defendant's grader, parked without lights or reflectors on portion of street under construction, any error in giving at defendant's request instruction as to contractual duty of defendant under contract with state to take necessary precautions and provide adequate means to protect the public, as required by state engineer, was favorable to plaintiffs, and plaintiffs could not complain thereof.

8. Automobiles ⇐309(2)
Trial ⇐256(10)

In action against contractor for wrongful death of passenger in automobile which collided at night with defendant's grader,

parked without lights or reflectors on portion of street under construction, instruction given at defendant's request as to defendant's duty under contract with state to take necessary precautions and provide adequate means to protect the public, as required by state engineer, was not misleading as raising an inference that absence of proof of action by engineer would spell full performance of defendant's duty, and plaintiffs' counsel, if not satisfied with the form of such instruction, should have prepared modifications thereof.

9. Appeal and Error ⇐768

Express or implied admissions of the briefs that counsel for both parties, in chambers and in the absence of court reporter, had agreed that jury be instructed with respect to a county ordinance without the necessity of its formal introduction in evidence, with reservation to plaintiffs of all other appropriate objections to the giving of any instruction on such subject, could be recognized on appeal as properly filling a hiatus in the transcript with respect to such agreement.

10. Stipulations ⇐14(11)

Where counsel for both parties had agreed that jury be instructed with respect to a county ordinance without the necessity of its formal introduction in evidence, with reservation to plaintiffs of all appropriate objections to the giving of any instruction on the subject, giving instruction concerning such ordinance which had not been formally received in evidence was not error, unless instruction was inherently erroneous or misleading.

11. Death ⇐104(2)

In action against contractor for wrongful death of automobile passenger in collision at night with defendant's grader, where trial court instructed jury that passenger, being deceased, was presumed to have exercised ordinary care and to have obeyed law, but did not withdraw statement made to jury at beginning of trial that defendant relied upon a claim of contributory negligence of deceased and did not advise jury that instructions on subject of contributory negligence had been refused, question of contributory negligence of deceased was not entirely eliminated from the case and giving an instruction reflecting defendant's theory of such issue was not improper.

12. Trial ⇐296(3)

Where instruction as to county ordinance, making it unlawful for any intoxicated person wilfully to appear or be in or on any public highway or public place in unincorporated territory of county, was immediately followed by instructions to the effect that driving while intoxicated is unlawful and negligent, the plain inference from instruction as to county ordinance was that a violation of such ordinance would spell negligence. West's Ann.Vehicle Code, § 502.

13. Automobiles ⇐308(11)

In action against contractor for wrongful death of passenger in automobile which collided at night with defendant's grader, parked on portion of street under construction, whether passenger was negligent in riding upon a public highway within unincorporated territory of county while in an intoxicated condition in violation of county ordinance and whether such negligence was a proximate cause of collision were questions of fact under the evidence.

14. Trial ⇐296(3)

In action against contractor for wrongful death of passenger in automobile which collided at night with defendant's grader, parked on portion of street under construction, where there was substantial evidence that both passenger and driver of automobile were intoxicated and jury was instructed that driving an automobile upon highway while intoxicated was unlawful and negligent, but that negligence of driver was not to be imputed to passenger, instructing jury as to county ordinance which made it unlawful for any intoxicated person wilfully to appear or be in or on any public highway or public place in unincorporated territory of county was not misleading or erroneous. West's Ann.Vehicle Code, § 502.

Robert A. Wenke, Long Beach, for appellants.

Ball, Hunt & Hart, by Clark Heggeness, Long Beach, for respondent.

ASHBURN, Justice.

Action for wrongful death of Wilfred John Royko. As a guest of Donald L. Lambert, he was riding south on Figueroa Street in Lambert's automobile. The street was being widened and resurfaced and was kept open for traffic during the entire work. Defendant Griffith Company was the contractor and had finished the east half of the roadway. It then placed a line of barricades along the west line of that east half, which in turn was divided into two lanes for north and south traffic. Shortly after 1:00 a. m. on April 30, 1954, Lambert and Royko left the 220 Club, where they had done some drinking of alcoholic liquor, and started down Figueroa toward Royko's home. Lambert was drunk and was driving at 50–55 miles per hour. Suddenly he left the paved side of the highway, went between barriers onto the west side, which was under construction, and continued southerly across Ocean Avenue, colliding with defendant's 12-ton grader which was parked on that unfinished side of the street with no lights or reflectors on it. The force of the impact was such that the grader, with brakes set, was pushed some 25 feet to the south. Royko received injuries from which he died at the scene of the accident. The evidence of defendant's negligence is clear, but a jury rendered a verdict for defendant. Plaintiffs appeal from the judgment entered thereon.

[1, 2] Appellants complain of refusal to give the following instruction: "You are instructed that if the realizable likelihood that a third person may act in a particular manner is the hazard or one of the hazards which makes the actor negligent, such an act whether innocent, negligent, intentionally tortious or criminal does not prevent the actor from being liable for harm caused thereby." It is a quotation from the opinion in Richardson v. Ham, 44 Cal.2d 772, 777, 285 P.2d 269, was intended to direct attention to the doctrine that foreseeability is the basic test of negligence, see Tucker v. Lombardo, 47 Cal.2d 457, 303 P.2d 1041, and, as the rule had not been adequately covered elsewhere, it should have been given if drawn in proper form. Unfortunately that was not the case. The requested instruction would leave it to the jury to determine whether "the realizable likelihood that a third person may act in a particular manner is the hazard or one of the hazards *which makes the actor negligent.*" (Emphasis added.) The question whether failure to recognize such a hazard would or would not constitute negligence was for the court to determine, and the answer should have been stated affirmatively as a matter of law, not left to the jurors. This case again illustrates the fallacy of requesting instructions in language of courts of last resort. See Sloan v. Stearns, 137 Cal.App.2d 289, 299–300, 290 P.2d 382. The court was not required to modify it and give the same as thus corrected. Idem. There was no error in refusal to give this requested instruction.

[3–5] Error is asserted to lie in the refusal of the following request: "During the trial of this case you heard something said about 'assumption of risk.' I instruct you that the deceased did not assume the risk of any injury that could have come to him through the negligence of the defendant Griffith Company or of said defendant's agents or employees." The contention is refuted by Prescott v. Ralph's Grocery Company, 42 Cal.2d 158, 265 P.2d 904, 906. It was there held proper to refuse an instruction that one "does not assume dangers which come only from the negligent act of another." The negligence there under discussion was that of the defendant and the ruling seems conclusive in the instant case. The court said, 42 Cal.2d at page 162, 265 P.2d at page 906: "As we have seen, the elements of the defense of assumption of risk are a person's knowledge and appreciation of the danger in-

volved and his voluntary acceptance of the risk. It follows that a person, if he is fully informed, may assume a risk even though the dangerous condition is caused by the negligence of others. [Citations.] Indeed, the cases in which this defense is applied usually involve dangerous conditions created by the negligence of another. The requested instruction was erroneous, and the trial court was not under a duty to revise it to state the law accurately."

At defendant's request the court instructed the jury that the contract between the State and defendant Griffith Company contained the following provisions: "Whenever the Contractor's operations create a condition hazardous to traffic or to the public, the Contractor shall take the necessary precautions and provide adequate means to protect those who must pass through or over the work. If the Contractor shall appear to be neglectful or negligent in providing such warning or protective measures, the Engineer may direct attention to the existence of a hazard, and any barricades, warning signs, lights or flagmen required to protect the public shall be installed by the Contractor, and the entire cost of such protective measures will be considered as being included in the prices paid for the various contract items of work.

"The Engineer may point out the inadequacy of protective devices or measures, but such action on the part of the Engineer shall not relieve the Contractor from responsibility for public safety or abrogate his obligation to furnish and pay for these devices."

"At the end of each day's work and at all other times when construction operations are suspended, all equipment and other obstructions shall be removed from that portion of the roadway open for use by public traffic."

[6, 7] Appellants contend that this "set up a different standard of care other than negligence," and that it was misleading. To the extent that it differed from common law requirements it imposed a contractual duty upon defendant to use care for the protection of the public (including decedent) which properly could form the basis of a tort action. See Eads v. Marks, 39 Cal.2d 807, 810–812, 249 P.2d 257. Any departure from defendant's common-law duty which is found in this instruction is an added burden of care and thus favorable to plaintiffs. If error, it was favorable error of which they cannot complain.

[8] The claim that reference to action by the state's engineer raised the inference that absence of proof of anything of the sort would spell full performance of defendant's duty, seems far-fetched. The instruction was not misleading in this regard. The present is one of those instances in which plaintiffs' counsel, if not satisfied with the form of the instruction, should have proposed modifications. 24 Cal.Jur. § 74, p. 796.

Appellants' counsel also asserts error in the giving of an instruction concerning a county ordinance which was not formally received in evidence. It is not questioned that the accident occurred in county territory. The instruction reads: "You are instructed that Los Angeles County Ordinance No. 1735 provides in part as follows: 'Section 1. It shall be unlawful for any intoxicated person, or any person in an intoxicated condition, wilfully to appear, remain, or be in or on any public highway, street, alley, way, park, playground, or public place in the unincorporated territory of the County of Los Angeles whether such person is or is not in or upon any automobile, street or interurban car, vehicle, or conveyance.'"

[9, 10] Careful scrutiny of the record at bar indicates that respondent's counsel correctly assert that both sides, in chambers and in the absence of the court reporter, agreed to a suggestion made by the judge that he instruct the jury with respect to the ordinance without the necessity of its formal introduction in evidence, reserving to plaintiff all other appropriate objections to the giving of any instruction on the subject. This appears to be one

of those cases in which the express or implied admissions of the briefs may be recognized as properly filling a hiatus in the transcript. Standard Iron Works v. Maryland Casualty Co., 56 Cal.App. 600, 601, 206 P. 136; Castriotis v. Cummins, 93 Cal. App. 654, 656, 269 P. 1115; H. Moffat Co. v. Rosasco, 119 Cal.App.2d 432, 443–444, 260 P.2d 126; Willson v. Security-First Nat. Bk., 21 Cal.2d 705, 712, 134 P.2d 800; 4 Cal.Jur.2d § 485, p. 321; Ribero v. Callaway, 87 Cal.App.2d 135, 137, 196 P.2d 109. There was no error in giving the instruction unless, as now urged, it was inherently erroneous or misleading.

[11–14] The court elsewhere instructed that the *driving* of an automobile upon a highway while intoxicated is unlawful and negligent; also that the negligence of the driver was not to be imputed to Royko, the guest. At the beginning of the trial the judge had explained to the jurors that defendant was relying upon a claim of contributory negligence of decedent and this statement was never withdrawn. While instructions upon the subject of contributory negligence were refused, the court did not advise the jurors of that fact, but did tell them that Royko, now deceased, was presumed to have exercised ordinary care and obeyed the law. Hence the question of his contributory negligence was not entirely eliminated from the case and it was not improper to give an instruction reflecting defendant's theory of that issue. Although the instruction under consideration does not advise the jurors of the effect of violating the ordinance, it was immediately followed by instructions to the effect that driving while intoxicated is unlawful, Veh.Code, § 502, and negligent. And the plain inference from the one under discussion was that violation of the ordinance would spell negligence. The driver's conduct having been covered by the instruction on § 502, the ordinance provisions would have pertinence primarily to Royko's conduct,—negligence on his part. There was substantial evidence that he, as well as Lambert, was intoxicated, and hence his riding on the highway while in such condition might well constitute negligence on his part, see 7 Cal.Jur.2d § 340, p. 241; Mann v. Chase, 41 Cal.App.2d 701, 703, 107 P.2d 498, which negligence might or might not have been a contributing cause of the accident,—proximate cause being also a question of fact.

We find no miscarriage of justice at bar.

Judgment affirmed.

MOORE, P. J., and FOX, J., concur.

Hearing denied; GIBSON, C. J., and CARTER and TRAYNOR, JJ., dissenting.



148 Cal.App.2d 18

The PEOPLE of the State of California, Plaintiff and Respondent,

v.

Joble STRICKLAND, Defendant and Appellant.

Cr. 2676.

District Court of Appeal, Third District, California.

Jan. 25, 1957.

Rehearing Denied Feb. 19, 1957.

Hearing Denied March 20, 1957.

Prosecution on an indictment charging defendant with murder where jury found defendant guilty of murder in first degree. The Superior Court, Butte County, Dudley G. McGregor, J., entered judgment of conviction and denied defendant's motion for new trial and defendant appealed. The District Court of Appeal, Warne, J., pro tem., held, inter alia, that where fact of victim's death and fact that such death resulted from act of defendant in shooting victim were never contested, and where defendant admitted the shooting, death certificate had stated cause of death as resulting from a gunshot and it was clearly proved that the gunshot wound was inflicted by defendant, jury was not misled by instructions which allegedly assumed victim was dead and that his life had been taken by defendant.

Judgment and order affirmed.

1. Criminal Law ⇐564(2, 3)

Venue, like any other fact in a criminal case, may be established by circumstantial evidence, and need not be proved beyond a reasonable doubt.

2. Criminal Law ⇐564(1)

In murder prosecution, jury was justified in finding from evidence that the murder was committed in the county where the prosecution took place. West's Ann.Pen. Code, § 790.

3. Criminal Law ⇐322, 324

Where Butte county sheriff was called to the scene of crime of homicide and apprehended defendant within a short time after the shooting and defendant was taken to Butte county jail by Butte county deputy sheriff, it was presumed that these officers were performing their official duties within Butte county and presumption could be considered in determining whether murder was committed in Butte county, where prosecution took place.

4. Evidence ⇐383(4)

A death certificate registered within a period of one year from date of event is prima facie evidence in all courts and places of the facts stated in it. West's Ann. Health and Safety Code, § 10551.

5. Homicide ⇐332(2)

It is the exclusive province of jury to determine from evidence whether the killing was wilful, deliberate and premeditated act of defendant, but upon appeal, evidence upon which the determination is made, is subject to review on question of its legal sufficiency to support verdict. West's Ann.Pen.Code, §§ 187, 189.

6. Homicide ⇐253(1)

Evidence was substantial to sustain conviction for first-degree murder. West's Ann.Pen.Code, §§ 187, 189.

7. Homicide ⇐332(2)

The District Court of Appeal may not, in reviewing the evidence in prosecution for murder, substitute its judgment for that of jury where evidence is substantial to support jury's verdict.

8. Criminal Law ⇐565

In murder prosecution, evidence was sufficient to establish date on which defendant shot victim and that death occurred within a year and a day following the shooting, where in addition to sheriff's testimony death certificate showed victim died of a gunshot wound and established the date of death as the same date as the homicide was reported. West's Ann.Health and Safety Code, § 10551.

9. Criminal Law ⇐1172(3)

In prosecution of defendant for murder, where fact of victim's death and fact that such death resulted from act of defendant in shooting victim were never contested, and where defendant had admitted the shooting, death certificate had stated cause of death as resulting from a gunshot and it was clearly proved that the gunshot wound was inflicted by defendant, jury was not misled by instruction which allegedly assumed that victim was dead and that his life was taken by defendant.

10. Criminal Law ⇐814(17)

Where evidence in a murder prosecution was nearly all direct, trial court was not required to instruct upon rules of law applicable to circumstantial evidence which was incidental to and corroborative of direct evidence.

Walter D. Cook, Sacramento, for appellant.

Edmund G. Brown, Atty. Gen., by G. A. Strader, Deputy Atty. Gen., for respondent.

WARNE, Justice pro tem.

The defendant was charged in an indictment with having murdered Donald Junior Gray, alias Isiah Gaines, on the 14th day of October, 1955. He pleaded not guilty and not guilty by reason of insanity. A jury found defendant guilty of murder of the first degree and fixed the penalty at life imprisonment. The jury further found that the defendant was sane at the time of the offense charged. Defendant ap-

peals from the judgment and from the order denying his motion for a new trial.

Defendant contends that the evidence is insufficient to support the judgment in three respects: (1) That the evidence does not sufficiently establish venue; (2) That the evidence is insufficient to justify a verdict of murder in the first degree in that premeditation and deliberation were not proved, and, (3) That the death was not shown to have occurred within a year and a day after the act of the defendant. Defendant further contends that the court erred in its instructions to the jury in assuming in one of the instructions given that the decedent, Donald Junior Gray, had died as a result of the defendant's acts, and, secondly, that the court erred in failing to instruct the jury on circumstantial evidence. We have concluded that the evidence is sufficient to establish homicide in the first degree and that all of defendant's contentions are without merit.

The decedent, a young man in his early twenties, considered to be of rather low intelligence and somewhat simple, had done some work for defendant, for which he was paid on the evening of October 13, 1955. On the following morning decedent was riding in an automobile being driven by a Mr. J. D. Weber. As they proceeded along Wyandotte Street in Oroville, defendant Strickland drove ahead of them and waved them over. Weber drove his car across the intersection and stopped, and defendant pulled up alongside of him and stopped in the middle of the street. Defendant then got out of his car, came to Weber's car and told decedent to get out of the car, which he did after some struggling with the defendant. Defendant then started pushing decedent toward his car and accusing him of stealing $20 from him or of having received $20 more than was due him because a $20 bill had stuck to the $10 bill with which defendant had paid the decedent for his work.

The decedent refused to get in defendant's car, and the defendant then obtained a tire iron from his car and struck decedent "around up by the head". Decedent backed up and was then struck with the tire iron on the legs, whereupon decedent ran off down the street.

Defendant pursued the decedent and finally forced him to enter his car and drive it to a place across the street from where defendant lived. Decedent did so while the defendant held a knife at his neck. At this point they got out of the car, and appellant got a rock and hit decedent on the head with it. Decedent did nothing other than ask defendant not to hit him.

Defendant called to his wife, and at his request she went back into the house and returned with a gun which she handed to defendant. The two parties then got back into the car and drove to a place referred to as the Hilltop. There defendant pulled decedent out of the car, and the two went behind an adjoining place known as the Hideout Club. During all this time defendant continued to accuse decedent of having the $20, and decedent repeatedly denied that he had the money. During this period of time, as testified to by several witnesses, defendant stated that he would kill the decedent, Donald Junior Gray, unless he gave him the $20. During all of this time decedent had nothing in his hands and made no threatening moves or motions toward defendant. He merely repeated his denial of having taken or received the $20. Finally, defendant asked decedent to take out his wallet and drop it on the ground, and as he did so, defendant fired two shots at decedent, the first one missing, the second hitting the decedent. Decedent died shortly thereafter on the same day, the cause of death being the bullet wound.

[1–4] As previously stated, defendant urges that the evidence at the trial is insufficient to establish venue in that there is no evidence in the record to show that the crime, or that death, occurred in the County of Butte. Venue, like any other fact in a criminal case, may be established by circumstantial evidence. It need not be proved beyond a reasonable doubt. People v. Cavanaugh, 44 Cal.2d 252, 282 P.2d

53; People v. Boyden, 116 Cal.App.2d 278, 253 P.2d 773; People v. Ford, 133 Cal.App.2d 695, 284 P.2d 836. These are the facts and circumstances as shown by the record from which the jury could reasonably conclude that the crime was committed in Butte County: Sheriff Gillick of Butte County was called to the scene of the crime and apprehended the defendant within a short time after the shooting. Defendant was taken to the county jail by Deputy Sheriff Lucas of Butte County. It is presumed that these officers were performing their official duty within Butte County. People v. Wright, 79 Cal.App. 523, 250 P. 204. The testimony that the trouble leading up to the shooting started on Wyandotte Street and ended at a place known as the Hilltop where defendant was taken into custody by the sheriff would justify the jurors in concluding that the street and place named by some of the witnesses were located in Oroville, Butte County. People v. West, 34 Cal.App.2d 55, 93 P.2d 153. Further, a certified copy of the death certificate of the decedent was introduced in evidence without objection, wherein the date of decedent's death is stated as 10–14–55, in the City of Oroville, Butte County. A death certificate registered within a period of one year from the date of the event is prima facie evidence in all courts and places of the facts stated in it. Health and Safety Code, Sec. 10551. From the above facts the jury was justified in finding that the murder was committed in Butte County. Section 790 of the Penal Code provides that the county where the victim died or where the injury was inflicted or the body was found is the proper place of trial.

The defendant's second contention is that the evidence is insufficient to establish murder of the first degree in that such evidence does not show premeditation and deliberation. Several witnesses testified that the defendant repeatedly stated to the decedent that he would kill him if he did not give him the $20. Witnesses also testified that immediately prior to the shooting, the defendant stated to the decedent while pointing the gun at him: "You don't think I'll shoot you, do you?" Immediately after the shooting defendant stated to witnesses that the first time he fired the gun he merely intended to scare the decedent, but the second shot was deliberately aimed with intent to kill. He admitted to the deputy sheriff who transported him to the jail that he had shot decedent, and he had killed him. The witness Weber testified that when he asked defendant not to hurt the boy, that defendant replied: "That isn't all I am going to do, I am going to kill him if he don't give me my $20." After he had shot the decedent, he walked over and picked up the wallet and stated: "Where's my twenty, I ought to kill you good." There is also testimony that defendant repeatedly cursed the boy.

Murder is defined as "the unlawful killing of a human being, with malice aforethought." Penal Code, Sec. 187. To constitute murder of the first degree, Penal Code, Sec. 189, the homicide must have been perpetrated "by means of poison, or lying in wait, torture, or by any other kind of wilful, deliberate, and premeditated killing", or committed in the perpetration of certain enumerated felonies.

[5–7] It is the exclusive province of the jury to determine from the evidence whether the killing was the "wilful, deliberate and premeditated" act of defendant. People v. Eggers, 30 Cal.2d 676, 185 P. 2d 1, 6; People v. Wells, 10 Cal.2d 610, 624, 76 P. 493. However "as is true as to all factual issues resolved by a jury, the evidence upon which the determination is made is subject to review on the question of its legal sufficiency to support the verdict." People v. Holt, 25 Cal.2d 59, 90, 153 P.2d 21, 37. Considering the acts and conduct of the defendant from the time he first stopped the decedent up to the time the fatal shot was fired, together with defendant's statements that he intended to kill the decedent, we conclude that there is substantial evidence in support of the jury's verdict. This court may not, in reviewing the evidence, substitute its judg-

ment for that of the jury under such circumstances. People v. Eggers, supra, and cases cited therein. "Conversely, to justify the reversal of a judgment of conviction, the record must clearly show that the evidence could not be interpreted as supporting the verdict." People v. Eggers, supra; People v. Tedesco, 1 Cal.2d 211, 219, 34 P.2d 467. Applying these rules, the jury's determination of first-degree murder must be upheld.

[8] Defendant urges that the evidence is insufficient to establish the date on which the defendant shot the deceased and that death occurred within a year and a day following the shooting. This contention is based upon the fact that no witness stated the year in which the events occurred. The record will not bear defendant out in this contention. Sheriff Gillick was asked this question: "On October 14 *of this year* did you report on a homicide call?" (Italics added.) He answered: "I did, yes, sir." The record in the case shows that the sheriff gave this testimony on December 30, 1955. As before stated, Gillick personally apprehended the defendant at the scene of the shooting. Further, the death certificate which was introduced in evidence at the trial also established the date of death. People v. Crozier, 119 Cal. App.2d 204, 258 P.2d 1029. The death certificate stated that Donald Junior Gray (alias Isiah Gaines) died of a gunshot wound of lungs and spinal cord, on October 14, 1955.

[9] Defendant next contends that the court committed error and prejudiced the rights of defendant by giving People's proposed instruction No. 12, in that said instruction assumed that Donald Junior Gray was "deceased", and that his life was taken by defendant. Assuming that it does, we fail to understand how it was in the least prejudicial to the rights of the defendant. The fact of the death and the fact that such death resulted from the act of the defendant in shooting Donald Junior Gray was never contested by the defendant at the trial. He admitted the shooting. The death certificate gives the cause of death as resulting from a gunshot. It was clearly proved that the gunshot wound was inflicted by defendant. The jury could not have been misled by the giving of this instruction in the light of this evidence.

Lastly, the defendant contends that the court erred in failing to give the defendant's requested instruction relating to circumstantial evidence. These instructions are contained in CALJIC Nos. 26, 27 and 28.

[10] The evidence in this case is nearly all direct. "A court is not required to instruct upon the rules of law applicable to circumstantial evidence which is incidental to and corroborative of direct evidence." People v. Watson, 46 Cal.2d 818, 831, 299 P. 2d 243, 251; People v. Jerman, 29 Cal.2d 189, 197, 173 P.2d 805; People v. Harmon, 89 Cal.App.2d 55, 60, 200 P.2d 32.

The judgment and the order are affirmed.

VAN DYKE, P. J., and SCHOTTKY, J., concur.



148 Cal.App.2d 1

Sonja VAN OSTRUM et al., Plaintiffs,

Dale Velzy, Plaintiff and Appellant,

v.

STATE of California and Jack Cloyes Yates, Defendants and Respondents.

Civ. 21877.

District Court of Appeal, Second District, Division 2, California.

Jan. 25, 1957.

Action for personal injuries sustained when defendant's truck hit plaintiff's automobile in the rear. The jury rendered a verdict for $4,000 in plaintiff's favor, and

defendant moved for a new trial. The Superior Court, Los Angeles County, Arthur Crum, J., entered order reducing amount of judgment to $1,500 provided plaintiff filed a consent to reduction, plaintiff declined to make any remission of damages and appealed from the order granting new trial. The District Court of Appeal, Ashburn, J., held that the trial judge had the duty as well as the power to set aside the verdict when he found, pursuant to his own independent appraisal of evidence, that it did not support an award of $4,000 and it was not necessary for him to find passion or prejudice on the part of the jurors.

Order affirmed.

1. New Trial ⇐128(5)

A specification in order for new trial of insufficiency of evidence is not necessary to a review of evidence where new trial is granted on ground of excessive damages. West's Ann.Code Civ.Proc., § 657.

2. New Trial ⇐110

The court in passing upon the motion for a new trial is confined to grounds specified in notice.

3. New Trial ⇐163(1)

Statute does not require that an order granting a new trial specify insufficiency of evidence to sustain verdict in any particular words or language, if the language used in order is susceptible of being interpreted as tantamount to granting a new trial on account of insufficiency of evidence or if it may be inferred from the language used that such was the ground upon which order for new trial was made. West's Ann.Code Civ.Proc., § 657.

4. New Trial ⇐163(1)

Where motion for new trial had specified insufficiency of evidence and excessive damages as grounds, minute order reciting that motion would be granted unless plaintiff filed remittance reducing $4,000 judgment to $1,500 could only have meant that one or both of the specified grounds was basis of minute order, and therefore minute order was not invalid for failure to specifically designate insufficiency of evidence as basis for grant of new trial. West's Ann. Code Civ.Proc., § 657.

5. New Trial ⇐71

A trial court in considering a motion for a new trial is not bound by a conflict in evidence and has not abused its discretion in granting new trial when there is any evidence which would support a judgment in favor of moving party.

6. Appeal and Error ⇐979(5)

On appeal from an order granting a motion for a new trial on ground of excessive damages, where there is a material conflict of evidence regarding extent of damage, the imputation of abuse of discretion by trial court in granting new trial is repelled, the same as if ground of order was insufficiency of evidence to justify verdict.

7. New Trial ⇐68

The trial judge has a positive duty to keep the verdict in line with facts when the matter is presented to him on motion for new trial.

8. Appeal and Error ⇐1004(1)

Reviewing court's power over excessive damages exists only when the facts are such that the excess appears as a matter of law, or is such as to suggest at first blush passion, prejudice, or corruption on part of jury.

9. Appeal and Error ⇐977(3)

Fact that the reviewing court would not have made an order granting a new trial if required to pass on the question initially is not determinative of whether trial court abused its discretion in granting motion for new trial.

10. New Trial ⇐76(4)

In action for whiplash injury causing pain and stiffness in the neck, trial judge had duty as well as power to set aside verdict when he found, pursuant to his own independent appraisal of the evidence, that it did not support an award of $4,000 and it was not necessary for him to find passion or prejudice on part of jurors, and trial judge did not abuse his discretion in grant-

ing the new trial on ground of excessive damages. West's Ann.Code Civ.Proc., § 657.

Joseph Schecter and Toxey Hall Smith, Los Angeles, Robert G. Beverly, Los Angeles, of counsel, for appellant.

Parker, Stanbury, Reese & McGee, Los Angeles, James N. Kenealy, Jr., Los Angeles, of counsel, for respondents.

ASHBURN, Justice.

Dale Velzy, one of the plaintiffs herein, appeals from an order granting a new trial as to him. The action seeks recovery of damages caused by defendant's negligence. Liability was admitted at the trial and defendant offered no evidence. The jury rendered a verdict for $4,000 in Velzy's favor.

Defendant moved for a new trial upon two grounds, (1) insufficiency of the evidence to justify the verdict, and (2) excessive damages appearing to have been given under the influence of passion or prejudice. After argument the court on January 31, 1956 orally ruled: "That motion is granted unless on or before February 20th, the plaintiff, Dale Velzy, files a remittance in this court reducing the amount of the judgment to $1500. In the event that he does not file such a remittance in this court, the motion for new trial is granted. If he does file such a remittance in this court, the motion for new trial is denied." On the same day the clerk made a minute order as follows: "Motion is argued, and as to plaintiff Dale Velzy only, said motion is granted unless plaintiff on or before Feb. 20, 1956 files a remittance with the Court reducing amount of judgment to $1500.00, in which event the motion will be deemed denied." This order was entered on February 2, 1956. Plaintiff declined to make any remission of damages and appealed from the order on said February 2. In the judge's oral ruling and the clerk's minute order no specific reference is made to insufficiency of the evidence. However, on February 6, 1956, the court made and signed, and the clerk filed, a written order reading as follows: "It is hereby ordered that defendants' motion for new trial herein is granted upon the ground of insufficiency of the evidence to support the verdict and judgment provided however that if the plaintiff Dale Velzy on or before February 20, 1956 files with the Court a consent in writing to a reduction of the judgment herein to the sum of $1500.00 the motion for a new trial is denied, otherwise it is granted upon the ground stated herein."

Appellant's first claim is that the ruling cannot be sustained upon the ground of insufficiency of the evidence because the written order of February 6 "is void and ineffective" and hence under § 657, Code of Civil Procedure,[1] "it will be conclusively presumed that the order was not based upon that ground" of insufficiency of the evidence. One of the reasons assigned for invalidity of the order of February 6 is that it was made after plaintiff had perfected an appeal from the minute order. It is unnecessary to consider this problem, for the granting of a new trial is sustainable regardless of the answer to the question thus raised.

[1] It is established law, since the decision in Sinz v. Owens, 33 Cal.2d 749, 760, 205 P.2d 3, 8 A.L.R.2d 757, that a specification of insufficiency of the evidence is not necessary to a review of the evidence where the new trial is granted on the ground of excessive damages. Plainly, that was the basis of the ruling here. To the same effect are Gardner v. Marshall (American Brake etc. Co.), 24 Cal.2d 686, 691, 151 P.2d 122; Lovett v. Dintzer, 131 Cal.App.2d 165, 166, 280 P.2d 58; Legg v. Mutual Benefit H. &

1. The pertinent language of the statute is this: "When a new trial is granted, on all or part of the issues, upon the ground of the insufficiency of the evidence to sustain the verdict or decision, the order shall so specify this in writing and shall be filed with the clerk within ten days after the motion is granted; otherwise, on appeal from such order it will be conclusively presumed that the order was not based upon that ground. The court may direct a party to prepare the order."

A. of Omaha, 136 Cal.App.2d 887, 890, 289 P.2d 550, 290 P.2d 87.

[2–4] Secondly, the grounds of the motion at bar were so limited that the language of the judge in his oral ruling, and that of the clerk's minute order, are plainly susceptible of construction that the motion was granted upon the ground of insufficiency of the evidence. The motion specified only insufficiency of the evidence and excessive damages as grounds for a new trial. The court, in passing upon the motion, is confined to the grounds specified in the notice, Dynes v. Bekins Van & Storage Co., 175 Cal. 72, 73, 165 P. 12; 20 Cal.Jur. § 127, p. 191; 4 Cal.Jur.2d § 539, p. 393. Hence, the order of February 2 could mean only one or both of the specified grounds, both of which are essentially insufficiency of the evidence. Sinz v. Owens, supra, 33 Cal.2d 749, 760, 205 P.2d 3. The governing rule is stated in Legg v. Mutual Benefit H. & A. of Omaha, supra, 136 Cal.App.2d 887, at page 891, 289 P.2d 550, at page 552, which quotes Piru Citrus Ass'n v. Williams, 95 Cal.App.2d 911, 914, 214 P.2d 426, as follows: " 'The statute,' however, 'does not require that the order specify insufficiency of the evidence to sustain the verdict in any particular words or language. If the language used is susceptible of being interpreted as tantamount to granting a new trial on account of the insufficiency of the evidence to sustain the verdict, or if it may be inferred from the language used that such was the ground upon which the order was made, it is uniformly held to have been based upon that ground. Where the nature of the order itself necessarily implies that the trial court deemed it necessary to reexamine the facts, a statement in the order that the evidence is insufficient is not essential.' "

[5] Plaintiff's final contention is that the court abused its discretion in granting a new trial. The rules governing review of an order granting a new trial for insufficiency of the evidence are stated in Ballard v. Pacific Greyhound Lines, 28 Cal.2d 357, 358, 170 P.2d 465, 467: "* * * The trial court in considering a motion for new trial is not bound by a conflict in the evidence, and has not abused its discretion when there is any evidence which would support a judgment in favor of the moving party. [Citations.] The only conflict may be the opposing inferences deducible from uncontradicted probative facts. In such case the trial court may draw inferences opposed to those accepted by the jury and may thus resolve the conflicting inferences in favor of the moving party, for 'It is only where it can be said as a matter of law that there is no substantial evidence to support a contrary judgment that an appellate court will reverse the order of the trial court.' [Citations.]"

[6] Concerning an order granting the motion upon the ground of excessive damages, it is said in Strosk v. Howard Terminal Co., 129 Cal.App.2d 797, 802, 277 P.2d 828, 831: " 'Whatever may be the rule which should govern the trial judge, it is certain that when his action in granting a new trial on the ground of excessive damages, or requiring a reduction of the amount as the condition of denying one, comes to be reviewed on appeal, his order will not be reversed unless it plainly appears that he abused his discretion; and the cases teach that, when there is material conflict of evidence regarding the extent of damage, the imputation of such abuse is repelled, the same as if the ground of the order were insufficiency of the evidence to justify the verdict.' Doolin v. Omnibus Cable Co., 125 Cal. 141, 144–145, 57 P. 774 * * *."

[7, 8] The trial judge has a positive duty to keep the verdict in line with the facts when the matter is presented to him on motion for new trial. The Supreme Court in Bond v. United Railroads, 159 Cal. 270, 286, 113 P. 366, 373, 48 L.R.A., N.S., 687, Ann.Cas.1912C, 50, had this to say on the subject: "We have cause to fear that the trial courts sometimes act on the theory that they can shift the responsibility in this matter to the appellate court, and that an excessive verdict

can be corrected on appeal. This is a mistake. Our power over excessive damages exists only when the facts are such that the excess appears as a matter of law, or is such as to suggest at first blush, passion, prejudice, or corruption on the part of the jury. [Citations.] Practically, the trial court must bear the whole responsibility in every case." See also People v. Robarge, 41 Cal.2d 628, 633, 262 P.2d 14.

[9] The fact that the reviewing court would not have made the order if required to pass upon the question initially is not determinative. In re Estate of Green, 25 Cal.2d 535, 543, 154 P.2d 692. One of the reasons is that the trial judge, who sees and hears the witness and observes his manner of testifying, is in better position to judge of his honesty and accuracy. The cold record at bar affords numerous suggestions of the pertinence of the foregoing observation in the present instance.

Defendant's truck hit plaintiff's automobile in the rear, thus inflicting upon him a whiplash injury causing pain and stiffness in the neck. For this he received treatments from the day of the accident, August 18, 1953, until December 4, 1953, and not later. During that period he wore a collar designed to immobilize the neck; this for a period of three weeks continuously and three more weeks intermittently. Although plaintiff still complains of pain in the neck his physician would say only that it is *possible* that it is due to the accident. On September 15, 1953, that physician, Dr. Farber, first learned of low back pains of which plaintiff now complains and which he claims to disable him from performing his work of handmaking and demonstrating the use of surf boards. It appears that plaintiff suffered an injury in that low back area in 1945 when struck with a heavy surf board. After that he was in the army where he again injured the low back, being discharged for that disability in March, 1951. The back now is in about the same condition as when he left the service, according to plaintiff's own testimony. Dr. Farber testified that Dr. Gruble, an orthopedic consultant to whom he referred plaintiff, diagnosed a typical whiplash injury. But Dr. Gruble was not available for testimony and Dr. Farber could do no better than to say that: "It is possible that pain at this time—if there is pain at this time, I don't know from my own examination * * *. Well, it is possible that it would be present from the accident at that time, although there is no way that I can substantiate that." Plaintiff himself testified: "My neck seems to get stiff, and I am not really complaining heavy about my neck pains. It is my back I am more concerned about, because that is what lays me completely off work."

Plaintiff's out-of-pocket damage seems to have been limited to a doctor bill of $250, plus $15 for X-rays and $27.50 for the collar.

Concerning loss of earnings his proof is in a nebulous state. He has no record of same and merely estimates his income prior to the accident; he fixed it at $50 a week in his deposition, and at $50 to $75 a week on the witness stand. He filed income tax returns for 1952 and 1953 which he thought he had at home but was unable to produce. On cross-examination he estimated his loss of profits at $1,485. He testified that he had been offered $4,000 for a half interest in his surf board manufacturing business shortly before the accident. On cross-examination it developed that the assets consisted of a rented building, tools worth $700 and plywood worth $400. Moreover, the offeror "wasn't very reliable," according to plaintiff's own testimony.

Apparently his automobile was badly damaged. He purchased it the day before the accident and valued it at $300 but was unable to say on cross-examination that he had paid more than $84 for it.

Of course there was considerable other evidence given by plaintiff and his wife concerning his sufferings and loss of ability to work as he had done before the accident. The foregoing recitals are designed to show that the trial judge had substantial ground for discounting that testimony and conclud-

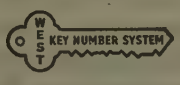
ing that plaintiff's present disability is due to the old injuries to the lower back and that they have not been substantially exaggerated by the accident caused by defendant's negligence.

[10] Counsel for appellant mistakenly argue: "It is inconceivable that the trial judge could conclude, as he must in order to grant a new trial on this ground, that it was so excessive as to appear to have been *'given under the influence of passion or prejudice.'*" The trial judge had the duty as well as the power to set aside the verdict when he found, pursuant to his own independent appraisal of the evidence, that it did not support an award of $4,000; it was not necessary for him to find passion or prejudice on the part of the jurors. Hughes v. Hearst Publications, Inc., 79 Cal.App.2d 703, 704–705, 180 P.2d 419.

We are unable to conclude that the record at bar shows an abuse of discretion in the granting of the new trial.

Order affirmed.

MOORE, P. J., and FOX, J., concur.



148 Cal.App.2d 25

The PEOPLE of the State of California, Plaintiff and Respondent,

v.

Harrison COLE, Defendant and Appellant.

The PEOPLE of the State of California, Plaintiff and Respondent,

v.

Frank LAMBERT, Defendant and Appellant.

Cr. 2708.

District Court of Appeal, Third District, California.

Jan. 25, 1957.

Prosecution for burglary of jewelry store, by separate indictments against two defendants. The actions were consolidated for trial, and Superior Court, Tehama County, Richard B. Eaton, J., entered judgment on verdict against defendants, and defendants appealed from judgments and from orders denying their motions for new trial. The District Court of Appeal, Peek, J., held that where the record disclosed that prosecuting attorney promised immunity from prosecution to accomplice on condition that he testify truthfully, and that accomplice's rights against self-incrimination were explained to him by court and he had stated he understood, admission of his testimony was not improper although district attorney's procedure was not precisely in accordance with statute regarding discharge of defendant from prosecution that he may be witness for state.

Affirmed.

1. Criminal Law ⇐404(4)

In prosecution for burglary of store, evidence of identification of stolen watches was sufficient to warrant their introduction into evidence.

2. Burglary ⇐45
Criminal Law ⇐742(1)

In prosecution for burglary of store, weight that should be given evidence in identification of stolen watches and credibility of witnesses who identified watches were for the jury.

3. Criminal Law ⇐1168(3)

Where prosecuting attorney promised immunity from prosecution to accomplice on condition that he testify truthfully but accomplice's rights against self-incrimination were explained to him by court, and he stated he understood, admission of his testimony was not prejudicial error, although district attorney's procedure was not precisely in accordance with statute regarding discharge from prosecution of accomplice that he may be witness for people. West's Ann.Pen.Code, § 1099.

4. Criminal Law ⇐511(4)

In prosecution for burglary of jewelry store, testimony of accomplice was suffi-

ciently corroborated by expert testimony showing that particles of glass found in his automobile were identical with the glass from broken window of jewelry store, and that tag which had been attached to one of stolen watches was found in his automobile, that one of stolen watches was found in police car under seat where he had been seated, and statement by defendant that he had driven with accomplice to city in which robbery took place.

5. Criminal Law ⇐700

In prosecution for burglary, charging of prior convictions by district attorney was not improper. West's Ann.Pen.Code, §§ 666, 667, 969, 969a.

6. Criminal Law ⇐721(1), 1171(5)

In prosecution for burglary, while some of remarks of district attorney to jury concerning failure of defendants to testify were uncalled for, remarks were not cause for reversal of conviction, especially where question had been fully presented in trial court on motion for new trial which had been denied.

James G. Ford, Red Bluff, for appellant Harrison Cole.

Robert L. Barbour, Red Bluff, for appellant Frank Lambert.

Edmund G. Brown, Atty. Gen., by Doris H. Maier and James M. Sanderson, Deputy Attys. Gen., for respondent.

PEEK, Justice.

By separate indictments the defendants and appellants Cole and Lambert were charged in Count I thereof with the crime of burglary and in Count II with conspiracy with the defendant O'Donnell and one Neeley, to commit burglary. Defendant Cole was also charged with five prior felony convictions and defendant Lambert with two prior convictions. The actions were consolidated for trial, and at the conclusion thereof the jury rendered verdicts finding both Cole and Lambert guilty of burglary in the second degree and of conspiracy as charged in the indictments. The motions of Cole and Lambert for a new trial were denied. A like motion of defendant O'Donnell was granted upon the insufficiency of corroboration of the testimony of the admitted accomplice Neeley. Thereafter judgments were entered pursuant to the jury verdicts against Cole and Lambert and they now appeal from said judgments and from the orders denying their motions for new trial.

The record shows that between 11 p. m. on the evening of March 12, 1956, and 7 a. m. on the morning of March 13, 1956, a window in a Red Bluff jewelry store was broken and 26 watches were removed, together with the boxes in which they were displayed. The accomplice Neeley testified that about 2 or 3 a. m. on the morning of March 13, 1956, he and the defendants Cole, Lambert and O'Donnell left Redding and drove to Red Bluff in Cole's automobile; that when they reached Red Bluff, Cole stopped the car in front of the jewelry store. O'Donnell and Lambert got out of the car. Lambert then walked to the next corner and O'Donnell walked over to the store, broke the window with a hatchet and removed some 26 watches. They then drove to a point seven or eight miles away from Red Bluff where they threw the boxes away and proceeded on to Neeley's apartment in Sacramento where Lambert hid the hatchet used in the burglary. From Sacramento they drove to Vallejo and Oakland, where some of the watches were pawned and then to San Francisco.

According to police officers, on March 13 Neeley was seen to pawn or sell a woman's watch in a pawn shop on Third Street in San Francisco. He was also seen with Lambert in the vicinity of Third and Mission Streets, and a short while later was seen in Cole's automobile. Shortly thereafter Lambert sold a watch for $6 in another pawn shop in the same vicinity. When accosted by an officer he gave his name as Jimmy Carter, but later admitted his true name. When he was searched a watch of the same type he had just sold was found on his person. Lam-

bert was then taken to the police station and booked. When the other two defendants and Neeley were apprehended, Neeley and Cole were placed in the rear seat of the police car and O'Donnell was placed in front. The car was searched a short time thereafter and a watch was found under the rear seat where Cole had been sitting. After Cole's car had been impounded, it was searched by Red Bluff police officers who found fragments of glass and a price tag therein. An expert who compared the glass fragments with some from the broken jewelry store window, testified that they were identical. The tag was identified by one of the co-owners of the store as having been attached to one of the stolen watches prior to the burglary. The hatchet used in the burglary was found under Neeley's bed in his Sacramento apartment. The boxes in which the stolen watches had been displayed were found a short distance from Red Bluff and were identified by one of the store owners as those taken from the jewelry store. None of the defendants testified in their own behalf, nor was any evidence offered by them.

[1, 2] In essence the first contention of appellants is that there was insufficient evidence of identification of the stolen watches to warrant their introduction into evidence. The watches were identified by one of the co-owners of the store who testified that at the time of the theft he did not know the watch case numbers, nor did his regular business records disclose such information, but that subsequently he had received a telegram wherein the numbers were set forth and had received additional information from another source. Assuming the evidence so attacked was hearsay, nevertheless there was positive identification of the watches by the owner as being the ones stolen from the store. Such identification was amply sufficient to sustain the element of identification. The weight to be given such evidence and the credibility of the witnesses was for the jury to determine.

[3] Appellants' next contention, that the court erred in admitting the testimony of the accomplice Neeley, is likewise without merit. Although the record discloses that the procedure followed by the district attorney was not precisely in accordance with section 1099 of the Penal Code, we cannot say that prejudicial error resulted. The court was advised by the district attorney that there was no pending proceeding against Neeley at the time of the trial; that a criminal complaint had been filed against him and the three defendants; that on motion in the justice court, the complaint had been dismissed as to Neeley and he had thereafter been held as a material witness. The record further discloses that the defendant Lambert's counsel stated to the court that it would be satisfactory so far as the defendants were concerned if Neeley was advised that the district attorney's promise to him was not binding. Thereafter the court advised Neeley that he had a constitutional right to refuse to answer any question, the answer to which might tend to incriminate him or show him to be guilty of a crime, and that such right could be waived by him. In response to the court's admonition, Neeley answered that he had been promised immunity; that he understood such a promise could be properly made only in exchange for his promise to testify truthfully; and that he understood that the enforcement of such promise depended upon the personal willingness of the district attorney and not upon a court order. A subsequent motion by Lambert's counsel to strike Neeley's testimony was denied. It is apparent from the record that the promise of immunity from prosecution upon the condition that he testify truthfully and that his rights against self-incrimination were adequately explained to Neeley by the court; that he affirmatively stated he understood; and hence, under the circumstances, the admission of his

testimony cannot be held to be prejudicial error.

[4] Appellant Cole further contends that the testimony of the accomplice Neeley was not sufficiently corroborated as to him. Under the rule expressed in People v. MacEwing, 45 Cal.2d 218, 224, 288 P. 2d 257, "* * * corroborating evidence is sufficient if it tends to connect the defendant with the commission of the crime in such a way as may reasonably satisfy the jury that the witness who must be corroborated is telling the truth." Here the record discloses evidence independent of Neeley's testimony which would establish that Cole was one of the burglars. There was the expert testimony showing that the particles of glass found in his automobile were identical with the glass from the broken window of the jewelry store, and that the tag which was attached to one of the stolen watches was also found in his car. There was the further testimony that one of the stolen watches was found in the police car under the seat where he had sat; and finally there was the statement by Cole himself to San Francisco police officers that he had driven to San Francisco with Neeley.

[5] Appellants' final contention relates to 12 specific items of alleged prejudicial misconduct on the part of the district attorney prior to and during the course of the trial. It would seem wholly unnecessary to summarize or discuss in detail each of these contentions. We deem it sufficient to note that such attacks by appellants fall into three general categories: (1) That the charging of the prior convictions by the district attorney was solely for the prejudicial effect it would have upon the jury; (2) that the district attorney committed prejudicial misconduct in the identification and admission into evidence of certain exhibits; and (3) that the district attorney committed prejudicial misconduct in his comments during the course of the trial and in statements made to the jury concerning the failure of the appellants to testify and the conduct of Cole's counsel.

Under the provisions of sections 969 and 969a of the Penal Code, the district attorney was under a duty to charge all prior felony convictions. The object is not, as appellants contend, necessarily for a determination of the habitual criminal status of the person charged, but also as noted in People v. Jeffries, 47 Cal.App.2d 801, 806, 119 P.2d 190, is for the information of the court in determining the punishment to be imposed in case of conviction. Penal Code, sections 666 and 667.

We find no error in the record pertaining to the admission into evidence of the designated exhibits, nor in the testimony elicited from the witnesses concerning the same. It appears that the jury was fully and fairly instructed concerning all of the items mentioned.

[6] Lastly we find no prejudicial error in the remarks of the district attorney attacked by the appellants. While we cannot condone either his comments or his remarks, neither can we say that prejudicial error resulted. It is quite apparent from the record that the trial was both heated and acrimonious. Much of the comment of the district attorney was wholly uncalled for, but that does not mean that it was thereby prejudicial. Furthermore this question was fully presented and argued to the trial court on appellants' motions for new trial which were denied.

The judgments and orders are affirmed.

VAN DYKE, P. J., and SCHOTTKY, J., concur.

Michael COLBERT, by his guardian ad litem, Loy Bass; and Giles B. Colbert, Plaintiffs and Appellants,

v.

Joseph C. BORLAND, Defendant and Respondent.

Joseph C. Borland, Cross-Complainant and Respondent,

Giles B. Colbert, Cross-Defendant and Appellant.

Irma Jean BORLAND, Plaintiff and Respondent,

v.

Giles B. COLBERT, Defendant and Appellant.

Civ. 8798.

District Court of Appeal, Third District, Californ ia.

Jan. 21, 1957.

Rehearing Denied Feb. 20, 1957.

Hearing Denied March 20, 1957.

Actions by father for personal injuries and by minor passenger through his guardian ad litem for his personal injuries and for death of his mother, also a passenger, against defendant motorist who was operating his automobile, with his wife as a passenger, on a divided highway when it struck vehicle being driven by father who had approached from opposite direction and was making a left hand turn onto intersecting county road. The Superior Court, Madera County, Stanley Murray, J., entered judgments for defendant on his cross-complaint and for his wife on her separate action and father and minor appealed. The District Court of Appeal, Van Dyke, P. J., held that evidence presented a jury issue as to negligence of both drivers but because of erroneous instruction on burden of proof which was invited by father but not by minor only judgment denying recovery by minor would be reversed.

Affirmed in part and reversed in part.

1. Automobiles ⇐245(14, 80)

In actions by plaintiff driver and his passenger for personal injuries and for death of another passenger, against defendant motorist who was operating his automobile on a divided highway when it struck vehicle being driven by plaintiff who had approached from the opposite direction and was making a left hand turn onto intersecting county road, question of negligence of both drivers presented issues of fact for jury.

2. Evidence ⇐539

In action for personal injuries and death resulting from automobile collision, there was no error in permitting experienced witness to testify as to his opinion on average distance required to stop vehicle of type and character being driven by defendant on a cement surface at various speeds.

3. Appeal and Error ⇐1064(2)
Automobiles ⇐245(80)
Trial ⇐194(16)

In action for personal injuries and death resulting from collision of defendant's vehicle with plaintiff's automobile that was making a left hand turn onto intersecting county road, under circumstances, whether plaintiff's having looked before making turn without seeing defendant's approaching automobile was negligence, presented a question of fact for jury and it was error to instruct them that looking without seeing was negligence as a matter of law, but such error was not prejudicial because instruction was of little value to jury.

4. Automobiles ⇐246(58)

In action for personal injuries and death resulting from collision of defendant's vehicle being operated on divided highway, with plaintiff's vehicle which was making a left hand turn onto intersecting county road, even though defendant motorist testified that he failed to see actual turn being made by plaintiff motorist, it was not error to give instruction respecting proper way to make left hand turn. Vehicle Code, §§ 86, 540.

5. Appeal and Error ⇐882(12)
Trial ⇐237(3)

In action for personal injuries and death resulting from automobile collision, court's preponderance of evidence instruction requiring certainty beyond any doubt at all was error and where one plaintiff had requested the same instruction, adverse judgment as to him would not be reversed because of rule of invited error, but adverse judgment would be reversed as to other plaintiff who did not request instruction.

Taheny & Taheny, San Francisco, Stammer, McKnight, & Barnum, Fresno, for appellants.

C. Ray Robinson, Merced, Richard M. Darby, Pasadena, Hansen, McCormick, Barstow & Sheppard, Fresno, for respondent.

VAN DYKE, Presiding Justice.

Mildred Colbert was killed when an automobile in which she was riding was struck by an automobile driven by defendant and respondent, Joseph Borland. Plaintiff Giles Colbert, her husband, was driving the car in which she was riding. Plaintiff Michael Colbert, also riding in the Colbert car, was eight years of age and was her adopted son. Giles Colbert sued for personal injuries which he sustained. Michael Colbert sued for damages for the death of his mother and for personal injuries which he sustained. Joseph Borland filed a cross-complaint against Giles Colbert for Borland's injuries. Irma Borland, his wife, who was riding with him, filed a separate action against Giles Colbert for damages for her personal injuries. The cases were consolidated for trial with the following result: Giles Colbert received nothing. Joseph Borland received a verdict for $7,500. Irma Borland received a verdict of $1,200. Giles Colbert has appealed from both judgments and from the judgment that he take nothing. Michael Colbert, the minor, was denied recovery in his action against Joseph Borland, and he appeals from that judgment.

The accident occurred at the intersection of U. S. Highway No. 99 and County Road No. 18½E in Madera County. Highway 99 runs north and south and is a divided highway consisting of two northbound, and two southbound, traffic lanes with a dividing strip approximately 60 feet wide. The county road intersects the southbound roadway of Highway 99 on the westerly side and opposite its entrance there is a crossover to and from the northbound lanes. The county road does not continue east. Giles Colbert, hereinafter called Colbert, stopped his car on the right shoulder of the northbound lanes near the crossover and after consulting a map, crossed the northbound lanes, entered the crossover, and approached the southbound lanes, at which point he said he stopped. He testified he stopped about six feet east of the southbound roadway and looked northerly to his right; that he saw a car approaching about 800 feet away in the westerly southbound lane; that he started across the southbound lanes, then again looked to his right, for, as he put it, 200 or 300 feet and within that distance saw no car approaching; that he was going about two or three miles an hour at that time; that he never saw the Borland car before the collision. It appears to be without material dispute that when the Colbert car was in a position where its front end was about ten feet west of the pavement of the southbound lanes it was struck broadside by the Borland car which had swerved to its right. Borland testified that as he approached the crossover going south the road was straight, clear, and that nothing obscured his view of the road or the crossover; that when he was 1,000 feet north of the crossover he passed two cars and after passing them remained in the easterly lane until he saw the Colbert car; that he passed the two cars at a speed of 60 to 65 miles an hour, which speed he maintained until he applied his brakes to avoid collision with the Colbert car; that he first saw the Colbert car when its front end was about at the

east edge of the southbound lanes; that it was then moving; that he was then from 200 to 300 feet from the Colbert car; that he then blew his horn and continued to blow it; that at the same time he turned toward the westerly lane; that he first applied his brakes lightly for an instant and then applied them hard; that he first applied his brakes lightly because he expected Colbert to stop when he heard the horn; that he estimated Colbert's speed at five miles an hour and observed no change at any time; that he started turning to the right before he pressed his brakes at all; that he had first intended only to retard his speed because he thought Colbert would stop. In connection with Borland's testimony it may be stated here that there was evidence which is not materially in dispute that the Borland car laid down skid marks for 180 feet angling westerly across the southbound lanes of the highway to a point where it struck the Colbert car, and that there were marks indicating sliding action for an additional 58 feet where the Borland car came to a rest with its front end in the ditch along the roadway. One H. A. Bland testified as follows: That he was going south on Highway 99 at a speed of 55 to 60 miles an hour; that when he was north of a sign which was 385 feet back from the crossover, the Borland car passed him on the left; that when the Borland car was about 50 to 100 feet past the sign he saw the stop lights flash on, the back of the car raise up and the front lower, indicating, as he said, that the brakes had been applied; that he heard no horn sounded; that when he saw the stop lights flash on, the Colbert car was several feet east of the west line of the southbound lanes, and he estimated its speed to be five to ten miles an hour.

[1] The minor appellant, Michael Colbert, first contends that Borland was guilty of negligence proximately causing the collision as a matter of law, and that therefore a retrial should be ordered as to him on the question of damages alone. This contention cannot be sustained. Under the facts in this record the question of the negligence of both drivers presented issues of fact for the jury to resolve. It was an issue of fact as to which car had the right of way at the time when the Colbert car proceeded to cross the southbound lanes. As is usual in such cases where distances of moving vehicles from a given point are to be proven, the evidence presents conflicts and consists mainly of estimates made by witnesses after the emergency is over, based upon recollections of things hastily viewed at the time. The jury could have found that Colbert stopped just east of the southbound lanes, looked to the north, and that at that time traffic was 800 feet or more back up the road and far enough away so as not to constitute an immediate hazard, thus justifying him in beginning to cross the southbound lanes, and at the same time casting upon Borland the duty of yielding the right of way to him. On the other hand the testimony of Bland and Borland would support a finding by the jury that before Colbert began to cross the southbound lanes, Borland's car was around 300 feet distant and approaching at a speed of 65 miles an hour; that it did present an immediate hazard, so that Colbert ought to have yielded the way to Borland. The jury could also have found that Borland, even having the right of way, could have, and should have stopped his car or so have retarded its speed as to avoid the collision. Borland's own description of his conduct affords support for such a conclusion, for though seeing the Colbert car just entering the lane on which he was traveling, Borland blew his horn and thought Colbert would stop. He kept on blowing his horn, turned to his right to pass around the Colbert car, first applied his brakes only lightly, then hard when he concluded Colbert would not stop. It was then too late. True, we are discussing emergency actions, but Borland's description of his actions is more easily referred to calculated risk than to emergency conduct. It is unnecessary to elaborate or to discuss the evidence in more detail. We hold that the question of the negligence of each of the drivers was for the jury.

What we have said disposes also of the contention in support of Colbert's appeal that the judgment against him ought to be reversed as unsupported upon the issue of his negligence.

[2] Both appellants contend that the court committed error in admitting the testimony of the expert witness Harper, who testified on behalf of Borland. This assignment of error cannot be sustained. Harper had majored in physics at the California Institute of Technology, and for nearly 20 years had acted as a consulting physicist. He had for years headed the technical laboratory of the Pasadena Police Department; had done extensive investigation of automobile accidents with relation to speed and stopping distances and had conducted many experiments in such investigation. Over objection he was permitted to testify that in his opinion the average distance required to stop a Cadillac automobile of the type and character driven by Borland on a cement surface was 75 feet at 50 miles per hour; that 60 miles an hour would require 270 feet of braking plus 66 feet of reaction time or a total stopping distance of 336 feet; and that 65 miles an hour would require a total stopping distance of 392 feet. The objection is based upon the proposition that the witness had never examined the pavement at the point of the accident, did not know its condition as of the time of the accident, did not know the braking efficiency of the Borland car, had never made tests with a 1949 Cadillac such as Borland's, had never himself made a test with a 1949 Cadillac at 65 miles an hour or more. There were other but like objections as to his qualifications to give opinion evidence at the trial. The jury were properly instructed that qualified experts could give an opinion on questions in controversy at a trial to assist the jury in deciding questions to be determined by them; that the jury was not bound to accept such opinions as conclusive but should give to them the weight to which they found them to be entitled, and could disregard the opinions if it found them to be unreasonable. With the qualifications of the witness Harper, it was not error to permit him to express his opinion in those matters as to which he testified. He neither told the jury nor could he have been considered by them as telling them just what was the total stopping distance of Borland's car driven by Borland. They understood that he was giving them estimates based on averages within his experience and training, safeguarded by tolerances wide enough to take in the probabilities with respect to Borland's car at the time and place of the accident. It would be seldom indeed that an expert could express an opinion if he was required to have knowledge of all of the factors that go into the length of time that a certain automobile can be stopped by a certain driver under circumstances existing at the instant of an accident. These things are well understood by juries, and they can be trusted to make proper allowances in using the information afforded by the opinion of an expert witness on such issues. We find no error in permitting the testimony of the witness Harper.

[3] Appellants both contend that the court erred in giving two instructions on the subject of the duty to look and to see. One instruction told the jury that: "If there is evidence to the effect that just before a collision a driver looked in the direction of an automobile but did not see the automobile, and if there is also evidence that the automobile was in plain sight, then the conclusion follows that either some part of that evidence is not true, or the driver was negligent in failing to keep a proper lookout for automobiles." The other instruction told the jury it was as much negligence to look and not see what was in plain sight as not to look at all, and then went on to say that if Giles Colbert did not use his powers of observation as a reasonably careful person would have done he was guilty of negligence. Referring these instructions to the evidence as to the care with which Giles Colbert exercised his powers of observation, we recall that Giles Colbert testified that before he entered the southbound lanes

he looked to his right and saw an automobile 800 feet away. He did not see the two cars following that automobile and it appears that in all probability he did not see Borland's car because Borland's car was trailing the other two at that moment, although it later passed the other two and became the lead car as the three cars approached the intersection. Nevertheless, Borland's car was in plain sight when Colbert looked. Under such circumstances whether looking without seeing Borland's car was negligent was a question of fact for the jury and it was error to tell them that looking without seeing was negligence as a matter of law. Prato v. Snyder, 12 Cal. App.2d 88, 55 P.2d 255; Leader v. Atkinson, 49 Cal.App.2d 265, 121 P.2d 759. Under the circumstances existing here the conclusion would not necessarily follow either that Colbert lied when he said he looked or that he lied when he said he looked and did not see Borland's car, or that there is any necessary inconsistency in his testimony that he looked and did not see Borland's car. It was equally improper under the circumstances here to tell the jury that it was as much negligence for Colbert to look and not to see the Borland car as it was not to look at all. This is easily illustrated from the facts here. Colbert was looking to ascertain whether or not there was any car approaching so close as to constitute an immediate hazard to his proposed crossing of the southbound lanes. The jury could conclude that he could do this by considering the distance to the lead car even though he did not see the Borland car which was also in plain sight. But we do not think that the giving of these instructions constituted prejudicial error. They are of argumentative type and tell the jury little if anything that they do not know without being told. We do not think that the verdict of the jury could either have been produced or measurably influenced by the instructions.

[4] Both appellants contend that the court erred in giving left turn instructions. The court read to the jury Section 540 of the Vehicle Code as it stood at the time of the accident at which time it provided that the driver of a vehicle intending to turn at an intersection where traffic was permitted to move in both directions on each roadway entering the intersection should approach for a left-hand turn in that portion of the right half of the roadway nearest the center line thereof, passing to the right of such center line where it enters the intersection and after entering the intersection the left turn should be made so as to leave the intersection to the right of the center line of the roadway being entered. The court also read to the jury Section 544 providing that no person shall turn a vehicle from a direct course or move right or left upon a roadway unless and until such movement can be made with reasonable safety and then only after the giving of an appropriate signal continuously during the last 50 feet traveled before turning and that signals given by hand and arm should be given from the left side of the vehicle by extending horizontally the hand and arm beyond the side of the vehicle. The jury were also informed that a violation of these provisions was presumptively an act of negligence, and in the absence of legal excuse or justification constituted negligence per se. Appellants claim it was error to give any instruction whatever with relation to turning for the reason that "Borland testified that he never saw the Colbert car until it had actually crossed the easterly shoulder and was actually entering the southbound traffic lanes" and therefore anything Colbert may or may not have done with regard to signaling a turn or with respect to the point from which he commenced his turn or relative to the length of time he maintained the turn signal could not be a proximate cause of the accident or have any bearing on the respective rights of the parties; in other words, appellants claim that, although the portions of the left turn sections of the code given were abstractly correct in point of law, the error lay in there no applicability to the facts of the case; that, therefore

the instructions were misleading. "'Intersection' is the area embraced within the prolongation of the lateral curb lines, or, if none, then the lateral boundary lines of the roadways, of two highways which join one another at approximately right angles * * *." Veh.Code, sec. 86. Applied to the scene of the accident here, this means that the area from the point where the county road entered the southbound lanes of the highway to the point where the lateral boundary lines of the county road prolonged reached the easterly edge of the northbound lanes of the highway was the intersection area. It was the entire area entered and used by the Colbert car as it proceeded north and turned to accomplish an entrance upon the county highway. The jury were not required to accept the testimony of Colbert that he pulled off onto the right-hand shoulder of the northbound lanes and stopped before turning into the crossover and proceeded on to the southbound lanes. They could, if they thought proper, infer that he approached the intersection in the northbound lanes and made the turn into the crossover and should have signaled his intention to do so. He testified that he did signal his turn but again the jury were not compelled to accept that part of his testimony. The jury could have concluded that at two o'clock in the afternoon of the June day his signal would have been visible to approaching traffic had he given it for the distance and in the position required by the statute and that approaching traffic would thus have had its attention alerted to the intended turn in the intersection. Even though drivers may have, as Borland and Bland testified they did, missed seeing the actual turn, yet had the signal been given it might have caught their eyes and given them information which otherwise they missed. We think there was sufficient applicability to the case to justify the court in giving the admittedly correct left turn instructions and that error cannot be predicated upon the court's having done so.

[5] Michael Colbert, the minor, complains of the court's giving the following instruction: "The burden is upon each plaintiff in these cases to prove the affirmative of his case by a preponderance of the evidence. Therefore, you may not speculate as to whether any conduct on the part of either defendant was a proximate cause of the accident or of any one of plaintiff's injuries or damages, and if the evidence leaves these things a matter of conjecture *or doubt*, then that plaintiff has not sustained the burden of proof required of him under the law as against that defendant." (Italics ours.) The error in this instruction is so obvious as to require little comment. Concerning a similar instruction, the court said in Greenleaf v. Pacific Tel. & Tel. Co., 43 Cal.App. 691, 185 P. 872:

> "* * * To what avail are the instructions as to the sufficiency of a preponderance of the evidence to support a verdict and as to its efficacy if it produces unprejudiced conviction in their minds, when followed by the explicit direction that the degree of certainty indicated must not only be beyond a reasonable doubt, but must not admit of any doubt at all? Even in a criminal case, requiring the minds of the jurors to be satisfied beyond a reasonable doubt, this instruction would be erroneous. That it must be considered prejudicial, under the state of the evidence here, there can be no question."

It may be observed that the attorneys for appellant Giles Colbert also asked the court to give this same instruction and that Giles Colbert's criticism of the instruction is, therefore, within the rule of invited error. However, Michael Colbert was represented by attorneys of his own, and they did not request the instruction, and the rule of invited error cannot be applied to him.

Respondents argue also that "If the jury was under the impression that to find for the plaintiff it must find beyond all doubt the elements of his case, then the jury did, in fact, find beyond doubt that the appellant in this case [Giles Colbert] was negligent, and that the respondent, Joseph C.

Borland, was free from negligence. Since Joseph C. Borland was not negligent Michael Colbert could recover nothing." The argument is not sound. Applying the instruction to the several situations presented by the cases we find the jury saying: Borland has satisfied us beyond doubt that Giles Colbert's negligence was a proximate cause of his injuries. He has borne his burden of proof. Giles Colbert has not satisfied us beyond doubt that Borland was contributorily at fault, and so has not borne his burden as to that defense. We are in doubt as to Borland's fault. Being so, Michael has failed to bear his burden of proof as plaintiff in his action. So we award him nothing.

The judgment against plaintiff and appellant Giles Colbert and in favor of respondent Borland and the judgment against Giles Colbert and in favor of Irma Borland are affirmed. The judgment against appellant Michael Colbert is reversed.

PEEK and SCHOTTKY, JJ., concur.

Hearing denied; SCHAUER and SPENCE, JJ., dissenting.



John Dyson POWELL, Petitioner,

v.

The SUPERIOR COURT of The State of California, In and for the COUNTY OF LOS ANGELES, Respondent.*

Civ. 22237.

District Court of Appeal, Second District, Division 2, California.

Jan. 31, 1957.

Hearing Granted March 27, 1957.

Prohibition proceeding was brought against the Superior Court of the State of California, in and for the County of Los Angeles, to restrain the Superior Court from proceeding with the trial of petitioner under an indictment charging him with the embezzlement of public funds. The District Court of Appeal, Richards, J. pro tem., held that an accused in a criminal prosecution has no absolute right before trial to an inspection and copy of his confession or the transcript of his statements in the possession of the prosecution, but, on the contrary, an application for pretrial inspection is addressed to sound judicial discretion of trial court, which has inherent power to order such an inspection if it appears necessary to enable defendant to have a fair trial, and that Superior Court did not abuse its discretion in denying petitioner's motion for pretrial inspection.

Order to show cause discharged, peremptory writ of prohibition denied, and stay of proceedings terminated.

1. Criminal Law ⇐627½

There is no common law right of pretrial discovery in a criminal prosecution whereby accused can compel the production of documents or other evidence in the possession of the prosecution.

2. Criminal Law ⇐627½

The pretrial right of inspection provided for in the Code of Civil Procedure is not applicable to criminal proceedings. West's Ann.Code Civ.Proc. § 1000.

3. Criminal Law ⇐627½

The right of a defendant in a criminal case to compel production of documents or other evidence in the possession of the prosecution, when it becomes clear during the course of the trial that the prosecution has in its possession relevant and material evidence, is to be distinguished from the right to a pretrial discovery of the same evidence.

4. Criminal Law ⇐627½

An accused in a criminal prosecution has no absolute right before trial to an inspection and copy of his confession or the transcript of statements made by him, which are in possession of the prosecution, but, on the contrary, an application for pretrial inspection is addressed to sound judicial discretion of trial court, which

* Opinion vacated 312 P.2d 698.

has inherent power to order such an inspection if it appears necessary to enable defendant to have a fair trial.

5. Criminal Law ⇐627½

Record established that trial court did not abuse its discretion in denying motion of defendant in embezzlement prosecution for an order authorizing defendant and his attorney before trial to inspect and make copies of a signed statement, which was made by defendant, and which was in the office of the chief of police, and in denying motion to inspect and make copies of typewritten transcript of tape recording made in police office.

Gladys Towles Root and Joseph A. Armstrong, Los Angeles, for petitioner.

William B. McKesson, Dist. Atty., and Jere J. Sullivan, Fred N. Whichello and Lewis Watnick, Deputy Dist. Attys., Los Angeles, for respondent.

RICHARDS, Justice pro tem.

Petitioner seeks a writ of prohibition to restrain the respondent court from proceeding with his trial under an indictment charging him with the embezzlement of public funds.

As grounds for the relief sought the petitioner alleges the denial by the trial court of his motion for an order authorizing the petitioner and his attorney to inspect and make copies of a signed statement of the petitioner made in the office of a chief of police and also denying his motion to inspect and make copies of the typewritten transcript of a tape recording made in the police office. It is further alleged that no copies of the statements were given to the petitioner and that he is not able to recall or relate to his attorney the contents thereof and that an inspection of the documents may be necessary to refresh his recollection.

It is conceded by the prosecution that the evidence contained in the signed statement is material to the issues and would be admissible on behalf of the prosecution as constituting a confession or admission.

[1–3] There is no common law right of pretrial discovery in a criminal prosecution whereby the accused can compel the production of documents or other evidence in the possession of the prosecution. People v. Riser, 47 Cal.2d 566, 305 P.2d 1; Shores v. United States, 8 Cir., 174 F.2d 838, 843, 11 A.L.R.2d 635. Nor is the pretrial right of inspection provided for in Code Civ. Proc., sec. 1000, applicable to criminal proceedings. People v. Ratten, 39 Cal.App.2d 267, 271, 102 P.2d 1097; People v. Wilkins, 135 Cal.App.2d 371, 377, 287 P.2d 555. The right of a defendant in a criminal case to compel production when it becomes clear during the course of a trial that the prosecution has in its possession relevant and material evidence, People v. Riser, 47 Cal. 2d 566, 305 P.2d 1, is to be distinguished from the right to a pretrial discovery of the same evidence, United States v. Krulewitch, 2 Cir., 145 F.2d 76, 78, 156 A.L.R. 337.

The precise question of the right of an accused to a pretrial inspection of a signed statement constituting evidence of a confession or admission has not been decided in this state. While there is some conflict in authority, the state courts generally, which have considered the question, have held that the accused cannot require the prosecution to furnish him before the trial with a copy of his confession. See Annotation, 52 A.L.R. 211; State v. Yeoman, 112 Ohio St. 214, 147 N.E. 3; State v. Tune, 13 N.J. 203, 98 A.2d 881; State v. Cicenia, 6 N.J. 296, 78 A.2d 568; Rosier v. People, 126 Colo. 82, 247 P.2d 448. It has been similarly held by the Federal Court, Shores v. United States, 8 Cir., 174 F.2d 838, 11 A.L.R.2d 635.

[4] It is our conclusion that an accused in a criminal prosecution has no absolute right before trial to an inspection and copy of his confession or the transcript of statements made by him which are in the possession of the prosecution. On the contrary, an application for a pretrial inspec-

tion of a signed confession or admission or transcript of statements made by an accused is addressed to the sound judicial discretion of the trial court, which has inherent power to order such an inspection, which power may be affirmatively exercised in case it appears necessary to enable the defendant to have a fair trial. State v. Cicenia, 6 N.J. 296, 78 A.2d 568; Shores v. United States, 8 Cir., 174 F.2d 838, 11 A.L.R.2d 635.

[5] From the record before us it appears that the trial court heard and ruled upon petitioner's motion for a pretrial inspection, and no abuse of discretion in denying his motion has been shown.

The order to show cause is discharged, a peremptory writ of prohibition is denied, and the stay of proceedings is terminated.

FOX, Acting P. J., and ASHBURN, J., concur.



The PEOPLE of the State of California, Plaintiff and Respondent,

v.

Velva Irene McCAUGHAN, Defendant and Appellant.*

Cr. 2710.

District Court of Appeal, Third District, California.

Jan. 24, 1957.

Rehearing Denied Feb. 19, 1957.
Hearing Granted March 20, 1957.

Prosecution for involuntary manslaughter. The County Court, Stanislaus County, Frank C. Damrell, J., after verdict of guilty suspended judgment and granted probation for three years on condition that defendant serve one year in county detention facility, and defendant appealed. The District Court of Appeal, Peek, J., held that statute providing that every person guilty of any harsh, cruel or unkind treatment of, or any neglect of duty towards, any insane person is guilty of a misdemeanor is so vague and uncertain as to violate due process.

Judgment reversed.

See also, 298 P.2d 871.

1. Constitutional Law ⇐258
Mental Health ⇐32

Statute providing that every person guilty of any harsh, cruel, or unkind treatment of, or any neglect of duty towards, any idiot, lunatic, or insane person is guilty of a misdemeanor is so vague and uncertain as to violate due process. West's Ann.Pen.Code, § 361.

2. Constitutional Law ⇐258
Statutes ⇐241(1)

The statutory rule that penal statute is to be construed according to the fair import of its terms, with a view to effect its objects and to promote justice, is subject to the rule that no one may be required at peril of life, liberty or property to speculate as to the meaning of penal statute. West's Ann.Pen.Code, § 4.

3. Criminal Law ⇐13

Statute creating a criminal offense must show in language capable of being understood by a person of ordinary intelligence what it is that is prohibited, and this can only be done by the use of terms or words of settled meaning.

4. Mental Health ⇐32

In statute providing that every person guilty of any harsh, cruel or unkind treatment of, or any neglect of duty towards any insane person is guilty of a misdemeanor, consideration of the elements in the conjunctive, in effect, changing the disjunctive "or" to conjunctive "and" would be making a new law which is not part of duty of court. West's Ann.Pen.Code, § 361.

5. Criminal Law ⇐1030(2)

Constitutional questions may be raised at any stage of the proceeding and need not necessarily be raised in the trial court.

6. Criminal Law ⇐1030(2)

Where question of constitutionality of statute involved further question of wheth-

* Opinion vacated 317 P.2d 974.

er crime had been committed, the question was jurisdictional and could be raised on appeal, although defendant did not question validity of statute in trial court and trial court had given two instructions, at defendant's request, pertaining to the statute. West's Ann.Pen.Code, § 361.

7. Criminal Law ⇐1186(1)

Where jury returned a general verdict finding defendant guilty of involuntary manslaughter but one of the statutes under which the jury could have found defendant guilty was unconstitutional, reviewing court could not speculate as to which statute the jury found the defendant had violated and the verdict must be set aside. West's Ann.Pen.Code, §§ 192, subd. 2, 242, 361.

Sutter & Carter by Douglas M. Sutter, Modesto, for appellant.

Edmund G. Brown, Atty. Gen., by John Fourt and Doris H. Maier, Deputy Attys. Gen., for respondent.

PEEK, Justice.

Appellant and her codefendant were jointly charged with involuntary manslaughter. Penal Code, sec. 192, subd. 2. The jury found appellant guilty as charged but found her codefendant not guilty, and appellant's motion for a new trial was denied. Judgment was suspended and she was granted probation for a term of three years on condition that she serve one year in a county detention facility.

As the court instructed the jury, the State relied upon a violation of either section 242 (battery) or section 361 (treatment of insane persons) of the Penal Code as constituting the commission of the unlawful act denounced by section 192, subdivision 2, of that code.

[1] Since it is our conclusion that the provisions of section 361 are so vague and uncertain as to violate due process, it becomes unnecessary to discuss the numerous other contentions made by appellant, or to summarize at length the facts disclosed in the very voluminous transcript. The pertinent facts show that the deceased died from asphyxiation caused by the aspiration of food while being spoon-fed by the defendants. The patient was being fed in this manner pursuant to the orders of the physician in charge to "spoon feed if necessary." The criminal aspects of the case arise out of the means employed by the defendants to so feed the patient.

Section 361 provides as follows:

> "Every person guilty of any harsh, cruel, or unkind treatment of, or any neglect of duty towards, any idiot, lunatic, or insane person, is guilty of a misdemeanor."

It is similar to section 2654 of the Penal Code, and although both sections date from the adoption of the code, neither has ever been considered by a reviewing court in this State.

[2] Under the provisions of Penal Code, section 4, penal statutes are to be "* * * construed according to the fair import of their terms, with a view to effect its objects and to promote justice." Such statutory rule, however, is subject to the further rule that:

> "No one may be required at peril of life, liberty or property to speculate as to the meaning of penal statutes. All are entitled to be informed as to what the State commands or forbids." Lanzetta v. State of New Jersey, 306 U.S. 451, 453, 59 S.Ct. 618, 619, 83 L.Ed. 888.

Or, as the court in the Lanzetta case also stated,

> "The applicable rule is stated in Connally v. General Const. Co., 269 U.S. 385, 391, 46 S.Ct. 126, 127, 70 L.Ed. 322 [328]: 'That the terms of a penal statute creating a new offense must be sufficiently explicit to inform those who are subject to it what conduct on their part will render them liable to its penalties is a well-recognized requirement, consonant alike with ordinary notions of fair play and the settled rules of law; and a stat-

ute which either forbids or requires the doing of an act in terms so vague that men of common intelligence must necessarily guess at its meaning and differ as to its application violates the first essential of due process of law.'"

[3] This principle was applied in the case of In re Peppers, 189 Cal. 682, 685–688, 209 P. 896, 897, where the phrase "oranges shall be considered unfit for shipment when frosted to the extent of endangering the reputation of the citrus industry, if shipped" was held invalid. Also, in Orloff v. Los Angeles Turf Club, 36 Cal.2d 734, 227 P.2d 449, the word "immoral" was held to be insufficient. And in People v. Saad, 105 Cal.App.2d Supp. 851, 854, 234 P.2d 785, 787, the words "practices inimical to the public interest" were held to be "too indefinite in their import to serve in a definition of criminal conduct." Again, in the case of In re Lockett, 179 Cal. 581, 178 P. 134, 139, where words not of the English language were used in a criminal statute, Mr. Chief Justice Angellotti, in a separate concurring opinion wherein he summarized the opinion of the court which held the words attacked were too uncertain, stated: "It must be conceded, I think, that it is essential to the validity of a statute creating a criminal offense that it show in language capable of being understood by person of ordinary intelligence what it is that is prohibited. This, it has been said, can only be done by the use of terms or words of settled meaning * * *."

In the present case even if we assume that the word "cruel" has a well-settled meaning, or that the defendant was well aware of the "duty" she owed to the deceased, certainly the same cannot be said of the phrase "harsh or unkind treatment." Webster's New International Dictionary, 2d Edition, Unabridged, defines "harsh" as follows:

"(1) Offensive to sense * * *; (2) Offensive to the sensibilities * * * (3) Of persons or things, offensive to a sense of justice or kindness; unfeeling; severe; cruel; unduly rigorous; as a *harsh* parent, philosophy, punishment, opinion. (4) Offensive to the physical feelings; roughly unpleasant; causing physical discomfort; as, a *harsh* climate, cure."

The synonyms given for the word "harsh" are: coarse, stiff, strident, discordant, jangling, crude, clashing, disagreeable, rigorous and relentless, in that order. The same authority gives the following definition of "unkind."

"1. Not kind; esp., wanting in kindness, sympathy, or the like; hence, cruel; harsh. 2. *Now Dial.* a. Unsuitable; unfavorable. b. Not thriving. c. Ungenial; rough * * *"

The prosecution's answer to such contention by defendant is that all of the elements contained in section 361 must be considered in the conjunctive; that when so considered the section is sufficiently clear and certain to meet the constitutional requirements. In any event, it is argued, the defendant did not question the validity of the section in the trial court, and in fact two of the instructions given by the court pertaining to that section were requested by the defendant; hence its validity cannot be questioned at this time.

As has been noted, it is the duty of the courts under Penal Code, section 4, to determine the "fair import" of the statute in order to effect "its objects and to promote justice." But when "* * * the legislature declares an offense in words of no determinate signification, or its language is so general and indefinite as that it may embrace within its comprehension, not only acts commonly recognized as reprehensible, but others also which it is unreasonable to presume were intended to be made criminal, the courts, possessing no arbitrary discretion to discriminate between those which were and those which were not intended to be made unlawful, can do nothing else than declare the statute

void for its uncertainty." Czarra v. Board of Medical Supers., 25 App.D.C. 443.

[4] Here it is readily apparent that the first portion of the prosecution's argument would have this court in effect amend section 361 by changing the disjunctive "or" to the conjunctive "and". As noted in United States v. Reese, 92 U.S. 214, 23 L.Ed. 563, to construe the statute in the manner contended for by the State would in effect be to make a new law, not to enforce an old one. This is no part of the duty of the courts. "It would certainly be dangerous if the legislature could set a net large enough to catch all possible offenders, and leave it to the courts to step inside and say who could be rightfully detained and who should be set at large. This would, to some extent, substitute the judicial for the legislative department of the government." United States v. Reese, supra.

[5, 6] Turning next to the second portion of the prosecution's contention, it is fundamental that constitutional questions may be raised at any stage of the proceedings. Here the question of the constitutionality of the act involves and determines the further question of whether a crime has been committed. Necessarily if the law is void, no crime has been committed and none could be committed under it, and the court would have no jurisdiction over the person of the defendant or the subject matter of the action. Under such circumstances the question is jurisdictional and can be raised at any stage of the proceedings. People v. Rodriguez, 58 Cal.App.2d 415, 136 P.2d 626. And it further would appear that if our conclusion be valid as to section 361, then appellant's counsel, by submitting the instructions referred to by the prosecution, could no more cure the jurisdictional defects than could the State by relying on said section.

[7] Lastly, since the jury returned a general verdict, and since we hold that one of the sections under which the jury could have found the defendant guilty of a violation of section 192, Penal Code, was unconstitutional, the verdict must be set aside inasmuch as this court cannot speculate as to whether the jury found the defendant guilty of a lawful or an unlawful act.

The judgment is reversed.

VAN DYKE, P. J., and SCHOTTKY, J., concur.



147 Cal.App.2d 818

STATE of California, Subsequent Injuries Fund, Petitioner,

v.

INDUSTRIAL ACCIDENT COMMISSION of the State of California, Marguerite Bachrach, County of Alameda, and State Compensation Insurance Fund, Respondents.

Civ. 17361.

District Court of Appeal, First District, Division 2, California.

Jan. 25, 1957.

Proceeding to review and annul award and decision of Industrial Accident Commission awarding permanent disability benefits from subsequent injuries fund. The District Court of Appeal, Kaufman, J., held that the evidence failed to establish any permanent partial disability antedating industrial injury such as would support an award against subsequent injuries fund under West's Ann.Labor Code, § 4751, providing for payment of compensation from such fund where a permanently partially disabled employee sustains subsequent compensable injury resulting in additional permanent partial disability.

Award against subsequent injuries fund annulled.

1. Workmen's Compensation ⇐1030

Statute providing for payment of part of compensation for permanent partial disability resulting from combined effect of

industrial injury and previous disability from Subsequent Injuries Fund indicated legislative policy that every person is entitled to the right to self support even after he has been physically handicapped by injury or disease. West's Ann.Labor Code, § 4751.

2. Workmen's Compensation ⇐1030

The purpose of statute providing for payment of part of compensation for permanent partial disability resulting from combined effect of industrial injury and previous disability from Subsequent Injuries Fund is to encourage the employment of physically handicapped persons, particularly veterans, and to make a logical and equitable adjustment of the liability under Workmen's Compensation Law. West's Ann.Labor Code, § 4751.

3. Workmen's Compensation ⇐1030

Statute providing for payment of part of compensation for permanent partial disability resulting from combined effect of industrial injury and previous "disability" or "impairment" from Subsequent Injuries Fund used quoted words as meaning only actual, manifest and symptomatic disabilities which antedated an industrial injury. West's Ann.Labor Code, § 4751.

See publication Words and Phrases, for other judicial constructions and definitions of "Disability" and "Impairment".

4. Workmen's Compensation ⇐1030

Permanent partial disability existing prior to and at time of industrial injury for which compensation is sought from employer is a condition precedent to recovery of benefits from Subsequent Injuries Fund under statute providing for payment from such fund of part of compensation for permanent partial disability due to combined effect of industrial injury and previous disability or impairment. West's Ann. Labor Code, § 4751.

5. Workmen's Compensation ⇐1030

As used in statute providing for payment of part of compensation from Subsequent Injuries Fund, if an employee who is permanently partially "disabled" receives a subsequent compensable injury, quoted word means a combination of partial or total physical incapacity and of inability to work. West's Ann.Labor Code, § 4751.

See publication Words and Phrases, for other judicial constructions and definitions of "Disabled".

6. Workmen's Compensation ⇐1030

As used in statute providing for payment of part of compensation for permanent partial disability due to combined effect of industrial injury and previous disability or "impairment" from Subsequent Injuries Fund, quoted word means not an unknown condition but one that causes loss of function of the body in whole or in part. West's Ann.Labor Code, § 4751.

7. Workmen's Compensation ⇐1030

Slight swelling or enlargement of ankles and knees of 64-year old deputy county clerk, which did not result in pain, limitation of action or weakness and did not affect her performance on the job, did not constitute permanent partial "disability" or "impairment" within statute providing for payment of part of compensation for disability due to combined effect of industrial injury and previous disability or impairment from Subsequent Injuries Fund. West's Ann.Labor Code, § 4751.

8. Workmen's Compensation ⇐1030

Proof that employer had knowledge of pre-existing disabling condition is a prerequisite to recovery of benefits from Subsequent Injuries Fund for permanent partial disability due to combined effect of industrial injury and previous disability or impairment. West's Ann.Labor Code, § 4751.

9. Workmen's Compensation ⇐1030

Statute providing for payment of part of compensation for permanent partial disability due to combined effect of industrial injury and previous disability or impairment from Subsequent Injuries Fund was not intended to apply to symptomatic disease processes or arthritic processes which were unknown to both employee and employer and which in nowise interfered with

employee's ability to work. West's Ann.Labor Code, § 4751.

10. Workmen's Compensation ⇐1030

Subsequent Injuries Fund was not liable for any part of compensation for permanent partial disability of deputy county clerk allegedly due to combined effect of industrial injury to right hip, back and knee and pre-existing arthritic processes, in absence of evidence that employer had any knowledge of pre-existing arthritic condition or that it had interfered with ability of deputy clerk to work prior to industrial injury. West's Ann.Labor Code, § 4751.

11. Workmen's Compensation ⇐1030

In proceeding on claim for permanent partial disability of deputy county clerk allegedly due to combined effect of industrial injury to right hip, back and knee and pre-existing arthritic processes, evidence failed to establish any permanent partial disability antedating industrial injury such as would support award against Subsequent Injuries Fund. West's Ann.Labor Code, § 4751.

Edmund G. Brown, Atty. Gen., of California. Gerald F. Carreras, Robert L. Bergman, Deputy Attys. Gen., for petitioner.

Everett A. Corten, Daniel C. Murphy, San Francisco, for respondent Industrial Accident Commission.

Smith & Parrish, by Joseph E. Smith, Oakland, for respondent Marguerite Bachrach.

KAUFMAN, Justice.

Petitioner seeks review and the annulment of an award and decision after reconsideration made by the respondent Industrial Accident Commission. The award gave respondent Marguerite Bachrach permanent disability benefits from the Subsequent Injuries Fund. The award was based on a finding that at the time of the industrial injury respondent Bachrach suffered from a previous physical disability or physical impairment resulting from arthritic processes.

On June 8, 1955, Marguerite Bachrach, aged 64, filed an application in which she alleged injury arising out of the course of her employment. It was claimed that while employed as a deputy clerk on July 29, 1953, by the respondent County of Alameda, Bachrach sustained an industrial injury when she fell, injuring her right hip, back and knee. In the application for adjustment of claim, applicant Bachrach answered "No" to the question: "Have you ever before filed a claim with this Commission?"

Applicant received temporary disability benefits and medical treatment.

A claim was filed to establish the amount of permanent disability benefits to which she was entitled from Alameda County. On July 21, 1955, an order issued from the respondent Commission whereby the petitioner State of California (Subsequent Injuries Fund) was joined as a party defendant, as it then appeared that Alameda County would not be responsible for all her disability.

Among the medical evidence considered by the Industrial Accident Commission were the reports of Doctor Toffelmeir which stated, "It should be noted that she has had a considerable amount of difficulty with both of her knees over a long period of time, and she has had arthritic changes in other parts of her body, but up to the present time, her past condition has not interfered with the treatment of her hip * * * As you will further note, this patient has arthritis in every joint in her body, especially in her knees and she has had difficulty for a considerable time." Doctor Walker reported that the applicant was suffering from pre-existing arthritic condition. The report of Permanent Disability Rating Bureau stated that the applicant has had some difficulty with arthritic changes in left knee and ankle and in right ankle. The applicant was also examined by the Commission's Medical Examiner and his report states as follows: "If re-

quired to give an arbitrary assessment, I would estimate 75% disability to be assessed to pre-existing pathology and 25% to injury."

A hearing was held on September 13, 1955, at which the applicant testified. Her testimony at this hearing, so far as it relates to her pre-existing condition, was that prior to her injury of July 29, 1953, her job required much bending over and assuming a squatting position when doing work on the files in the County Clerk's office. Before said injury she had no pain or limitation of motion in the right hip. She had no pain in the right knee, but had some enlargement of both ankles and knees. This enlargement, however, did not limit the motion of the ankles or knees. Before said injury she had no difficulty in performing the requirements of her job. She had no trouble bending or squatting; however, she was not as nimble as her co-workers. She had never lost any time from her job before the said injury due to any physical complaints, and had had no difficulty whatsoever in performing her work.

The matter was submitted after the hearing of September 13, 1955. On January 16, 1956, the respondent Commission's Permanent Disability Rating Bureau issued a recommended rating of 85% combined disability. The recommended apportionment was 19¼% disability to the industrial injury and the balance to the alleged pre-existing disability.

On March 13, 1956, and on April 24, 1956, the Subsequent Injuries Fund cross-examined Mr. Dougherty, the Commission's Permanent Disability Rating Specialist. Mr. Dougherty was questioned as to the Instructions to Rating Bureau prepared by the Referee. He testified that if the applicant had no trouble in bending or squatting prior to the injury in question, such would be entirely inconsistent with the disability described under the combined factors of disability. He further testified that the description "enlargement of ankles and knees" for a deputy county clerk would not be a ratable factor of disability in the absence of limitation of motion. He also stated that in executing a rating such as this, it is important to know what the applicant could or could not do because of the alleged physical disability. The instructions to the rating bureau did not contain these relevant factors for the rating specialist's consideration.

The Industrial Accident Commission found that at the time of her injury she suffered from a previous physical disability or physical impairment resulting from arthritis. Petitioner sought reconsideration which was denied.

The petitioner contends: (1) that the applicant suffered from no pre-existing disability within the meaning of Labor Code, section 4751; (2) that the State of California (Subsequent Injuries Fund) cannot be assessed for a disability which did not antedate the industrial injury.

I.

Question: Whether the applicant's pre-existing nondisabling arthritic processes constitutes a "pre-existing partial disability or impairment" within the meaning of California Labor Code, section 4751?

Labor Code, sec. 4751 provides: "If an employee who is permanently partially disabled receives a subsequent compensable injury resulting in additional permanent partial disability so that the degree of disability caused by the combination of both disabilities is greater than that which would have resulted from the subsequent injury alone, and the combined effect of the last injury and the previous disability or impairment is a permanent disability equal to 70 percent or more of total, he shall be paid in addition to the compensation due under this code for the permanent partial disability caused by the last injury, compensation for the remainder of the combined permanent disability existing after the last injury as provided in this article."

[1, 2] The history of section 4751 is a brief one. It was originally passed in 1945, St.1945, p. 2209, just as World War II was coming to a close. It is reasonable to infer that the act indicates the legislative policy

to be that every person is entitled to the right of self support even after he has been physically handicapped by injury or disease; and that the purpose of the act is to encourage the employment of physically handicapped persons, veterans in particular, and to make a logical and equitable adjustment of the liability under Workmen's Compensation Law. At that time, after the words at the beginning of the section "If an employee who is permanently partially disabled" appeared the following: "by reason of the loss of, or loss of use of, a hand, an arm, a foot, a leg, or an eye." Thus the only employee who then was entitled to payment from the Subsequent Injuries Fund was one who at the time of an industrial injury had lost the use of, or lost, a specified member of his body. An employer could see that a prospective employee had such a condition, and would know that if such person suffered an injury while in his employ, the employer would not be required to compensate for the disability already existing. The section did not apply to an employee having a disability or an impairment in other respects than those specified. An employee with a partial disability other than one caused by a specified member of his body, if subsequently injured, could make no claim on this fund. In 1949, St.1949, p. 2711, evidently for the purpose of including other disabilities than those specified, the quoted phrase was eliminated from the section.

[3] We can find neither in the original act, nor in its present form, any indication that the Legislature intended that either the term "disability" or "impairment" used therein was not to be limited "to *actual manifest and symptomatic disabilities which antedated an industrial injury.*" State Subsequent Injuries Fund v. Industrial Acc. Comm., 135 Cal.App.2d 544, 551, 288 P.2d 31, 35.

Hanna in "The Law of Employee Injuries and Workmen's Compensation," Volume 2, page 269 states: "It is insufficient to show pre-existing pathology which, at the time of industrial injury, had not become disabling. The recovery permitted under the law cannot be predicated upon proof of pre-existing pathologies, nor upon the existence of present disability based on pre-existing pathologies. The employee must show that prior to his industrial injury he suffered 'permanent disability or physical impairment.'"

[4] Any liability of the Subsequent Injuries Fund in the instant case must be derived admittedly from section 4751. More particularly, the controlling words, for purposes of the benefits sought herein, are, "If an employee who is permanently partially disabled * * *." That is, the section is not operative and the Subsequent Injuries Fund can incur no liability unless a claim is made by an employee who is *disabled* at the time of subsequent compensable injury. Such permanent partial disability is a condition precedent to an applicant's recovery of benefits from the Subsequent Injuries Fund under this section. Further, such disability must be in existence prior to the industrial injury for which compensation is sought from the employer. State Subsequent Injuries Fund v. Industrial Acc. Comm., supra, Labor Code, sec. 4751.

[5–7] The term "disabled," as used in Labor Code, section 4751, means "a combination of partial or total physical incapacity and of inability to work." State Subsequent Injuries Fund v. Industrial Acc. Comm., supra, 135 Cal.App. at page 550, 288 P.2d at page 35. "Impairment," as used in the same section, "is not an unknown condition but one that causes loss of function of the body in whole or in part." Id. The uncontroverted evidence showed that Marguerite Bachrach was suffering from no pre-existing permanent partial disability or impairment at the time of her industrial injury. Prior to her injury her knees and ankles were slightly enlarged; but there was no pain, limitation of motion or weakness evident, nor was she aware of any. She had never had any difficulty performing the duties of her job. True, she stated she was not as nimble as her co-workers. But who can expect a woman 64 years of age to be nimble? Slight enlargement of

the knees and ankles, without pain, without limitation of motion or weakness, without affecting her performance on the job, cannot under the definitions in the State Subsequent Injuries Fund v. Industrial Acc. Comm., case, supra, constitute a permanent partial disability or impairment. Such slight swelling or enlargement is not of itself a ratable factor of disability. This was admitted by the respondent Commission's Permanent Disability Rating Specialist. Furthermore, there is no medical evidence showing that the slight enlargement of the ankles and knees was caused by any "disease process," such as her latent arthritic condition.

II.

Did the employer know (or should have known) as a reasonable person of the pre-existing arthritic processes? The kind of physical impairment the Legislature had in mind was one of which the employer had knowledge since the statute was designed to encourage the employment of partially disabled people and an obscure disability unknown to the employer would present no handicap to employment. "An employer could see that a prospective employee had such a condition, and would know that if such person suffered an injury while in his employ, the employer would not be required to compensate for the disability already existing." State Subsequent Injuries Fund v. Industrial Acc. Comm., supra, 135 Cal.App.2d at page 550, 288 P.2d at page 35.

[8] In the instant case there is not a scintilla of evidence for establishing that applicant's employer had any knowledge of applicant's pre-existing arthritic condition. Furthermore there is no evidence that the applicant, herself, knew that she had a pre-existing arthritic condition. In Urquiza v. Industrial Acc. Comm., 144 Cal.App.2d 322, 300 P.2d 871, this court reemphasized the requirement laid down in State Subsequent Injuries Fund v. Industrial Acc. Comm., supra, 135 Cal.App.2d 551, 552 and 553, 288 P.2d 35 and 36, that in such a case the applicant must show as a condition precedent that the employer had knowledge of the pre-existing disabling condition before she can come within the provisions of Labor Code, sec. 4751.

[9] Labor Code, sec. 4751 was not intended to apply to a symptomatic disease processes or arthritic processes which were unknown to both employee and employer and which in nowise interfered with the employee's ability to work. State Subsequent Injuries Fund v. Industrial Acc. Comm., supra, 135 Cal.App.2d 553, 288 P.2d 36.

[10, 11] We conclude that under the evidence there was no permanent partial disability antedating the hip injury and hence under the statute no liability on the part of Petitioner Subsequent Injuries Fund.

Award providing for payment of compensation by Subsequent Injuries Fund is hereby annulled.

DOOLING, Acting P. J., and DRAPER, J. pro tem., concur.



Estate of Jane L. STANFORD, Deceased.
The BOARD OF TRUSTEES OF the LELAND STANFORD JUNIOR UNIVERSITY and Ruth C. Barton, Appellants,
v.
Aimee G. REYNOLDS, Minnie Devereaux Bond Rochester and Aimes C. Muniz, Respondents. *
Civ. 17187.

District Court of Appeal, First District, Division 2, California.
Jan. 25, 1957.
Hearing Granted March 20, 1957.

Proceeding involving distribution of property in the hands of a trustee pursuant to a testamentary trust. The Superior Court, Santa Clara County, M. G. Del Mutolo, J., entered a judgment in favor of residuary legatee under the will, and in favor

* Opinion vacated 315 P.2d 681.

of certain adopted children of a trust beneficiary, and against the sole heir of a deceased child of a trust beneficiary, and appeals were taken by adverse claimants. The District Court of Appeal, Kaufman, J., held, inter alia, that where testatrix's will bequeathed a certain fund in trust to her niece for life and upon her death provided that such fund "shall belong to" the child or children of such niece, the testamentary intent of such language was not to include adopted children, and therefore, after niece's death subsequent to death of her only issue, trust became distributable to residuary legatee.

Judgment affirmed in part and reversed in part with directions.

1. Executors and Administrators ⇐315(6)

The effect of a will is controlled by a decree of distribution, when such decree is final.

2. Executors and Administrators ⇐315(5)

If the terms of the distributive part of a decree of distribution are ambiguous, resort may be had to the will to interpret them.

3. Appeal and Error ⇐1008(3)

Where the opinion of a trial court in a proceeding for distribution of a trust demonstrated that the court findings were arrived at from language used in testatrix' will, analyzed in light of decided cases, it was duty of District Court of Appeal to interpret such language according to applicable principles of law, without regard to interpretation made by the trial court.

4. Wills ⇐706

If District Court of Appeal cannot determine meaning found in language used in a will, then it may resort to any competent parol evidence introduced at trial concerning construction of such will.

5. Wills ⇐629

The policy of the law is to favor early vesting of testamentary trust remainders.

6. Wills ⇐630(10)

Presumption, that where there is no "gift over" in the event of a trust beneficiary's death, the estate will be presumed to have vested at the time of testator's death, is not a rule which applies regardless of testamentary intent.

7. Wills ⇐630(10)

Where testatrix' will created a trust for the benefit of her niece for life, and upon niece's death the trust was to cease and belong to and be delivered to her child or children, title to the res of the trust did not vest in niece's son by virtue of a decree of distribution transferring the trust to a trustee, but niece's son merely had an interest contingent upon survival of his mother, and in view of fact he did not survive his mother, res fell into the residue of testatrix' estate and did not constitute property which son could bequeath to another.

8. Wills ⇐488

Extrinsic evidence may be admitted to explain an ambiguity created by the language of a will.

9. Wills ⇐456

Words in a will are to be given their usual and ordinary construction.

10. Wills ⇐497(5), 858(1)

Where testatrix' will bequeathed a certain fund in trust to her niece for life and upon her death provided that such fund "shall belong to" the child or children of such niece, the testamentary intent of such language was not to include adopted children, and therefore, after niece's death, subsequent to death of her only issue, trust became distributable to residuary legatee.

11. Wills ⇐858(1)

Where testatrix' will in a residuary clause, bequeathed the remainder of testatrix' property and estate, "not hereinbefore disposed of" to a beneficiary, the word "hereinbefore" did not show any intent to exclude residuary legatee from gifts otherwise provided for in the will which might lapse.

12. Wills ⇐858(1)

Where a residuary bequest is not circumscribed by clear expression in a will, and the title of the residuary legatee is not

narrowed by special words of unmistakable import, residuary legatee will take whatever may fall into the residue, whether by lapse, invalid disposition, or other reason.

James D. Adams, Albert J. Moorman, McCutchon, Thomas, Matthew, Griffiths & Greene, San Francisco, for appellant, The Bd. of Trustees of the Leland Stanford Junior University.

Dudley Robinson, Caryl Warner, Los Angeles, for appellant, Ruth Barton.

John L. Bradley, Sam J. Whiting, Jr., Crimmins, Kent, Draper & Bradley, San Francisco, for respondents, Aimee G. Reynolds and Minnie Devereaux Bond, Rochester.

Schwartz & Alschuler, Beverly Hills, for respondent, Aimee C. Muniz.

KAUFMAN, Justice.

This is an appeal from a judgment of the Superior Court in and for the County of Santa Clara dated October 28, 1955, decreeing that all the property in the hands of the trustee, be distributed to respondents Aimee G. Reynolds, Minnie Devereaux Bond Rochester and Aimee Christine Muniz in equal shares. Appellants Ruth Barton and The Board of Trustees of The Leland Stanford Junior University, whose interests are opposed, have filed separate briefs on appeal.

The trial court held that the property in the hands of the trustee should be distributed to respondents as the adopted children of Mrs. Amy Hansen, a niece of testatrix, Mrs. Jane Stanford, declaring them to be members of the class provided for in a provision of the will for the "child or children" of Mrs. Hansen. It denied the claim of Mrs. Barton, who had been designated by Walter Hansen, deceased, a son of Amy Hansen, as his sole heir in his will. The trial court determined that the provision in the will for the "child or children" of Mrs. Hansen did not describe an interest that vested at the death of testatrix, but was contingent upon the child's survival of his mother. Hence, the gift was held to vest in respondents, the surviving adopted children of Amy Hansen. The court denied the claim of The Trustees of Leland Stanford Junior University, who had contended that the University took as residuary legatee under the will, the class gift having lapsed. The Trustees had argued that testatrix had not intended to include adopted children in the classification "child or children" of Amy Hansen, and that the adoption order of the New York Court was procured in a special type of administrative rather than judicial proceeding, hence could be collaterally attacked.

Mrs. Jane Lathrop Stanford, the widow of Leland Stanford, Sr., died on February 28, 1905. Her will was dated July 28, 1903. On August 10, 1904, she executed a short codicil thereto, directing that certain jewels and a private car be sold by her executors and the proceeds turned over to the Trustees of Stanford University.

The opening paragraphs of the will, the portion of that document providing for the gifts giving rise to this controversy, read as follows:

"I give and bequeath to the Union Trust Company of San Francisco, a corporation organized and existing under the laws of the State of California, the sum of Two Million ($2,000,000) Dollars, to have and to hold the same in trust for the following uses and purposes, that is to say:

"a. I authorize, empower and direct said Trustee to invest said sum of Two Million ($2,000,000.) Dollars in first class bonds, or other securities, as it may deem best, and to pay over, at regular intervals, the net income arising from one million dollars thereof to my brother Ariel Lathrop of Albany, New York for and during the term of his natural life, and upon his death, (as he has no children or descendants) this trust shall cease and determine as to one-half of said trust property, that is to say, as to One Million dollars thereof, and the said sum or the property in which it may be invested shall belong to and be delivered

to his relatives as follows, viz.: One-half thereof to his brother Charles Gardner Lathrop, and the other one-half thereof to the descendants of his deceased brother Daniel Shields Lathrop in the proportions of one-third to the daughter Jennie L. Lawton, one-third to his daughter Amy Gardner Hansen, and the remaining one-third in equal shares to Daniel S. Gunning and Amy L. Gunning, the children of Christine L. Gunning, the deceased daughter of Daniel Shields Lathrop, deceased.

"b. To pay over at regular intervals to my niece, the said Jennie L. Lawton, the full one-third of the net income arising from one million dollars, the other one-half of said trust fund, for and during the term of her natural life, and upon her death this trust shall cease and determine as to one-third of said one million dollars, and the said one-third of said one million dollars shall belong to and be delivered to the child or childen of said Jennie L. Lawton.

"c. To pay over at regular intervals to my niece the said Amy L. Hansen, the full one-third of the net income arising from said one million dollars, being one-half of said trust fund, for and during the term of her natural life, and upon her death this trust shall cease and determine as to one-third of said one million dollars and the said one-third of said one million dollars shall belong to and be delivered to the child or children of said Amy L. Hansen.

"d. To pay over, one-half to each, at regular intervals, to said Daniel S. Gunning and Amy L. Gunning, the children of my deceased niece Christine L. Gunning, one-third of the net income arising from said one million dollars, the said one-half of said trust property, until such time as the younger, of the two shall reach the age of twenty-five years, at which time this trust shall cease and determine as to one-third of said one million dollars, the one-half of said trust property, and the said one-third shall belong to and be delivered to said Daniel S. and Amy L. Gunning, absolutely and in their own right, share and share alike, and free from all trusts; provided, however, that if either should die before the younger attains the age of twenty-five years, this trust shall cease and determine as to one-half of said one-third of a million dollars and that proportion of the trust property shall belong to and be delivered to the children of the one so dying, or, if there be no such children, then to the other; and the trust shall thereafter continue as to the other one-half of said one-third of a million dollars until the survivor reaches the age of twenty-five years, at which time the trust as to the remainder of said one-third of a million dollars shall cease and determine and the property shall belong to and be delivered to said survivor, but if such survivor dies before attaining such age of twenty-five years this trust shall then cease and determine and the trust property shall belong to and be delivered to his or her children, or if there be none such, then to his or her heirs at law."

Following these provisions was a gift of $1,000,000 to the brother of testatrix, Charles Lathrop. Numerous bequests ranging between $5,000 and $15,000 were made to devoted friends, servants and charities. The residuary bequest was made to Stanford University in Paragraph XXII, and Paragraph XXV of the Will declared that testatrix had made what she considered the wisest and most just disposition of the large estate committed to her husband and herself, "and the disposition most in accordance with the cherished wishes long entertained by my husband and myself, and I shall greatly deplore any attempt to disturb it; and if any devisee or legatee under the above written Will, or any person who, if I died intestate, would be entitled to any part of my estate, should either directly or indirectly attempt to oppose or set aside the probate of this Will, or to impair, invalidate or set aside its provisions, or to set aside or avoid, or to have declared void, null or ineffectual any transfer or grant made or atempted to be made by my husband or myself to said Trustees of said University, then and in that case, I give and bequeath to such person or per-

sons the sum of One Hundred ($100.) Dollars * * * and all the rest of the interest that would otherwise have gone to such person or persons by devise or inheritance shall pass under the residuary clause of the said Will."

On April 6, 1906, a Decree of Partial Distribution was entered ordering "that there be distributed to the respective legatees upon their respective legacies * * * the following respective amounts, namely: 'To the Union Trust Company * * * $1,900,000 in trust and upon the trusts provided for by said last will * * * said trusts being expressed in said will as follows, * * *'" The decree then quoted directly from the will the portion hereinbefore quoted, that is the paragraph dealing with the $2,000,000 gift in trust to the Union Trust Company, and paragraphs a, b, c, d.

On May 1, 1908, the Superior Court entered the Decree of Settlement of Third and Final Account and of Final Distribution. The decree recited that all legatees under the will had been paid their legacies in full, with the exception of the Board of Trustees of Stanford University, the residuary legatee, and ordered that all the rest, residue and remainder of the estate known or not then known or discovered be delivered to the trustees of said University.

Jennie L. Lawton, niece of Mrs. Stanford, who was given a life income from one-third of one million dollars by Paragraph I b of the will, had one child, Daniel L. Lawton, who predeceased her on November 4, 1926, bequeathing his interest in the Stanford estate to his mother. On October 7, 1927, the Superior Court of Santa Clara County adjudged and decreed that the trust terminated as to one-third of the one-half of the trust estate on the death of Jennie Lawton and ordered said sums delivered to the executor of her estate. The opinion of the trial court states that the interest of Daniel Lawton vested upon the death of testatrix. Stanford University had claimed the aforesaid share of the estate as residuary legatee, and appealed the decision to the Supreme Court. On May 5, 1928, the remittitur of that court issued, reciting that the parties had filed their stipulation that the appeal be dismissed, and ordering that the appeal be dismissed with costs to respondents.

Amy L. Hansen had but one child, Walter L. Hansen, who was twelve years of age at the time when Mrs. Stanford made her will. He died in 1918 at the age of twenty-seven making appellant Ruth Barton the sole heir to his estate.

On February 23, 1924, a year after the probate of Walter's estate, his mother, Amy L. Hansen, had an adoption decree entered in the State of New York, adopting as her own children, her niece, Mrs. Aimee Gunning Reynolds, and the two minor children of Mrs. Reynolds, Aimee and Minnie Rochester. The petition shows that Mrs. Reynolds was then thirty-five years of age, a resident of Pennsylvania where she resided with the two minor children whose father was Mrs. Reynolds' former husband, Richmond Rochester, Jr. The Final Judgment of Divorce attached as an exhibit to the petition, gave custody of the children to the mother, and allowed her at any time on eight days notice to apply for an order against the children's father for their support. Nothing in the adoption record shows that any notice of this proceeding was given to the father of the minor children. The order of adoption recites that an instrument in writing had been presented to the court by which Aimee Lathrop Hansen agreed to adopt Mrs. Reynold and her children, that they had appeared before the court and the court had examined them and was satisfied that their moral and temporal interests would be promoted by said adoption, and ordered that the adoption "be allowed and confirmed and henceforth the said Aimee G. Reynolds, Aimee Christine Rochester and Minnie Devereaux Bond Rochester shall be regarded and treated in all respects as the children of said Aimee Lathrop Hansen." The petition, agreement, and order for adoption, are all dated on the same day.

Appeal of Ruth Barton

[1, 4] Appellant Barton contends that the 1906 Decree of Distribution superseded the will and finally determines the rights of the parties. The decree referred to the distribution of the estate as a completed fact. It distributed to the Union Trust Company $1,900,000 "in trust and upon the trusts provided for in the last Will of Jane L. Stanford, deceased", quoting the provisions of said trust directly from subparagraphs a, b, c, and d of Paragraph I of the will. In re Estate of Easter, 24 Cal.2d 191, 194, 148 P.2d 601, 603, holds that "The decree supersedes the will and prevails 'over any provision therein which may be thought inconsistent with the decree'." And, see, In re Estate of Norris, 78 Cal.App.2d 152, 160, 177 P.2d 299; Rest. Prop. sec. 242. The Decree of Final Distribution in 1908 declared that all of the legatees under the will had been paid their respective legacies in full. From these decrees appellant concludes that the gift to Walter Hansen unquestionably vested in him at the death of testatrix. It is, of course, settled that the effect of a will is controlled by a decree of distribution when the latter is final. In re Estate of Easter, supra; Keating v. Smith, 154 Cal. 186, 191, 97 P. 300. In the case now before the court, the decree makes the distribution in the exact terms of the will quoting therefrom verbatim. In Manning v. Bank of California, 216 Cal. 629, 637–638, 15 P.2d 746, 750, it is said that "Although the decree of distribution supersedes the will as the measure of the rights of the parties, the will is part of the record in a probate proceeding, and, where it is ascertained upon comparison that the decree is a counterpart of the will, without additions or alterations, the decree cannot be given a different or broader interpretation than the will." The trial court in the 1906 decree simply decreed a distribution in the terms of the will, making no interpretation of the terms thereof. If the terms of the distributive part of the decree are ambiguous, resort may be had to the will to interpret them. In re Estate of Tynan, 129 Cal.App.2d 364, 366, 276 P. 2d 809; In re Estate of Norris, 78 Cal.App. 2d 152, 160, 177 P.2d 299. The finding of the trial court herein that decedent intended by sub-paragraph c to make a future gift to a class consisting of the child or children of Amy Hansen who should be living at the time of the death of said Amy Hansen is based entirely on an interpretation of the language used in that portion of the decree and will without the aid of extrinsic evidence. The opinion of the trial court filed herein and made a part of the findings of fact and conclusions of law, demonstrates that the finding was arrived at from the language used which was analyzed in the light of decided cases. It is therefore the duty of the court to interpret the language according to the applicable principles of law without regard to the interpretation made by the trial court. In re Estate of Norris, 78 Cal.App.2d 152, 159, 177 P.2d 299. If, of course, this court cannot determine the meaning found in the language used, then it may resort to any competent parol evidence introduced at the trial.

[5, 6] Numerous authorities are cited by appellant in support of the policy of favoring early vesting of trust remainders. Secs. 28, 143, Prob.Code; Secs. 694, 699, Civ.Code; In re Estate of Riemer, 69 Cal. App.2d 634, 159 P.2d 677; In re Estate of Backesto, 71 Cal.App. 409, 416, 235 P. 670; In re Estate of Rider, 199 Cal. 724, 738, 251 P. 799; Williams v. Williams, 73 Cal. 99, 102, 14 P. 394; Rest.Prop., Sec. 243(b). That such is the policy of the law may be regarded as well settled.

It is urged that the rule of interpretation that where there is no "gift over" in the event of the minor's death, the estate will be presumed to have vested at the time of testator's death, further supports the position of appellant. This rule was clearly stated by this court in Re Estate of Riemer, 69 Cal.App.2d 634, 637, 159 P.2d 677. In the Riemer case the intention to make a present gift, with the time of payment postponed, was clearly indicated. The court stated that the will left no doubt as to that intention, because the words used were "I hereby give, devise and bequeath

to my grandson." The rule of interpretation, secondarily relied on in the cited case, as appellant Stanford has pointed out, does not change the presumption into a rule of law which applies regardless of the testamentary intent.

Appellant relies on In re Estate of Wallace, 11 Cal.2d 338, 79 P.2d 1094, and states that this case has overruled In re Estate of Blake, 157 Cal. 448, 108 P. 287. We have, however, been unable to find a case overruling the Blake case. In re Estate of Wallace, the final decree of distribution followed closely the provisions of the will creating a trust and providing for payment by the trustee of the net income of the trust property to decedent's widow and two daughters. It provided that "Upon the death or remarriage of said widow, the said trust shall terminate and said trustee *shall distribute* the balance remaining in said trust fund to the two above-named daughters of decedent, in equal proportions, share and share alike". (Emphasis ours.) [11 Cal.2d 338, 79 P.2d 1095.] One daughter pre-deceased the widow. If the remainders to the daughters were construed as contingent there would result an intestacy as to one-half the trust property. The court applied the rule that a construction favorable to testacy should be made where the language used reasonably admits of such construction. In re Estate of Dunphy, 147 Cal. 95, 99, 81 P. 315. In the present case if a gift lapsed, there would be no question of intestacy, as the residuary legatee would take.

In re Estate of Wallace, the court, relying on the interpretation of the words "shall distribute" in Re Estate of Dunphy, supra, construed said words to mean simply delivery to the daughters of possession of the trust res the ownership of which had previously vested in them. The words employed in the instant case, "shall belong to and be delivered to" were not construed in Re Estate of Wallace, but appellant notes that the court there quoted and relied on the Restatement of the Law of Real Property (sec. 157, Comment h, p. 548) declaring that "when an otherwise effective conveyance of either land or a thing other than land creates one or more prior interests, the maximum duration of which is measured by lives, or by years, or by a combination of lives and years, and then provides, in substance, that upon the expiration of such prior limited interests, the ownership in fee simple absolute of the land, or the corresponding interest in the thing other than land, shall belong to a person who is presently identifiable, such person has an indefeasibly vested remainder." The court then held that the absolute ownership was to pass to the then identifiable persons, the testator's two daughters, hence each took a vested remainder, and intestacy would be avoided.

It is true that the word "belong" is used in the above quotation, but it is used in connection with a person "presently identifiable", and comment h refers to comment (i) for a definition of this latter expression. Comment (i) states that a person is " 'presently identifiable' when such remainder is limited, (1), to one or more named persons, in Re Estate of Wallace the daughters were named in the instrument; or (2), to 'the children' of a transferring testator who is survived by one or more children; or (3), to the 'children' of a person other than the transferor, *which person is dead* and survived by children still alive when the creating instrument speaks." (Emphasis ours.) Under this definition the taker of the remainder was not "presently identifiable" at the death of testatrix, since Amy Hansen was then living. The language in the Wallace case is therefore not authority that the words "shall belong to" convey a vested interest when used in connection with a person or persons not then identifiable. Bochte v. Chess, 124 Cal.App.2d 321, 268 P. 2d 493, cited by appellant, involved a presently identifiable taker of the remainder.

Appellant has argued that the decision in Re Estate of Dunphy was written near the time of Mrs. Stanford's death, and demonstrates the care, employed by lawyers of that day, to void the rule of In re Estate of Fair, 1901, 132 Cal. 523, 60 P. 442, 64 P.

1000. Since In re Estate of Fair had declared void a trust to convey real property, there is no reason to conclude that the language here used in regard to an estate consisting entirely of personal property, was employed for that purpose. In the Dunphy case, real property as well as personal was involved, hence the necessity of favoring a construction that would render the trust valid.

In Re Estate of Norris, 78 Cal.App.2d 152, 177 P.2d 299, 302, the language of the decree of distribution differed from that used in the will, stating that upon the death of the survivor, the trust should at once be at an end, and that the trustee "shall deliver" all the property in the trust to the children, share and share alike, or their legal heirs by right of representation, and did not use the language "grant and deliver" used in the will. The distributive portion of the decree was held to be clear and unambiguous, creating a vested remainder in the class which would open to include after born members. In the present case we have the combination of terms "shall belong to" and "be delivered to". The meaning of "be delivered to" is clear as a direction to turn over possession of the trust res. In re Estate of Norris, supra. The words "belong" and "deliver" are clearly not synonyms nor do they have at all similar connotations. The testatrix was therefore not reiterating the direction to deliver possession. "Belong" is given several varying definitions in the dictionary, one of them "to be the property of", and others, "to be connected with as an attribute or adjunct", "to be the concern, business or function (of)". In Hackett v. California Laundry, 7 Cal.App.Supp.2d 757, 758, 45 P. 2d 833, 834, the words "belonging to" used in a statute creating a lien against certain personal property were interpreted by the court. It said that when these words were given their natural and ordinary meaning they are equivalent "when used to designate the legal relationship between a person and property, to 'the property of' or 'owned by.' They imply ownership." And in San Francisco v. McGovern, 28 Cal.App. 491, 152 P. 980, the court in interpreting the expression "belong to" used in section 1 of Article XIII of the California Constitution stated that the words were to be given their ordinary meaning, except where the meaning has been established by statute or by judicial construction. That case cites several early out of state authorities which give to the aforesaid expression the meaning "owned by". And, see, State Land Settlement Board v. Henderson, 197 Cal. 470, 480, 241 P. 560. The primary meaning of the word "belong" implies ownership. 10 C.J.S. page 241. The cited authority states that the word also has other meanings, one of them being "to be at the disposal of or in the power of", citing but one authority for that meaning, the New York case cited herein by appellant. In re Hitchins' Estate, 43 Misc. 485, 89 N.Y.S. 472, 476. Since there is no showing that at the time of Mrs. Stanford's death there was an adjudicated meaning given to the expression "shall belong to" the words are to be taken in their ordinary sense, and if so construed they obviously mean that the property in the trust is to become the property of the child or children upon the death of the holder of the life estate.

[7] In re Estate of Easter, supra [24 Cal.2d 191, 148 P.2d 602], the decree of distribution provided that "Upon the death of the said Catherine Easter, the trust hereinbefore referred to shall terminate and all of the property then in the hands of the trustee * * * *shall go to and vest in* the heirs at law of the said Alfred Easter, deceased, in accordance with the statute of succession * * *, and the trustee is directed to convey, deliver and pay over all the corpus * * * unto such heirs * * * *." (Emphasis added.) The Court held that the decree was properly construed by the trial court to distribute a contingent interest only to the heirs, "the contingency being their survivorship of the testator's wife upon whose death the trust terminated. * * * The decree of distribution, by providing that two things should occur 'Upon the death of the said Catherine Easter,'

namely, 1. 'the trust * * * shall terminate,' and 2. 'all the property then in the hands of the trustee * * * shall go to and vest in the heirs at law of said Alfred Easter, deceased,' clearly indicates an intention that the interests of the heirs should vest at the time of the termination of the trust. Any other construction would ignore the normal and usual meaning of the words 'shall go to and vest in the heirs at law'." The court distinguished the Wallace case, in that there only the meaning of "shall distribute" was involved. It noted also that the use of the future tense in a decree of distribution ordinarily connoted future action. The decree in the instant case also employs language connoting future action. Upon the death of Amy Hansen the one-third of a million dollars, shall become the property of her child or children and be delivered to them. We conclude that the language here employed in the decree was sufficiently similar to that used in the decree of distribution in Re Estate of Easter, supra, to warrant the construction that a contingent interest was created, rather than one which vested at the death of the testatrix.

Accordingly, it is our view that the decree of the trial court with respect to the appellant Ruth Barton finds support in the record in this respect and we hold that Stanford University is entitled to this fund because of our holding in the appeal of Stanford University herein.

It is urged that the trial court in the present case was bound by the decision of the same Superior Court in 1927, when that court decided that Paragraph I(b), a provision for Jennie L. Lawton and her child or children, vested ownership of one-third of a million dollars in Daniel Lawton, the child of Jennie, at the death of Mrs. Stanford. Daniel Lawton, having predeceased his mother, and having made her the legatee of his interest in the Stanford estate, one-third of a million dollars was therefore distributed to Mrs. Lawton's estate. Paragraph I(c), the construction of which is here in question, is practically identical with I(b). While it would at first glance appear that as far as Stanford University, the residuary legatee, is concerned, the doctrine of res judicata might estop it, see, Dillard v. McKnight, 34 Cal.2d 209, 209 P.2d 387, 11 A.L.R.2d 835, there having been a final judgment on the merits against Stanford, and the issue there, as here, having been, Did the language create a vested or a contingent interest, still there is authority that the issue in the 1927 case may not be considered identical with that now before the court. Freeman on Judgments (Fifth Ed., Vol. 2, p. 1748, § 822) states that "a judgment in a proceeding to construe a will is not conclusive as to the construction of a clause the meaning of which is not shown to have been determined; nor is it conclusive with respect to property of the estate which was not involved in the proceeding." The third of a million dollar fund here involved was not involved in the earlier case, and the order declaring a vested interest extended only to Paragraph I(b) of the will and not to Paragraph I(c).

The law of the case is not here involved because this is not a second appeal of the same case. No precedent which must now be followed was established by any appellate court in the matter. The case having been dismissed by stipulation of the parties, no opinion was ever rendered, even though it is true that under sec. 955, Code of Civ. Proc., such dismissal results in an affirmance of the judgment. (4 Cal.Jur.2d 591–599).

Appeal of Leland Stanford Junior University

The Board of Tustees of Stanford University appeals from the judgment awarding the trust fund to respondents as the adopted children of Mrs. Amy Hansen. The trial court found that it was the testamentary intent of Mrs. Stanford to include adopted children when she used the language "child or children of Amy Hansen." In the opinion of the trial court no intent to exclude adopted children was expressed in the will, and it therefore permitted a letter of the testatrix to be introduced into evidence, on the basis of which

it determined that there was an intent to include adopted children in the class "child or children". This letter was written by Mrs. Stanford on November 23, 1897, seven years before the execution of the will, in order to put on record with Dr. David Starr Jordan, president of Stanford University, the fact that neither she nor her husband had ever adopted Mrs. Stanford's niece, the daughter of her brother, Charles Lathrop. The letter discloses that Charles' wife died when this child was an infant, and before her death she had requested Mrs. Stanford to care for her. Leland Stanford, Sr., was opposed to taking the niece into their home as their own child to fill the place of their deceased son. Jennie Lathrop was therefore placed with Mrs. Stanford's sister until the time of the sister's death, and was thereafter sent to a convent boarding school until she was eighteen. Mrs. Stanford supported and educated her, and Mr. Stanford remembered her generously in his will. Mrs. Stanford stated her reasons for placing this letter on record with Stanford as follows:

"So very many unexpected and new phases in human nature have been brought to my attention, and in a way have added to my sorrows—some hearts have hardened towards me who should have been sympathetic and tender because of my dear husband's loving remembrance of them and these revelations of character have led me into a train of thought that impels me to write this letter to you that you may fully understand the relations that exist betwixt my niece Jennie L. Lathrop and myself." And in closing, "I make this explicit explanation in this letter to you that you may hold it sacred and if * * * the subject would be discussed whether or not Jennie L. Lathrop had been adopted, you can use this letter and defend me.

"I hope and pray that there will be no need to ever produce it, but I have learned by very sad experiences the greed for gain tempts beyond the ability to resist. My dear brother Charles G. Lathrop the Father has been most kind in allowing me to care and do for her as best pleased me, and he will never deviate from his love and loyalty to me, or my memory."

The letter also states that Jennie and all the children of Mrs. Stanford's brothers had been then living had been given one hundred thousand dollars in her husband's will. She expresses the opinion that she has won the love and devotion of this niece. From this letter the trial court concluded that Mrs. Stanford understood the meaning and effect of adoption, that she believed that an adopted child would have the same rights as a natural child, hence when she made a bequest to the "child or children" of her niece, Mrs. Hansen, she intended to include any children that Mrs. Hansen might adopt.

There can be no doubt but that the letter indicates that testatrix understood that an adopted child of her own would have a claim against the Stanford estate. Or, interpreted more broadly, that she understood that any adopted child would have rights in the estate of its adoptive parents. In other words, Mrs. Stanford knew something of the adoption laws, which in any case she would be presumed to know. The letter may also be said to indicate her fears that there was a need to protect Stanford University against claims of relatives.

[8] Mrs. Stanford knew that her nieces Amy Hansen and Jennie Lawton each had one young son at the time she executed her will. There were no adopted children in either of these families during Mrs. Stanford's life, and there is no evidence that Mrs. Stanford knew that either considered adopting children. Respondents admit that the will is silent on the subject of adoption, but contend that the above letter supports the finding that the testamentary intent included adopted children. They say that the rule may be true as contended for by appellant and stated in 3 Restatement of Property, Sec. 287, that "When a limitation is in favor of the 'children' of a designated person, all persons adopted by the designated person are excluded from the possible takers thereunder except when a contrary

intent of the conveyor is found from additional language or circumstances." That extrinsic evidence may be admitted to explain an ambiguity created by the language of the will, or by the fact that the testator knew that the person to whose children he made the gift had adopted or was contemplating the adoption of children, is well established. In re Estate of Pierce, 32 Cal. 2d 265, 196 P.2d 1. Respondents assume that an ambiguity exists in the will permitting the introduction of extrinsic evidence.

[9] However, no ambiguity appears as to the intent of the testatrix from the language of the will. The words are to be given their usual and ordinary construction. No ambiguity was created by external circumstances at the time the will was executed nor at Mrs. Stanford's death, for there was then a child of the blood living in both the Hansen and Lawton families. The adoption herein relied on took place more than twenty years after Mrs. Stanford's death. The general rule of construction set forth in the Restatement and in numerous other authorities is well summarized in the following language of an Ohio case, Rodgers v. Miller, 43 Ohio App. 198, 182 N.E. 654, 657:

"There is a presumption that words used in a will are used in their primary and ordinary sense. It is generally held that when a testator uses the word 'child' he means a natural child, unless the context clearly shows that he means to use the term in a sense including adopted as well as natural children. This is particularly the fact when the testator speaks, not of his own children, but of the children of other persons. 28 Ruling Case Law, p. 252, states the rule as follows:

"'There are numerous decisions to the effect that a testator who by will makes provision for his own "child or children" by that designation should be held to have included an adopted child, since he is under obligation in morals if not in law to make provision for such child. If, however, a will makes provision for a "child or children" of some other person than the testator, the adopted child of such person is not included, unless other language of the will makes it clear that it was so intended. In the absence of circumstances tending to show that the testator anticipated the adoption, or knew that it had already taken place, and therefore probably intended to treat the person adopted as a possible beneficiary, the decisions generally exclude the adopted child from the benefit of the will. A limitation in a will, to a child or children, or conditioned upon the survivorship of a child or children, is not deemed to include an adopted child, where the grantor or testator is a stranger to the adoption.'"

Undoubtedly the draftsmen of Mrs. Stanford's will were familiar with the construction to be given the terms used under the rules of interpretation then prevailing (and still generally in effect), and there is no showing that Mrs. Stanford intended to give them a broader meaning. There appears to be no California case directly in point. In re Estate of Pierce, supra, deals with an ambiguity created in a will by the use of "lawful issue" inserted in parenthesis after the word "children". The gift was made to the "children (lawful issue)" of testator's brother. [32 Cal.2d 265, 196 P.2d 3.] In this case testator knew that his brother had taken two foster children into his family. Extrinsic evidence was introduced to show that the testator had disapproved of the adoption of these children, had threatened to disinherit his brother, and the brother had promised not to adopt them. It was held that they did not inherit. The Pierce case reiterates the rule that it is the testator's intent as derived from the language of the will that must control, and when an uncertainty appears on the face of the will, or from the circumstances under which it was executed, extrinsic evidence is admitted. In the Pierce case the testator had used "lawful issue" to qualify the word "children" thereby creating an ambiguity on the face of the will. The court points out in its opinion that the adoption law of this state does not re-

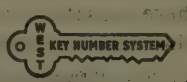
quire persons other than adoptive parents to regard adopted children as children born of such parents, and does not require them to so regard them "in the drafting of private instruments such as wills, trusts, and deeds." "The adoption statutes of this state do not purport to affect the relationship of any person other than that of the parents by blood, the adopting parents, and the child." In re Darling's Estate, 173 Cal. 221, 225, 159 P. 606, 608.

[10] We therefore conclude that adopted children were not within the testamentary intent in the gift to the "child or children of Amy Hansen", that the extrinsic evidence was erroneously admitted, and that in any event it is not reasonably subject to the inference drawn therefrom by the trial court.

[11, 12] It is our view then that the residuary legatee, appellant Stanford University, is entitled to the fund. The trial court made a finding that there was an intent to exclude the residuary legatee from all of the money placed in the trust fund for her relatives. This intent was gathered from the language "All the rest, residue and remainder of my property and estate, * * * not hereinbefore disposed of", the trial court holding that by this expression she intended that Stanford should receive only such portion of her estate as she might have overlooked or failed to dispose of in her will. The word "hereinbefore" does not show any intent to exclude the residuary legatee from gifts therein provided for which might lapse. In re Estate of Kelleher, 205 Cal. 757, 272 P. 1060, 1062, quoting from In re Estate of Upham, 127 Cal. 90, 59 P. 315, the court stated that the rule is that where a residuary bequest " 'is not circumscribed by clear expressions in the instrument, and the title of the residuary legatee is not narrowed by special words of unmistakable import, he will take whatever may fall into the residue, whether by lapse, invalid disposition, or other reason'." And in O'Connor v. Murphy, 147 Cal. 148, 81 P. 406, it is said that it must appear unequivocally that the testator intended that the residuary legatee should be thus excluded. The finding that there was any such intent to exclude is clearly unsupported. The will itself evidences Mrs. Stanford's devotion to the University and her concern that any relative might attempt to attack the will or the grants previously made by her and her husband to that institution.

In view of the foregoing the judgment is affirmed in so far as it decrees that appellant Barton is not entitled to take but said judgment is reversed as to appellant Stanford University with directions to the trial court to enter its decree in favor of Stanford University as prayed for.

DOOLING, Acting P. J., and DRAPER, J. pro tem., concur.



148 Cal.App.2d 147

Efren P. GARCIA, Plaintiff and Appellant,

v.

Dora Escobedo GARCIA and Richard G. Garcia, a minor, Defendants and Respondents.

Civ. 5533.

District Court of Appeal, Fourth District, California.

Jan. 29, 1957.

Action by former husband against his former wife and her minor son for a declaration of no paternity relationship between former husband and minor son. The Superior Court, Riverside County, O. K. Morton, J., entered judgment adverse to former husband and he appealed. The District Court of Appeal, Griffin, J., held, inter alia, that where former husband, by a property settlement agreement included in an interlocutory divorce decree agreed that during his relationship with his wife, and as a result thereof, there was born to

said parties a certain child, and he therein agreed to support said child, as between former husband and his former wife the issue of parentage of said child was determined by such divorce action and could not be raised again by former husband in the instant action.

Judgment affirmed as modified.

1. Judgment ⇐958(1)

Upon hearing of demurrer raising question of res judicata and sustaining such demurrer without leave to amend, and on hearing on motion to dismiss on the same ground, trial court was not authorized to hear and determine merits of allegations of complaint upon affidavits, and upon dismissal of such action was not authorized to enter findings on conflicting evidence as to issues raised by complaint, and the only judgment that could properly be entered was dismissal of action for reason indicated in demurrer and motion to dismiss.

2. Judgment ⇐948(2)

Generally, in absence of applicability of statutory provision to contrary, advantage of estoppel based upon prior adjudication appearing in adverse party's pleadings may be taken by demurrer, provided objection appears from face of plaintiff's pleadings, and if his pleadings do not disclose existence of matter relied on to support application of doctrine of res judicata, the objection cannot be raised by demurrer, but must be taken by plea or answer. West's Ann.Code Civ.Proc., § 597.

3. Appeal and Error ⇐1042(1)

Even if defense of res judicata should have been raised by answer instead of by demurrer on motion to dismiss, if record of former action made it clear that plaintiff could not overcome such defense, fact that such defense might not have been properly raised would not be ground for setting aside action of trial court in sustaining motion to dismiss on ground of res judicata.

4. Judgment ⇐725(1)

Generally, judgment or decree that necessarily affirms existence of any fact is conclusive on parties or their privies whenever existence of that fact is again in issue between them, not only when subject matter is the same, but also when the point comes incidentally in question in relation to different matter in same or any other court.

5. Judgment ⇐720

Even though second suit is on different cause of action, a right, question, or fact once determined in prior action must be taken as conclusively established so long as judgment in prior action remains unmodified.

6. Judgment ⇐715(1)

Generally, in order that judgment in one action may constitute an estoppel in subsequent action, it must be made to appear either on face of record or by extrinsic evidence that identical questions involved in the issues to be tried were determined in former action, and any fact or matter that was required to be established or passed on to sustain judgment is concluded by it.

7. Judgment ⇐725(1)

Matters put in issue in an action are concluded, although not expressly mentioned in the judgment in such action, if the judgment determines them by necessary implication.

8. Divorce ⇐308

Where former husband, by property settlement agreement included in an interlocutory divorce decree, agreed that during his relationship with his wife, and as a result thereof, there was born to said parties a certain child, and he therein agreed to support said child, as between former husband and his former wife issue of parentage of said child was determined by such divorce action and could not be raised again by former husband in action for declaration of no paternity relationship between him and said child.

9. Judgment ⇐707

A party asserting plea of res judicata does not necessarily have to be a party, or in privity with a party, to prior litigation.

10. Divorce ⇐308

Where a divorce action between former husband and former wife determined question of paternity of a child of former wife, such child was authorized to assert defense of res judicata against former husband in an action by him for a declaration that there was no paternity relationship between him and such child, even though such child was not a party to the divorce action between his mother and former husband.

Willard H. Winder, Riverside, for appellant.

Alexander W. Staples, Indio, for respondents.

GRIFFIN, Justice.

Plaintiff and appellant, on July 27, 1955, brought this action under Civil Code Section 231 against his wife Dora and her minor son Richard, aged about 3½ years, to declare that there is no paternity relationship between the plaintiff and defendant Richard. He alleges that his marriage to the mother was on September 9, 1950, and soon thereafter they separated; that on October 12, 1951, a child was born to her and that the mother claims plaintiff to be his father. Upon information and belief he denies her claim and seeks judgment for a determination of the fact. Defendant mother and the minor son, appearing through her as his guardian ad litem, demurred to the complaint, and besides other grounds, alleged therein that this cause of action had been adjudicated in a certain divorce case in Riverside County in which plaintiff appeared by his attorney and there executed a property settlement agreement approved in and made a part of the interlocutory decree, whereby plaintiff acknowledged parentage of the named defendant minor. Thereafter, defendants moved the court to dismiss this proceeding upon the grounds of res judicata of the subject matter. Certain affidavits were filed and the record of the divorce action (No. 57439) was incorporated by reference in support of the motion. In the mother's affidavit she recites that on "April 3, 1951," she filed a complaint for divorce against plaintiff in this action upon the ground of cruelty, and that she there alleged she was pregnant as a result of her marriage to this plaintiff, and prayed that he support and maintain her and that upon the birth of the child he be ordered to pay such additional support for it as the court deemed proper; that this plaintiff was ordered to and did appear by attorney and in person in answer to an order to show cause, testified and was ordered to pay $7 per week for his wife's support; that he failed to make the payments and was cited for contempt; that on no occasion did plaintiff in this action ever question the paternity of said child; that on April 18, 1952, after numerous conferences between the parties and their attorneys, a property settlement agreement was entered into; that these divorce proceedings were abandoned on account of her questioned legal residence and a similar divorce proceeding was instituted in Riverside County (case No. 57439). It appears therefrom that she alleged, for statistical purposes, certain facts including: "V. Number of children issue of said marriage * * * One (1) a son, Richard Guadalupe Garcia, of the age of one year and eight months." It then alleges the execution of the property settlement agreement referred to and asked that it be approved and made a part of the decree. This agreement provides in part that the parties were married on September 9, 1950, and ever since have been husband and wife and "during such relationship and as a result thereof there has been born to said parties, one child, namely: Richard Garcia, of the age of six (6) months"; and that the parties, by this agreement, desire to provide for his care and custody and agree that the mother have such custody, subject to the right of reasonable visitation on the part of the plaintiff here and he agrees to pay $7 per week for his care. He also agreed to pay certain hospital and doctor bills contracted by reason of the birth of said child, and each agreed not

to remove said child out of the jurisdiction of the court. Through their respective attorneys it was stipulated that the divorce case might be heard as a default. An interlocutory judgment was entered according to the agreement in respect to the child and it was approved and made a part of the decree as though set forth therein in haec verba. Accordingly it became merged in the judgment. Arthur v. Arthur, 147 Cal. App.2d 252, 305 P.2d 171; Foust v. Foust, 47 Cal.2d 121, 302 P.2d 11; Flynn v. Flynn, 42 Cal.2d 55, 58, 265 P.2d 865. One year thereafter plaintiff here applied for and obtained a final decree upon filing his affidavit that he had complied with all of the terms of the interlocutory decree. On October 14, 1955, he was ordered before that court on contempt proceedings for failure to make delinquent payments.

In the instant action he filed opposition to the motion to dismiss his complaint and alleged generally that he did not believe he was the father of the child and at the suggestion of the trial judge that he would also determine that issue, he produced certain additional affidavits of relatives and others that during the separation of the parties they visited with each other on week-ends, in the home of relatives, but they verily believed the parties did not have the opportunity of having sexual intercourse with each other. The wife claimed otherwise and filed supporting affidavits. Plaintiff here also alleged that in the Los Angeles divorce action he told his then attorney to contest the question of the paternity of the child but he failed to do so and as a compromise he signed the property settlement agreement indicated because he wanted to remarry at the earliest date possible. On the conclusion of this hearing, based on these affidavits and the record in the divorce proceeding, the trial judge granted the motion to dismiss the action, sustained the demurrer without leave to amend, and ordered counsel for defendants to prepare full findings and judgment. In these findings it is found, as true, about all of the facts related in the mother's affidavit and that said child was born as the lawful issue of said parties; that the facts related in the affidavits produced by plaintiff were untrue; that plaintiff is the natural father of said child; that the former divorce action (No. 57439) adjudicated the issues here presented, and accordingly operated as res judicata of those issues. Judgment was entered accordingly.

[1] It is plaintiff's contention on this appeal that the trial court was not authorized, under the pleadings as indicated, to pass upon the question and enter a decree that plaintiff here was the natural father of Richard G. Garcia. We agree with this claim. Upon the hearing of a demurrer raising the question of res judicata and sustaining the demurrer without leave to amend, and on a hearing on a motion to dismiss on the same ground, the court was not authorized to hear and determine the merits of the allegations of the complaint upon affidavits. Upon a dismissal of the action it was not authorized to enter minute findings on the conflicting evidence as to the parentage of the child. The only judgment that could properly be entered was a dismissal of the action for the reason indicated in the demurrer and on the motion to dismiss.

[2, 3] It is next contended that the court was not authorized to hear and determine the motion to dismiss before an answer was filed, and was not authorized to sustain the demurrer without leave to amend. It appears to be the general rule that in the absence of the applicability of a statutory provision to the contrary, advantage of an estoppel based upon a prior adjudication appearing in the adverse party's pleadings, may be taken by demurrer, provided, of course, the objection appears from the face of the plaintiff's pleadings; if his pleadings do not disclose the existence of the matter relied on to support the application of the doctrine of res judicata, the objection cannot be raised by demurrer, but must be taken by plea or answer. 30 Am.Jur. p. 989, Sec. 264; 15 Cal. Jur. p. 208, Sec. 230, and cases collected; Willson v. Security-First National Bank,

21 Cal.2d 705, 710, 134 P.2d 800; Bennett v. Hibernia Bank, 47 Cal.2d 540, 305 P.2d 20; Stratford Irrigation District v. Empire Water Co., 44 Cal.App.2d 61, 111 P.2d 957; Sec. 597, Code Civ.Proc.

A somewhat different rule has been applied on a motion to dismiss the action on the ground of res judicata. Cunha v. Anglo California Nat. Bank, 34 Cal.App.2d 383, 93 P.2d 572; Best v. Fitzgerald, 81 Cal.App.2d 965, 185 P.2d 377; McKenna v. Elliott & Horne Co., 118 Cal.App.2d 551, 258 P.2d 528; Olwell v. Hopkins, 28 Cal. 2d 147, 168 P.2d 972. In the latter case there was a former action between the same parties. A new complaint was filed based upon the same factual background. A demurrer and motion to dismiss was filed alleging res judicata because in the former action it was determined that the brokerage company there involved had not qualified to do business in the State of California and accordingly the contract involved was void. It was there contended that the defense of res judicata could not be raised by demurrer because the facts alleged in the complaint were not sufficient to support the defense. The complaint there did allege facts in reference to the former action. The reviewing court assumed that the defendants should have raised the defense of res judicata by answer instead of by demurrer or motion to dismiss, but did consider the plea because it was held that the record of the former action made it clear that plaintiff could not overcome that defense.

[4–8] Assuming therefore that the proceedings here taken come within the exception noted we will proceed to determine whether the order dismissing the action as to both defendants may be supported under the theory of res judicata. As between the plaintiff and his wife individually, we conclude that the judgment of dismissal on this ground was proper. The trial court properly had before it for consideration the files in action No. 57439. Olwell v. Hopkins, supra, 28 Cal.2d at page 153, 168 P.2d 972. It properly considered extrinsic evidence in determining the issues adjudicated in the former action. McKenna v. Elliott & Horne Co., supra; Best v. Fitzgerald, supra; County of Sonoma v. De Winton, 105 Cal.App. 166, 287 P. 121; Garwood v. Garwood, 29 Cal. 514. It is a general rule that a judgment or decree that necessarily affirms the existence of any fact is conclusive on the parties or their privies whenever the existence of that fact is again in issue between them, not only when the subject matter is the same but also when the point comes incidentally in question in relation to a different matter, in the same or any other court. Even though a second suit is on a different cause of action, a right, question, or fact once determined must be taken as conclusively established so long as the judgment in the first action remains unmodified. Where the circumstances are such that a judgment cannot be relied on as a bar, but it is pleaded as an estoppel as to some matter coming again in question in a subsequent action on a different claim or cause of action, there may be difficulty in deciding whether the point was directly in issue in the prior action. Generally, in order that a judgment in one action may constitute an estoppel in a subsequent action, it must be made to appear either on the face of the record or by extrinsic evidence, that the identical questions invoved in the issues to be tried were determined in the former action. Any fact or matter that was required to be established or passed on to sustain the judgment is concluded by it. Matters put in issue are concluded although not expressly mentioned in the judgment, if it determines them by necessary implication. 29 Cal.Jur.2d pp. 197–198, secs. 237 and 238; Papineau v. Security-First National Bank, 45 Cal.App. 2d 690, 114 P.2d 629; Scarbourough v. Briggs, 81 Cal.App.2d 161, 183 P.2d 683. It has been declared that even where the causes of action were different, the prior determination of a litigated issue is conclusive in a subsequent suit not only as to the issue itself but also as to every matter that might have been urged for or against that issue in its determination. Sutphin v. Speik, 15 Cal.2d 195, 99 P.2d 652, 101

P.2d 497. There are some limitations to this rule. 29 Cal.Jur.2d p. 204, sec. 242. In the instant action it was alleged in the complaint that there was a minor child, the issue of said marriage, naming him. The plaintiff, by his property settlement agreement which was included in the interlocutory decree, agreed that during their relationship as husband and wife "and as a result thereof" there was born to said parties one child, naming him. He therein agreed to support said child. As between the plaintiff here and defendant wife the trial court was justified in holding that the issue of the parentage of said child was determined by that action.

[9, 10] A different question arises as to the effect of this judgment as between the plaintiff father and the defendant minor son who was not a party to that action. It is argued by the plaintiff that the divorce action was between different parties; that the minor child was not a party to it and accordingly that judgment operated only as an estoppel between the parties there named, citing 29 Cal.Jur.2d p. 235, sec. 265. It is further argued that it is a recognized principle of the law of estoppel that the judgment must be mutual and binding on both parties, citing People v. Kovacevich, 19 Cal.App.2d 335, 65 P.2d 807; and Gonzales v. Pacific Greyhound Lines, 34 Cal.2d 749, 214 P.2d 809. The latter was an action by a minor for the wrongful death of the father. The principal issue was that of heirship. A previous divorce was sought by the father against the mother claiming that he was not the father of the child. An interlocutory decree of divorce was entered so finding. In the death action the Supreme Court held this interlocutory decree was not admissible to show that plaintiff was not the son of the deceased father because it was established that he was born in lawful wedlock, etc., and Pacific Greyhound Lines could not, under section 195 of the Civil Code, question his paternity. It was also held that the decree stood as a final adjudication between the husband and wife on the issues there presented, but since the boy was not a party to that litigation he was not bound by the determination therein of his status. See also Baratti v. Baratti, 109 Cal.App.2d 917, 923, 242 P.2d 22. There are authorities holding that under the doctrine of res judicata or estoppel by judgment the adjudication must be *mutual* and *reciprocal* and between the same parties. People ex rel. Drew v. Rodgers, 118 Cal. 393, 46 P. 740, 50 P. 668. This and like authorities have been overruled and the rule in reference to mutualities has been modified as indicated in Bernhard v. Bank of America, 19 Cal.2d 807, 122 P.2d 892, 894. This subject was fully discussed in that case and it was stated that the criteria for determining who may assert a plea of res judicata differ fundamentally from the criteria for determining against whom a plea of res judicata may be asserted; that the requirements of due process of law forbid the assertion of a plea of res judicata against a party unless he was bound by the earlier litigation in which the matter was decided; that he is bound by that litigation only if he has been a party thereto or in privity with such a party; that there is no compelling reason for requiring that the party asserting the plea of res judicata *"must have been a* party", or in privity with a party, *"to the earlier litigation."* (Italics ours.) It is then stated that no satisfactory rationalization has been advanced for the requirement of mutuality; that just why a party who was not bound by a previous action should be precluded from asserting it as res judicata against a party who was bound by it is difficult to comprehend; that many courts have abandoned the requirement of mutuality and confined the requirement of privity to the party against whom the plea of res judicata is asserted; that the courts of most jurisdictions have in fact accomplished the same result by recognizing a broad exception to the requirement of mutuality and privity, namely, that they are not necessary where the liability of the defendant asserting the plea of res judicata is dependent upon or derived from liability of one who was exonerated in an earlier suit brought by the same plaintiff upon the same facts. (Cit-

ing cases.) It then said the cases justify this exception on the ground that it would be unjust to permit one who has had his day in court to reopen identical issues by merely switching adversaries. It then set forth the essential requirements in determining the validity of a plea of res judicata. Defendants here have met those requirements. It then overruled certain cases inconsistent with that opinion. This holding is most appropriate and proper in the instant case, otherwise, if defendant minor should be here compelled to go to trial on the issues presented by the complaint, it might result in a most incongruous judgment if plaintiff should prevail. The conclusion reached in that case and subsequent authority hereinafter cited to the effect that a party asserting the plea of res judicata does not necessarily have to be a party, or in privity with a party to the earlier litigation, disposes of the issue here presented in reference to the minor child. He was authorized to assert this special defense against plaintiff, who was a party to the divorce action determining the question of the paternity of the child. Barker v. Carver, 144 Cal.App.2d 487, 301 P.2d 307; Hardware Mutual Ins. Co. v. Valentine, 119 Cal.App.2d 125, 259 P.2d 70. The holding in Gonzales v. Pacific Greyhound Lines, supra, relied upon by plaintiff, is distinguishable. There the doctrine of res judicata was attempted to be applied against the minor, not a party to the divorce action. The judgment of dismissal as to this defendant was therefore proper.

The portion of the findings and judgment holding that plaintiff is the father of the minor child, being based upon certain conflicting affidavits relating to his paternity and which were wrongfully considered by the trial court in a hearing on a demurrer and motion to dismiss, cannot be supported since the action was not at issue on the merits and was dismissed. It should be stricken.

The portion of the judgment dismissing the action as to both defendants for the reasons indicated should be affirmed. The remaining portion of the judgment is stricken. Judgment affirmed as modified. Defendants to recover costs on appeal.

BARNARD, P. J., and MUSSELL, J., concur.



147 Cal.App.2d 686

In re SMITH'S GUARDIANSHIP.

Application of Ellen HIGHTOWER to be Appointed Guardian of the Person and Estate of Susan Carol Smith, a Minor.

Civ. 17262.

District Court of Appeal, First District, Division 1, California.

Jan. 21, 1956.

Proceeding in the matter of the application for appointment as guardian of a minor. From a decree of the Superior Court, County of Santa Clara, M. G. Del Mutolo, J., the minor's mother appealed. The District Court of Appeal, Peters, P. J., held, inter alia that evidence including showing that girl's mother for several years had engaged in extra-marital affairs, that her moral standards were low, that mother had been indicted and acquitted of the murder of her husband who was the father of the girl, and that mother admitted to some sort of relationship with confessed murderer of her husband supported trial court's finding that mother was unfit to have custody of the girl and warranted appointment of girl's paternal aunt as the guardian.

Decree affirmed.

1. Guardian and Ward ⇐8
States ⇐5½

Notwithstanding provision of Probate Code conferring jurisdiction to appoint

a guardian upon county where minor "resides or is temporarily domiciled", California courts have jurisdiction to appoint a guardian whenever best interests of minor require it, and certainly where child is physically present, regardless of where he may be technically domiciled, and although such rule may result in two or more states having concurrent jurisdiction over the minor, the federal Constitution does not prohibit such a rule. West's Ann.Prob.Code, § 1440.

2. Guardian and Ward ⇐8

Where child was physically present in Santa Clara County, child's aunt seeking to be appointed as guardian resided there, and child's mother who contested the application made a general appearance such facts gave the Superior Court of Santa Clara County jurisdiction to appoint a guardian for the child. West's Ann.Prob.Code, §§ 2, 1440.

3. Guardian and Ward ⇐8, 13(1)

The purpose of guardianship proceedings is to protect and promote the best interests of the child, and such purpose will not be permitted to be frustrated by raising of technical jurisdictional objections so that for jurisdictional purposes how a child came to be in California is relatively unimportant the fact being that child is physically present there. West's Ann.Prob.Code, §§ 2, 1440.

4. Guardian and Ward ⇐10

The best interests of a child require that the parent be its guardian unless that parent is unfit. West's Ann.Prob. Code, §§ 1406, 1407, 1409.

5. Courts ⇐91(1)

The District Court of Appeal is bound by decisions of the Supreme Court.

6. Divorce ⇐298(1)
Guardian and Ward ⇐10

In either guardianship proceedings or custody proceedings in a divorce action, parents of a legitimate child have preference over a nonparent and custody cannot be given to a nonparent unless the parent is found unfit. West's Ann.Prob. Code, §§ 1406, 1407, 1409.

7. Guardian and Ward ⇐10, 13(4)

In guardianship proceedings the parent is presumed to be fit to have custody of child, and burden is on nonparent to establish the contrary, and fitness is to be determined as of time of the hearing. West's Ann.Prob.Code, §§ 1406, 1407, 1409.

8. Guardian and Ward ⇐13(4)

In proceeding for appointment of nonparent as guardian of child, trial court has wide discretion in passing on admissibility of evidence relating to issue of present fitness of parent, and may allow evidence to be introduced relating to past conduct of parent and of nonparent for a reasonable period prior to the hearing. West's Ann.Prob.Code, §§ 1406, 1407, 1409.

9. Parent and Child ⇐2(3.3)

Merely because the nonparent is more able than the parent to provide financial, educational or social benefits does not render the parent unfit to have custody of child, but unfitness must directly relate to the relationship of parent and child. West's Ann.Prob.Code, §§ 1406, 1407, 1409.

10. Parent and Child ⇐2(4)

The fitness of parent to have custody of child is a question of fact, and determination of trial court that a parent is unfit will not be set aside in absence of a clear showing that the evidence does not support the finding.

11. Parent and Child ⇐2(4)

The burden on one claiming unfitness of a parent to have custody of child is a heavy one.

12. Guardian and Ward ⇐13(4)

Evidence including showing that girl's mother for several years had engaged in extra-marital affairs, that her moral standards were low, that mother had been indicted and acquitted of the murder of her husband who was the father of the girl, and that mother admitted to some sort of relationship with confessed murderer of her husband supported trial

court's finding that mother was unfit to have custody of the girl and warranted appointment of girl's paternal aunt as the guardian. West's Ann.Prob.Code, §§ 1406, 1407, 1409.

David L. Spaulding, West Los Angeles, Bruce Spaulding, Portland, Or., Rankin, Oneal, Luckhardt, Center & Hall, San Jose, for appellant.

Burnett, Burnett & Somers, San Jose, for respondent.

PETERS, Presiding Justice.

Ellen Hightower, a resident of Santa Clara County, petitioned the Superior Court of that county to be appointed the guardian of the person and estate of her niece, Susan Carol Smith, a minor, who was born April 28, 1952. The mother of Susan, Marjorie Smith, a resident of Oregon, opposed the petition. Based on findings that it was necessary and convenient to appoint a guardian, that Mrs. Hightower was a fit and proper person to be appointed, and that Mrs. Smith was "unfit to have the care, custody and control" of the child, the court entered its order appointing Mrs. Hightower the guardian of the person and estate of Susan. From this order, the mother of the child appeals.

Mrs. Hightower is the aunt of Susan, being the sister of Susan's deceased father, Kermit Smith. The trial court, in its opinion, had the following to say about Mrs. Hightower:

"The Petitioner herein, Mrs. Hightower, is a person of unquestioned integrity with good training and education. It was stipulated in open court by both parties that her home and family is of the highest type and that Susan would receive the best of care and attention * * *.

"In view of the above and of other evidence introduced in the case, there is no question in the Court's mind that Susan will always have a fine home with the Hightowers; receive a good education; be amply provided for and grow up to be a decent and respectable woman."

These findings are not challenged on this appeal. The two main contentions of appellant are that the Superior Court of Santa Clara County had no jurisdiction to appoint a guardian for Susan, and that there is no substantial evidence to support the finding that appellant, the mother of the child "is not a fit and proper person to have the care, custody and control of said child."

In support of her contention that the California courts have no jurisdiction of this guardianship proceeding, the appellant charges that the Hightowers brought Susan to California without the mother's consent; that the Hightowers were in effect guilty of child stealing; that the child never acquired a lawful residence in California, and that such residence is a condition precedent to the exercise of jurisdiction in this case.

Susan was brought to California under the following circumstances: In April of 1955 she was living in Oregon with her mother, the appellant, and her father, Kermit Smith. On April 21, 1955, Mr. Smith was murdered when a bomb exploded as he was getting into his automobile. One Lawrence Wolf confessed to the crime, and is now in jail in Oregon. Wolf implicated the appellant in the crime and she was arrested and charged with the murder of her husband. She was tried for the offense and acquitted by a 10–2 verdict, which, it is agreed, is an acquittal under Oregon law.

Mrs. Hightower, the respondent, is the sister of Kermit Smith. Upon hearing of her brother's murder, she proceeded to Oregon, and arrived shortly after appellant had been arrested. Susan had been first taken to a neighbor's house, and then an aunt of appellant arrived and took Susan to her house. Shortly thereafter Mr. Hightower called on the aunt and took Susan with him. Neither appellant's aunt, nor appellant's grandmother, also an Oregon resident, volunteered to care for Susan.

No one objected to the Hightowers taking Susan to California. The child was kept by the Hightowers at their home in Santa Clara County until November of 1955, when Mrs. Hightower instituted the present proceeding seeking appointment as the guardian of Susan. In this petition she alleged that there is a conflict of interest between Mrs. Smith and Susan; that she is informed and believes that Mrs. Smith killed her husband; that Mrs. Smith is unfit to be guardian of the child; that neither she nor her husband is interested in obtaining any funds from the estate of the child, and that she waives any rights thereto and to any support money from any person. Mrs. Smith made a general appearance in the proceeding, generally denying the allegations of the petition, and alleging that respondent had wrongfully taken the child from Oregon against appellant's will, and that she, appellant, was a fit and proper person to have the care, custody and control of Susan.

It is appellant's contention that Susan was "wrongfully" brought to California; that the only basis of jurisdiction over the guardianship proceedings is the physical presence of the child in this state; and that physical presence alone is not sufficient to confer jurisdiction. It is contended that under Oregon law the child was not in need of care when respondent removed her from that state and that, moreover, Oregon law provided a means for giving such care if it had been needed; that the child had not been "abandoned"; that the taking of the child from Oregon, under the circumstances, amounted to child stealing; that the finding of the trial court that under the circumstances then existing "it was not only the proper thing to do, but the dutiful thing to do" to take Susan to California is not supported by the evidence; that, under such circumstances, the California courts had no jurisdiction to appoint a guardian of the child. The contention is that the California courts have no jurisdiction over a guardianship proceeding where neither the child nor its parents are domiciled in this state. This, apparently, is the rule of the Restatement. (§ 145 of the Restatement of Conflict of Laws.)

[1] California has not followed the mechanical rule of the Restatement. Section 1440 of the Probate Code confers jurisdiction to appoint a guardian upon the county where the minor "resides or is temporarily domiciled." In spite of this language, the California cases have held that courts in this state have jurisdiction to appoint a guardian whenever the best interests of the minor require it, and certainly where the child is physically present, regardless of where he may be technically domiciled. Although such a rule may result in two or more states having concurrent jurisdiction over the minor, the federal Constitution does not prohibit such a rule. May v. Anderson, 345 U.S. 528, 73 S.Ct. 840, 97 L.Ed. 1221; see discussion 1 Survey of California Law 99; 3 Survey of California Law 143; see also Stumberg, The Status of Children in the Conflict of Laws, 8 Univ. of Chicago L.Rev. 42. Thus, contrary to appellant's contention, the jurisdictional question involves solely the proper interpretation of California law.

[2] In the instant case the child was physically present in Santa Clara County. The petitioning party, the respondent, resides there. The contesting party, the appellant, made a general appearance, and contested the petition. Thus, all interested parties were before the Santa Clara County court. There are many cases holding or implying that these facts are sufficient to confer jurisdiction on the California courts.

The pertinent code section, as already pointed out, is section 1440 of the Probate Code. So far as pertinent here, it provides: "When it appears necessary or convenient, the superior court of the county in which a minor resides or is temporarily domiciled, or in which a nonresident minor has estate, may appoint a guardian for his person and estate, or person or estate * * *." This section was derived from section 1747 of the Code of Civil Procedure. That section contained the language "who

are inhabitants or residents of the county." Under the Code of Civil Procedure section the cases uniformly held that physical presence in the county was all that was required to confer jurisdiction in such proceeding. Ricci v. Superior Court, 107 Cal. App. 395, 290 P. 517; In re Green, 67 Cal. App. 504, 226 P. 76.

Although the language in section 1440 of the Probate Code differs from that in old section 1747 of the Code of Civil Procedure, section 2 of the Probate Code provides that the "provisions of this code, so far as they are substantially the same as existing statutes, must be construed as continuations thereof, and not as new enactments." Apparently, with this admonition in mind, the courts have not limited the Probate Code section, but have interpreted it as had been interpreted the former Code of Civil Procedure section. Thus, in Re Guardianship of Phillips, 60 Cal.App.2d 832, 141 P.2d 773, a mother brought her child, in violation of the custody order of another county, into the county where she filed the guardianship petition some eight days after her arrival. The court held that former section 1747 and present section 1440 should be interpreted in the same fashion, and that if the child were an "inhabitant" of the county seeking to exert jurisdiction that was sufficient. The court expressly rejected the argument that such jurisdiction could be defeated because the child was present in the county in violation of an interlocutory custody decree. See also In re Guardianship of Lee, 123 Cal.App.2d 882, 267 P.2d 847.

In Greene v. Superior Court, 37 Cal.2d 307, 312, 231 P.2d 821, 823, it was stated that "If the child is present or domiciled in California it is essential for the protection of his welfare that the courts of this state have jurisdiction over his custody." In Titcomb v. Superior Court, 220 Cal. 34, 29 P.2d 206, 210, the court equated the phrase "resides or is temporarily domiciled" in section 1440 of the Probate Code, with "resides or inhabits" in old section 1747 of the Code of Civil Procedure, and also referred to the "inherent jurisdiction" of courts in this state to inquire into the custody of children present in this state. See also In re Guardianship of Cameron, 66 Cal.App.2d 884, 153 P.2d 385. There is also pertinent language in Sampsell v. Superior Court, 32 Cal.2d 763, 197 P.2d 739. In that case a husband-father sought custody of his child in Los Angeles County. The wife-mother was in Nevada with the child establishing her "domicile" for purposes of divorce. Thus, the child was technically domiciled in Los Angeles County, but physically outside the state. The Supreme Court limited the application of certain prior cases, and concluded: "It is a sufficient basis for jurisdiction that the state 'has a substantial interest in the welfare of the child or in the preservation of the family unit of which he is a part * * * and this jurisdiction may exist in two or more states at the same time.' (Stansbury, 10 Law and Contemp. Prob. supra at 831.)" 32 Cal.2d at page 780, 197 P.2d at page 750.

Certain language in Lerner v. Superior Court, 38 Cal.2d 676, 242 P.2d 321, is also pertinent. There, the Supreme Court had the following to say, 38 Cal.2d at page 681, 242 P.2d at page 324: "Although it may be assumed that the California decree would receive the same respect in other states that foreign custody decrees receive in our courts * * *, the physical presence of the child would give the foreign state jurisdiction to decide for itself what action would be in his best interests."

Several of the cited cases deal with custody questions rather than guardianship, but the Supreme Court has ruled that the two are substantially similar and should be, if possible, governed by the same rules. Titcomb v. Superior Court, 220 Cal. 34, 41, 29 P.2d 206.

[3] From the above cases it is apparent that the courts of this state have adopted the common sense rule that the purpose of guardianship proceedings is to protect and promote the best interest of the child, and will not permit that purpose to be frustrated by the raising of technical jurisdictional

objections. Thus, so far as jurisdiction is concerned, how the child came to be in Santa Clara County is relatively unimportant. The fact is, that the child is physically present there. The only real jurisdictional question is, not how the child came to be within the county, but does the best interests of the child require that a guardian be appointed?

In passing on this question the law that is to be applied should be mentioned before the facts are discussed. The statutory guides are to be found in several sections of the Probate Code.

Section 1406 provides, in part: "In appointing a general guardian of a minor, the court is to be guided by what appears to be for the best interest of the child in respect to its temporal and mental and moral welfare * * *."

Section 1407 provides, in part: "Of persons equally entitled in other respects to the guardianship of a minor, preference is to be given as follows:

"(1) To a parent; * * *

"(4) To a relative * * *."

Section 1409 provides, in part: "A parent who knowingly or wilfully abandons or, having the ability so to do, fails to maintain his minor child under fourteen years of age, forfeits all right to the guardianship of such child * * *."

[4–6] A literal reading of these sections would tend to indicate that it was the legislative intent that the best interests of the child should be the controlling factor, and that the right of a parent to be appointed only comes into existence when the parent is "equally entitled" to the guardianship with the contending person. But the cases have not so held. They have held that the best interests of the child require that the parent be its guardian unless that parent is unfit. See generally, 2 Armstrong, Family Law, 993; 42 Cal.L. Rev. 514; 33 Cal.L.Rev. 306; 13 Cal.L. Rev. 54; In re Campbell's Estate, 130 Cal. 380, 62 P. 613; Stever v. Stever, 6 Cal.2d 166, 56 P.2d 1229; Roche v. Roche, 25 Cal. 2d 141, 152 P.2d 999; In re Guardianship of Smith, 42 Cal.2d 91, 265 P.2d 888, 37 A.L.R.2d 86. In the Campbell case, supra, which is one of the leading cases establishing the "parental right" doctrine, the Supreme Court stated that the parent has a "natural right" to the care and custody of his child and that the code provisions "are to be regarded as but a re-expression of the principles of the common law governing the subject." 130 Cal. at page 382, 62 P. at page 614. But as early as 1917 the Supreme Court began to recognize a "modern trend" to "regard as of primary importance the welfare of the minor himself" and followed the Campbell case rule with some reluctance. In re Mathews' Estate, 174 Cal. 679, 683, 164 P. 8, 9. But in spite of some vigorous dissents, see Roche v. Roche, 25 Cal.2d 141, 144, 152 P.2d 999; Stewart v. Stewart, 41 Cal.2d 447, 453, 260 P.2d 44; In re Guardianship of Kentera, 41 Cal.2d 639, 645, 262 P.2d 317; In re Guardianship of Smith, 42 Cal.2d 91, 98, 265 P. 2d 888, 37 A.L.R.2d 867, the majority of the Supreme Court still follow the "parental right" doctrine of the Campbell case. As an intermediate court we are, of course, bound by the decisions of the Supreme Court. Therefore, we accept the rule as stated in one of the several opinions in Re Guardianship of Smith, 42 Cal.2d 91, at page 92, 265 P.2d 888, at page 889, as follows: "It is settled in this state that in either guardianship proceedings or custody proceedings in a divorce action, the parents of a legitimate child have preference over a non-parent and the custody shall not be given to a non-parent unless the parent is found unfit."

[7, 8] In such proceedings the parent is presumed to be fit, and the burden is on the nonparent to establish the contrary. Stewart v. Stewart, 41 Cal.2d 447, 260 P.2d 44. Fitness is to be determined as of the time of the hearing. Prouty v. Prouty, 16 Cal.2d 190, 105 P.2d 295; In re Green, 192 Cal. 714, 221 P. 903; Matter of Forrester, 162 Cal. 493, 123 P. 283; Ashwell v. Ashwell, 135 Cal.App.2d 211, 286 P.2d 983. But the trial court has wide discretion in passing on the admissibility of evidence

relating to the issue of present fitness, and may allow evidence to be introduced relating to the past conduct of the parent and of the nonparent for a reasonable period prior to the hearing. Prouty v. Prouty, 16 Cal.2d 190, 105 P.2d 295; In re Hawkins, 183 Cal. 568, 192 P. 30; In re Estate of Bedford, 158 Cal. 145, 110 P. 302; In re Guardianship of Casad, 106 Cal.App.2d 134, 234 P.2d 647; In re Guardianship of Jones, 86 Cal.App.2d 35, 194 P.2d 141.

[9] Of course, the real issue in such cases is what is meant by the words "fit" or "unfit." It is the rule, and properly so, that merely because the nonparent is more able than the parent to provide financial, educational or social benefits does not render the parent unfit. Stewart v. Stewart, 41 Cal.2d 447, 260 P.2d 44. The unfitness must directly relate to the relationship of parent and child.

[10, 11] Fitness is, of course, a question of fact, and the determination of the trial court that a parent is unfit will not be set aside in the absence of a clear showing that the evidence does not support the finding. In re Estate of Bedford, 158 Cal. 145, 110 P. 302; In re Guardianship of Lewis, 137 Cal. 682, 70 P. 926. The burden on the one claiming unfitness of a parent is a heavy one. In Matter of Galleher, 2 Cal.App. 364, 370, 84 P. 352, 354, the rule is stated as follows: "In examining the evidence in this case we have not overlooked the rule where there is a conflict in the evidence, or where different conclusions may be fairly drawn from the evidence, the appellate court will not interfere with the action of the trial court. But we have considered it in the light of the rule that a father is *prima facie* presumed to be competent to have the care and custody of his child, and can only be deprived of his right by an affirmative showing that he is incompetent. He is not shown to be incompetent by proof that he has some faults, or that he has not been or is not an ideal parent. There must be such a showing as to make it appear that he will probably fail in a substantial degree to discharge his duty toward his child."

None of the California cases has made or attempted to make a clear-cut definition of "unfitness," applicable to all guardianship or custody cases. See In re Guardianship of Willis, 123 Cal.App.2d 446, at page 450, 266 P.2d 944, at page 946; concurring opinion of Justice Traynor in Re Guardianship of Smith, 42 Cal.2d 91, at page 94, 265 P.2d 888, at page 891. Because human relationships and human conduct are so variable and complex it probably is impossible, and certainly undesirable, to state or to try to state a fixed formula applicable to all cases.

It is impractical in the confines of this opinion to discuss all of the cases where the subject of the sufficiency of the evidence to sustain a finding of fitness or unfitness has been discussed. A few leading cases will be mentioned.

There are many cases where the finding of parental unfitness has been sustained on appeal. Most of these involve immorality of the parent, or neglect and ill treatment of the children by the parent. But not all of the cases are of this nature.

In Re Guardianship of Shannon, 218 Cal. 490, 23 P.2d 1020, the parents of the two minor children were divorced, the decree awarding the custody to each parent for six months of the year. The father remarried, and the two children lived with him and his new wife for five years. Then the father was killed. The stepmother petitioned to be appointed guardian of the two children. The mother cross-petitioned. The trial court, based on a finding of unfitness of the mother, appointed the stepmother guardian. The mother of the children had remarried and her new husband agreed to furnish a home for the children. The Supreme Court emphasized the facts showing that it would be for the best interests of the children not to take them from the home where they had lived for five years. There was no evidence of immorality on the part of the mother, or of any bad relationships with her children. The

only facts referred to in the opinion in connection with the finding of unfitness were that the new husband of the mother, although he had agreed to support the children, would be under no legal obligation to do so, and that he intended to reside in Canada. The court pointed out that this would remove the children from the jurisdiction of the California court.

In the case of In re Hawkins, 183 Cal. 568, 192 P. 30, the contest was between the maternal grandfather and the father of a five-year old child. The mother was divorced from the father when the child was four years old, and was awarded custody. A year later the mother died, and the maternal grandfather took the child and immediately applied to be appointed her guardian. The father contested the petition. The trial court found that the father was unfit, and this finding was held to be supported by the evidence. The evidence relied upon was to the effect that the father had mistreated the mother prior to their divorce, and had shown little interest in the child; that prior to the divorce, which was granted in Arizona, the husband had illicit relations with an unmarried woman whom he subsequently married; that in Arizona this woman had an unsavory reputation and was reputed to be a prostitute; that the father drank to excess; that he never wrote to or visited the child after the divorce. The father and his new wife moved to New York after the marriage, and the evidence was uncontroverted that in New York they had good reputations. Thus, their reputations at the time of the hearing were good. Nevertheless, the court held the finding of unfitness was supported by the evidence of the father's past misdeeds.

The case of In re Imperatrice's Guardianship, 182 Cal. 355, 188 P. 48, contains some interesting language. There the contest was between the mother of three children, the father being dead, and a stranger in blood. The mother had been committed to a state hospital, where she stayed a year, and was then restored to capacity. After being so restored, the court granted the stranger's petition to be appointed guardian, finding the mother to be unfit. There was evidence that prior to her commitment the mother had neglected the children. In upholding the trial court's action, the Supreme Court stated, 182 Cal. at page 358, 188 P. at page 50: "And while primarily the parents of a child have the right, by nature and statutory enactment, to its custody, which right should be freely recognized in the absence of compelling reasons for its disregard, yet whenever conditions are shown to be such, by reason of the mental and moral limitations or delinquency of parents, that to allow the child to continue in their custody would be to endanger its permanent welfare, this right of the parent must give way, its preservation being of less importance than the health, safety, morals, and general welfare of the child."

There are also many cases which, in upholding a finding of unfitness, have emphasized that the best interests of the child must be considered in connection with the question of the fitness or unfitness of the parent, that the question is primarily one of fact, and that a finding of unfitness cannot be upset except where totally unsupported. See, for example, In re Lew Choy Foon's Guardianship, 173 Cal. 159, 159 P. 440; In re Guardianship of Minnicar, 141 Cal.App.2d 703, 297 P.2d 105; Yates v. Yates, 138 Cal.App.2d 711, 292 P.2d 934; Guardianship of Aviles, 133 Cal.App.2d 277, 284 P.2d 176; In re Guardianship of Casad, 106 Cal.App.2d 134, 234 P.2d 647; In re Coughlin's Guardianship, 101 Cal. App.2d 727, 226 P.2d 46; In re Guardianship of Bynum, 72 Cal.App.2d 120, 164 P. 2d 25; In re Bensfield, 102 Cal.App. 445, 283 P. 112; In re Johnson's Estate, 101 Cal.App. 110, 281 P. 435; Crater v. Crater, 135 Cal. 633, 67 P. 1049.

There are also a substantial number of cases holding that the finding of unfitness was unsupported. In Re Estate of Akers, 184 Cal. 514, 194 P. 706, the mother of the child had been married at seventeen and had left her husband shortly after the

birth of the child. She had no permanent home, but moved from place to place working as a cook, washerwoman, waitress, servant, helper in an airplane factory and candy-store operator. She worked under assumed names, stating that she did this because she feared her husband would find her if she used her real name. During a period of four years she visited the child only once. There was evidence that during the period of her married life she was guilty of immoral conduct. A rather suggestive letter written by her to another man while she was still living with her husband was introduced. She was seen in restaurants at varying hours with a woman of bad reputation and with two men. Three or four men were seen going into her house, but these, she explained, were roomers or boarders in the house. The court stated that, 184 Cal. at page 520, 194 P. at page 709: "mere lack of integrity is not sufficient in itself to justify depriving a parent of the natural right to the custody of the child. * * * [W]e are not satisfied that, standing alone, the competent evidence adduced upon this phase of the case would have impelled the trial court to the conclusion that the mother was not a fit and proper person * * *.

"* * * In conclusion, it may not be amiss to say, * * * that, even though it was shown that the mother had not, at the time of the hearing, a permanent home of her own, and therefore might be unable for the time being to keep the child with her personally, nevertheless she should not, for that reason alone, be deprived of the legal custody of the child and the related right of selecting a fit and proper place where he should be kept and cared for."

Another case in which a finding of unfitness was reversed is In re Guardianship of Willis, 123 Cal.App.2d 446, 266 P.2d 944, 945. There the mother of the child involved died, leaving that child and nine other children. The court referred to the home as being "in a deplorable and filthy condition." The father placed the new born child with petitioners, with whom he stayed for four years. They nursed the child to health and he was well cared for. The father hired a housekeeper to help him with the other children, and they all lived in the three-bedroom home of the housekeeper, who also had a minor child of her own. There was evidence that the father had driven the children in his automobile while he was intoxicated; that he used vile and abusive language in the presence of the children; that he became intoxicated at home in the presence of the children; that the housekeeper used profane language in the presence of the children. On the other hand, there was evidence that the father was earning $500 a month; that the children were clean and well cared for; that the father did not mistreat the children. The court concluded that the finding the father was unfit was unsupported and stated, 123 Cal.App.2d at page 450, 266 P.2d at page 946: "[T]o brand a parent as unfit would almost certainly mean that the parent could never hope to gain either the respect or affection of his child. The finding of unfitness necessarily implied that [the father] was unfit to care for all of his other children, an implication not supported by the record." See also Matter of Galleher, 2 Cal.App. 364, 84 P. 352; In re Estate of Wise, 179 Cal. 423, 177 P. 277; Washburn v. Washburn, 49 Cal.App.2d 581, 122 P.2d 96; In re Estate of Lindner, 13 Cal.App. 208, 109 P. 101; Matter of Schwartz, 171 Cal. 633, 154 P. 304; In re Guardianship of Mathews, 169 Cal. 26, 145 P. 503; Matter of Forrester, 162 Cal. 493, 123 P. 283.

In Ashwell v. Ashwell, 135 Cal.App.2d 211, 286 P.2d 983, the controversy was between competing parents. The trial court, after first awarding the children to the mother awarded them to the father, and the mother appealed. The evidence showed that, after the mother had left the father, she went to live with another man, by whom she had another child; that when the mother had control of the children she frequently left them in the custody of a small child, and the children were frequently ragged and dirty. The mother testified that she was living with the man in her

house because of economic necessity, and that she intended to marry him when her divorce became final. There was also evidence that the appellant had been a good mother and took good care of the children. In reversing the finding that the mother was unfit, the appellate court stated, 135 Cal.App.2d at page 216, 286 P.2d at page 986: "There is no worthwhile dispute here but that Norma took good care of her children, and if she did that then anyone who has observed the tasks that must be performed by a mother in caring for four tiny children will know that she is the hardworking, and, toward her children, the conscientious woman that her neighbors testified she was. * * * Except for her relations with Cassella, there is nothing in this record to indicate that Norma is a loose woman. There is here no proof that she is amoral. There is proof of error, but along with it goes proof of her acceptance of the consequences and her expressed desire to regularize, within the possible limits her habitation with Cassella. * * *. These two people, regardless of their sin, were in all things else responding commendably to the demands of a burdensome situation. It is proper to bear in mind, as these things are being considered, that in determining where custody of children shall lie the courts are not engaged in a disciplinary action to punish parents for their shortcomings as individuals nor to reward the unoffending parent for any wrong suffered by the sins of the other. * * * The prime question is, What is the effect upon the lives of the children and what will be the effect of a modified decree that disturbs their settled life and compels them to make adjustments to a life with strangers. In view of the tender ages of these children we think that the conduct of the mother as described in the testimony was at the time this change was ordered having no possible bad effect upon them. They were too young."

These cases are sufficient to show the attitude of the courts towards the problem here involved. The question now presented for consideration is, what does the evidence in the instant case show on the issue of fitness or unfitness of the mother?

As already pointed out, the record shows that appellant was indicted for the murder of her husband, the father of Susan. The entire record of that murder trial was admitted into evidence in this proceeding. The record shows that appellant was acquitted of the murder charge, which means that the jury found the charge was not proved beyond a reasonable doubt. But, as will be pointed out, the record also shows, and appellant admits, some sort of a relationship with the confessed murderer. The trial judge in this proceeding did not purport to reweigh the evidence in the murder case, but he did give some weight to the evidence there produced. At one place in the record he stated (R.T. 708): "[O]ne thing I'm certain of at the present time, and that is that I'm not going to pass upon the guilt or innocence of this lady, whether or not she had anything to do with the killing of her husband; that matter was litigated in Oregon; * * * [the jury's] conclusion was that this lady was innocent of that crime, and that's good enough for me, so I'm not going to endeavor to pass upon that subject." But, it is equally clear, that the consideration of the evidence in the Oregon trial was properly a matter of major importance to the trial judge. It certainly was of major importance to him in passing on the admissibility of evidence relating to the past conduct of the appellant. After considerable argument the trial judge ruled that he would admit evidence of her conduct over a period of about 10 years prior to the date of the guardianship hearing. In this connection the trial judge stated (R.T. p. 328): "I hate to admit it, but this is not the ordinary petition for guardianship. Here we have a mother of a child who was tried for murder and acquitted. Again, she was a witness in another murder case, where the other Defendant, who claimed that she was the instigator of this murder, was found guilty of second degree murder. Well, under the circumstances, it seems to me that everything has to come in. I hate

to prolong this trial unnecessarily, but I have to admit everything that is material to the case, and from what * * * [counsel for the petitioner] stated, I believe it's material."

At the time of the guardianship hearing appellant was 34 years of age. She had had a somewhat complex marital career. In 1941 she married her first husband, Merrick Hersey, while he was in the army. They had a child, Gregory, born in 1943. Appellant separated from Hersey before he left for overseas. During the war period appellant admitted to an association with a man with a criminal record whom she introduced to her neighbors as her cousin. She denied knowing that this man had a criminal record.

In 1945 appellant was working in a restaurant in San Francisco, and claims that, during this period, she was forcibly raped by someone unknown. Appellant then went to Portland where, in 1946, a child was born as a result of this rape. Admittedly, appellant explained her pregnant condition to her friends in Portland by stating that she had gone to a cocktail party and got drunk and someone had taken advantage of her. The child was given out for adoption.

In 1946 appellant obtained a divorce from Hersey in California. In 1947 she lived in Los Angeles for a time, and then went to New Orleans. In 1948 she took a job as a laundress on a cruise to South America, and late that year returned to Portland to put Gregory in school.

In 1949 appellant married Michael Brant from whom she separated in January of 1951, and later that year obtained a divorce. Thereafter, appellant met Kermit Smith, and the child involved in these proceedings was conceived. She had relations with Smith on several occasions, once in the apartment where she and Gregory were living. In the late summer of 1951 appellant and Smith had an argument and they separated without Smith knowing that appellant was pregnant. About this time she received a letter from her first husband, Hersey, suggesting a reconciliation. The two started to live together, and took a trip to Miami. Gregory accompanied them. Hersey had in fact remarried, but appellant testified that she thought he was divorced and that she hoped to remarry him.

Late in 1951 they came back to California and went to San Diego, where appellant discovered that she was pregnant as a result of her affair with Smith. Appellant caused Hersey to believe that he was the father of the expected child. When Hersey discovered her condition he became angry and left appellant and returned to his wife in Sacramento, after advising appellant to go to Placerville, which she did. The child was born there in 1952. Appellant listed Hersey as the father on the birth certificate. During this period Hersey was paying appellant $40 a month for Gregory's support.

After the child was born, appellant informed Smith in Portland, and he took it for granted that he was responsible. He sent appellant some money, and had the birth certificate corrected. In May of 1952 Smith brought appellant and the two children to Portland, and in August he and appellant were married.

In 1954 appellant separated and obtained a divorce from Smith. She purchased a rooming house in Portland which she operated. There she met Lawrence Wolf, the man who subsequently confessed to the murder of Smith. Wolf was married and had a small son. His wife did not live at the rooming house. Wolf served as a general handyman about the apartment in exchange for room and board for himself and his son. Appellant and Wolf became friendly, how friendly is a matter in dispute. Admittedly, appellant cooked meals for Wolf and the two shared some food expense, and exchanged gifts on holidays. Admittedly, appellant went on drives with Wolf, and admittedly appellant had four or five dates with him. During this period appellant testified that she also had dates with other men. Wolf, at appellant's murder trial, testified to having had intercourse with appellant. This she denied.

In February of 1955 Smith and appellant became reconciled, and the two remarried,

and appellant moved out of the apartment house. She continued to see Wolf, however. On April 21, 1955, Smith was killed when a bomb exploded as he was getting into his automobile. Wolf was arrested, and he implicated appellant, and she was arrested. The day appellant was arrested Mrs. Hightower, the respondent, arrived in Portland, and took Susan back to her home in Los Gatos. After appellant was acquitted she made inquiries about getting Susan back, and then Mrs. Hightower filed the present petition in November of 1955.

One witness who had known appellant since childhood deposed that appellant's "general reputation for personal morality in Portland" was "bad." There was some other evidence about appellant drinking. She testified that she only drank "socially," but admittedly wrote a letter to a friend stating "I'm loaded," and signed it "Love from a drunk." A social worker who had known appellant in Placerville testified that, in her opinion, appellant lacked judgment and was careless, but on the whole was "pretty much of a wholesome homebody."

Appellant had been confirmed in the Episcopal Church and participated in Gregory's confirmation classes. She belonged to the P.T.A., was a cub scout den mother, and donated to several charities. A doctor deposed that appellant had a character defect, but that it was not sufficient to "change her abilities as a parent." An Oregon friend testified, in the Oregon murder trial, that appellant was quite generous.

Appellant testified that after securing the divorce from Smith in 1954, she had intended to make a trip to Africa on borrowed money, but that illness prevented the trip. She was already in debt for the rooming house. At the time of the guardianship hearing she had no money and no job. She testified that she intended to live with her grandmother who had agreed to help her and the children. She testified that it was her plan to get a degree in gemology and then work in Portland as a gemologist.

As far as the record shows, appellant's relations with her two children—Gregory and Susan—were, on the whole, good. However, she took Gregory with her on most of her travels while she was having the various affairs already discussed. Admittedly, she took him to New Orleans in 1948 contrary to the provisions of the divorce decree.

In Portland she was thoughtful towards the children and bought them gifts and gave them parties. The family minister testified that the children regularly attended Sunday School, and that appellant was cooperative in their religious training.

At the Oregon murder trial Wolf testified that appellant loved Susan, and that she had planned with him to kill Smith rather than again divorce him because she was afraid that he would get custody of Susan.

This is a fair summary of the evidence. Does it support the finding that appellant is "unfit" to have custody of her child?

[12] It must be remembered that the trial judge saw this witness and, after listening to much testimony, found her unfit. This finding, under the cases already cited, must be upheld if supported by substantial evidence. The record shows that over several years appellant engaged in several extra-marital affairs. The trial judge was justified in believing that her moral standards were low. Her past conduct was far below society's moral norm. Certainly, the record shows that she lacks certain desirable character traits. These things, standing alone, under the decided cases, perhaps would not be sufficient to support the finding. But they do not stand alone. There is the matter of her indictment and trial in Oregon for the murder of her husband, the father of Susan. It is true that an Oregon jury acquitted her of that charge, necessarily holding that the murder charge was not proved beyond a reasonable doubt. The evidence relied upon by the prosecution in that case to connect her with the crime was that of the confessed slayer Wolf, and that of a confessed robber. The jury obviously did not believe that testimony, and it would not seem proper to retry that case in this guardianship proceeding. But that case cannot

be entirely disregarded. Appellant admitted to some sort of a relationship with Wolf. The trial judge was entitled to believe from the evidence in the murder case that, although appellant did not participate in planning the murder, she knew of Wolf's plans and took no steps to protect her husband. The trial judge was also entitled to believe that appellant was involved with the murderer, and that this relationship was the inspiration for the murder. Under such circumstances, to place Susan back into the custody of appellant, would be to subject her to most unpleasant possibilities. The child would always have some doubt about the moral responsibility of her mother for the death of her father. This would certainly not be in the best interests of the child. Under these circumstances we think the finding is supported.

The other points raised by appellant do not require discussion.

The decree appointing Mrs. Ellen Hightower the guardian of the person and estate of Susan is affirmed.

BRAY and FRED B. WOOD, JJ., concur.



147 Cal.App.2d Supp. 836

The PEOPLE of the State of California, Plaintiff and Respondent,

v.

Charles Clyde RANDOLPH, Defendant and Appellant.

Cr. A. 33.

Appellate Department, Superior Court, San Bernardino County, California.

Jan. 21, 1957.

Defendant was convicted of violating section of the Vehicle Code dealing with failure to make a boulevard stop, section of the Vehicle Code dealing with the basic speed law, and section of the Penal Code dealing with resisting an officer. The Municipal Court of San Bernardino Judicial District, Edward P. Fogg, J., entered judgment of conviction and an order denying motion for new trial, and defendant appealed. The Appellate Department of the Superior Court, Hilliard, J., held that evidence sustained conviction.

Judgment and order affirmed.

1. Automobiles ⇐349

Section of the Vehicle Code defining the procedure to be followed by a peace officer following the arrest of a person charged with misdemeanor violation of the Vehicle Code is not penal in nature and cannot form the basis for a lawful arrest. West's Ann.Vehicle Code, § 736.

2. Arrest ⇐68

Where motorist, on noting presence of police vehicle with its red light, voluntarily stopped his automobile, stepped therefrom, and engaged in conversation with officer, and defendant knew that officers were members of the Highway Patrol and in an official automobile, and motorist was immediately informed by one of the officers that the motorist had allegedly violated the Vehicle Code by failing to make a boulevard stop, there was a "submission to custody" by motorist in accordance with section of the Penal Code dealing with method of making arrest. West's Ann. Vehicle Code, § 577; West's Ann.Pen. Code, § 835.

See publication Words and Phrases, for other judicial constructions and definitions of "Submission to Custody".

3. Automobiles ⇐349

Where officers of the Highway Patrol stopped motorist, who had allegedly failed to make a boulevard stop, and who allegedly was violating the basic speed law, and motorist submitted to custody, it was the duty of the officers to proceed under sections of the Vehicle Code defining the procedure to be followed by a peace officer following arrest of a person charged with a misdemeanor violation of the Vehicle Code. West's Ann.Vehicle Code, §§ 510, 511, 577, 736, 739; Pen.Code, § 835.

4. Criminal Law ⇐1159(2)

A reviewing court cannot disturb a verdict or judgment, if it is supported by substantial and competent evidence.

5. Automobiles ⇐355(1)

Evidence sustained conviction of motorist for violating section of the Vehicle Code dealing with failure to make a boulevard stop. West's Ann.Vehicle Code, § 577.

6. Automobiles ⇐355(5)

Evidence sustained conviction of motorist under the Vehicle Code for violating the basic speed law. West's Ann.Vehicle Code, §§ 510, 511.

7. Obstructing Justice ⇐16

Evidence sustained conviction for resisting arrest. West's Ann.Pen.Code, § 148.

8. Indictment and Information ⇐119
Obstructing Justice ⇐11

Complaint alleging that defendant resisted a public officer in violation of Section 148 of the Penal Code and that defendant on or about certain date in certain county did wilfully and unlawfully and by means of threats, force, and violence, resist, delay, and obstruct a public officer in performing his duty as such officer in attempting to arrest defendant on charge of failure to exhibit satisfactory evidence of his identity, in violation of Section 736 of the Vehicle Code, sufficiently charged defendant with resisting arrest, and trial court properly treated language relating to the purpose of the attempted arrest as surplusage. West's Ann.Pen.Code, § 148; West's Ann.Vehicle Code, § 736.

9. Criminal Law ⇐349

In prosecution for failure to make a boulevard stop, for violation of basic speed law, and for resisting an officer, testimony concerning transactions or facts occurring after the alleged commission of the offenses charged, was admissible, where it related to circumstances which, in point of time, had evidentiary value in corroborating or disproving facts related as having occurred at time of commission of the offenses. West's Ann.Vehicle Code, §§ 510, 511, 577; West's Ann.Pen.Code, § 148.

10. Witnesses ⇐280

In prosecution for failure to make a boulevard stop, for violation of basic speed law, and for resisting an officer, trial court properly sustained objection to argumentative question concerning officer's ability to estimate the speed of vehicles, asked by defendant of police officer after officer had stated that he was unable to estimate speed. West's Ann.Vehicle Code, §§ 510, 511, 577; West's Ann.Pen.Code, § 148.

11. Criminal Law ⇐721½(2)

In prosecution for failure to make a boulevard stop, for violation of basic speed law, and for resisting an officer, wherein defendant was denied right to obtain the personnel and employment records of arresting police officers, it was improper for District Attorney in argument to jury to state that if officers had a record of past brutality in performance of their duties, then defense undoubtedly would have presented evidence thereof. West's Ann.Vehicle Code, §§ 510, 511, 577; West's Ann.Pen.Code, § 148.

12. Criminal Law ⇐1171(1)

In prosecution for failure to make a boulevard stop, for violation of basic speed law, and for resisting an officer, wherein defendant was denied right to obtain the personnel and employment records of arresting police officers, improper statement of District Attorney in argument to jury that if officers had a record of past brutality in performance of their duties, then defense undoubtedly would have presented evidence thereof, was not prejudicial error. West's Ann.Vehicle Code, §§ 510, 511, 577; West's Ann.Pen. Code, § 148.

13. Obstructing Justice ⇐18

In prosecution for resisting an officer, instruction that if an arrest is lawful, there is no right to resist, even though in fact person arrested is not guilty of crime which forms basis of arrest or no crime has in fact been committed, was sub-

stantially correct, even though a somewhat incomplete and anomalous statement of the law. West's Ann.Pen.Code, §§ 148, 836.

Stephens, Jones, La Fever & Smith and Eugene W. Bell, Los Angeles, for appellant.

Lowell E. Lathrop, Dist. Atty. and Philip Kassell, Deputy Dist. Atty., San Bernardino, for respondent.

HILLIARD, Judge.

These proceedings were initiated by the filing of a criminal complaint charging the defendant in Count I thereof with the crime of violation of Section 577, California Vehicle Code; in Count II thereof with the crime of violation of Sections 510–11, California Vehicle Code; in Count III thereof with the crime of violation of Section 148 of the Penal Code; and in Count IV thereof with the crime of violation of 274(b) of the California Vehicle Code. The Fourth Count was dismissed prior to trial upon proof of the fact that defendant possessed a valid operator's license at the time of the alleged offenses.

Testimony was given at the trial by two C. H. P. officers, Thomas and Kling, who stated that they had directly observed the defendant fail to make a boulevard stop in violation of Section 577, C.V.C. The officers further testified that immediately thereafter they started in pursuit of the defendant, and clocked his speed as being in excess of 75 miles per hour, which was in violation of the basic speed law and posted speed limits. As the police car approached the vehicle being operated by defendant, the officers flashed a red light, whereupon defendant stopped his vehicle at the side of the road. Officer Kling alighted from the police car and walked toward the defendant's vehicle at the same time the defendant stepped out of his automobile, and met Officer Kling by the side of his car. There is some conflict in the testimony concerning the precise salutation or preliminary remarks which preceded further events, but Officer Kling testified that he advised defendant of the fact that the officers had observed his failure to make the boulevard stop. The defendant then referred to the particular intersection and inquired as to whether that was the place where such violation had occurred. Upon being assured that this was the location he then responded "Yeah".

Officer Kling then requested defendant to produce his operator's license and, being advised that defendant did not have the same in his possession, required some further identification. There is considerable divergence in the testimony concerning the events which happened immediately thereafter. According to defendant, he was not permitted to obtain other papers or documents which might have established his identity, nor would the officers undertake to verify his identity by contacting various individuals whom he mentioned. It is defendant's further contention that he was summarily handcuffed and restrained after being advised that he was under arrest for violation of C.V.C. § 736. Officers Kling and Thomas testified that they assisted defendant in a search of the glove compartment of his automobile in an effort to find some means by which he might establish his identity. According to their testimony the defendant refused to evidence any spirit of cooperation and, to the contrary, was openly defiant of the right or authority of the officers to place him under arrest. Such testimony further indicated that, upon the basis of defendant's defiance of authority and inability to produce any identification, he was taken into physical custody by the officers. The defendant forcibly resisted the attempts of the officers to take him into physical custody and, in the course of the ensuing scuffle, there were some minor injuries inflicted upon Officer Kling and the defendant.

Defendant now contends that the judgment of conviction cannot be sustained and, in support of that position, urges that the trial court committed errors of law in ruling upon evidence and instructions to the jury, that the District Attorney was guilty of

prejudicial misconduct, and that the verdict was contrary to the law and the evidence.

Defendant asserts that Count III of the complaint, in which defendant was charged with violation of Penal Code, § 148, does not state a public offense. We will first consider such contention before commenting upon other grounds relied upon by defendant in this appeal.

Count III of the complaint is in the following form and language:

"As and for a third, further and separate cause of action, being a different offense from, but connected in its commission with the charge set forth in count I and count II hereof, the said M. E. Milleman under oath complains and accuses Charles Clyde Randolph of the crime of

"Resisting a Public Officer (P.C. § 148) a misdemeanor committed as follows:

"That said Charles Clyde Randolph on or about the 11th day of November, 1955, in the County of San Bernardino, State of California, did wilfully and unlawfully and by means of threats, force and violence resist, delay and obstruct Theodore Kling, then and there a public officer, to wit: a duly appointed and acting officer of the California Highway Patrol in performing his duty as such officer in attempting to arrest the said Charles Clyde Randolph upon the charge of Failure to Exhibit Satisfactory Evidence of his Identity, in violation of section 736 of the California Vehicle Code, a misdemeanor."

Defendant's contention, with respect to the alleged insufficiency of Count III, may be briefly summarized as follows:

(a) the charging portion of the Count accuses the defendant of resisting or attempting to resist arrest

(b) the attempted arrest was for alleged violation of C.V.C. § 736

(c) such section (C.V.C. § 736) is procedural and not penal in nature.

(d) since no arrest could be accomplished for violation of C.V.C. § 736, it follows that the attempt to do so was unlawful, and that defendant was within his legal rights in resisting the officer.

It is clear, we believe, that Section 736, C.V.C. is intended to define the procedure to be followed by a peace officer following the arrest of a person charged with misdemeanor violation of the California Vehicle Code. The Section specifically provides that

"Whenever any person is arrested for any violation of this code, not declared herein to be a felony [he] shall be taken * * * before a magistrate * * *

"[if he] fails to exhibit his operator's * * * license or other satisfactory evidence of his identity."

Section 739, C.V.C. prescribes the procedure to be followed upon an arrest for misdemeanor violation of the code, and requires that, if the person is not immediately taken before a magistrate, then a traffic citation shall be issued and the arrested person "in order to secure release" must sign the written promise to appear in court. "Thereupon the arresting officer shall *forthwith release the person arrested from custody*".

[1–3] It thus appears that both Sections 736 and 739, C.V.C. contemplate a situation in which an arrest has been accomplished. It is defendant's contention herein that he had not been placed under arrest at the time of the altercation between himself and the officer, and that the only arrest attempted to be made was for violation of Section 736. As we have hereinabove noted, such section is not penal in nature and cannot form a basis for a lawful arrest. The evidence shows, however, that, upon noting the presence of the police vehicle with its red light, the defendant voluntarily stopped his automobile, stepped therefrom and engaged in conversation with Officer Kling. It is apparent that defendant knew that Officers Kling and Thomas were members of

the California Highway Patrol, and in an official car. Defendant was immediately informed by Officer Kling of the fact that he had allegedly violated Section 577, C. V.C. These circumstances, of themselves, are sufficient to constitute a "submission to the custody" in accord with Penal Code Section 835. The situation did not then indicate the necessity of further physical force or restraint for the purpose of actually taking defendant into physical custody. Thereafter it was the duty of the peace officers to proceed in accordance with either Sections 736 or 739, C.V.C. The first of these procedures, which were enjoined upon the officers as their duty under the circumstances, required that the operator's license or other satisfactory identity be produced by the defendant. It was in the course of performing these duties that defendant resisted and obstructed the efforts of the police officers.

[4–7] Under familiar and well established rules governing appellate procedures, the reviewing court cannot disturb a verdict or judgment if it is supported by substantial and competent evidence. People v. Werner, 111 Cal.App.2d 264, 244 P. 2d 476. The jury was the sole judge of the credibility of witnesses, and the weight to be given to their testimony. It is apparent that the jury in this case believed the testimony given by Officers Kling and Thomas, and did not accept the version of the transaction as related by the testimony of defendant. There is, therefore, substantial and competent evidence to sustain the verdict as to each of the counts in the complaint.

Defendant contends, however, that he was charged with the offense of resisting an unlawful arrest, and that the evidence shows that this was the basis upon which Officer Kling was proceeding. We have hereinabove noted the language of the complaint in this regard. The testimony clearly establishes that such was the intent of Officer Kling who testified as follows:

"Q. By Mr. Bell: By the way, Officer Kling, from what you have said, I assume that you were attempting to arrest Mr. Randolph upon the charge of failure to exhibit satisfactory evidence of his identity, in violation of Section 736, is that correct? A. Yes."

The case of People v. Martensen, 76 Cal. App. 763, 245 P. 1101 presents a similar factual situation. In that case the defendant was stopped by officers of the Motor Vehicle Department for the offense of exceeding the speed limit. One of the officers approached the stopped car, asking defendant for his operator's license and advising him that he was exceeding the speed limit. The defendant refused to exhibit his operator's license, his name, or in any manner reveal his identity. Thereupon the peace officer advised defendant he was under arrest. The defendant made three efforts to start the motor of his car, and finally the peace officer stepped on the running board, reached into the automobile and turned the ignition switch. Upon this occurrence the defendant pushed the officer from the running board of the automobile. Thereafter the officers took the defendant into actual custody, charging him with speeding, and also the offense of resisting an officer.

Upon the appeal in that case the defendant advanced the identical contention urged by appellant in this case. The evidence clearly showed that the officer had arrested the defendant because the latter had refused to give any identification, and such offense was not one for which an arrest might be made.

The Court said:

"By reference to section 154 of the Motor Vehicle Act of the state of California, as amended in 1925 (St.1925, p. 415, § 19), and which section was in full force and effect on the 18th day of September, 1925, it will appear that the contention of the defendant upon this appeal is founded upon a misapprehension of the law relating to arrests for violations of the Motor Vehicle Act. By that section of the Motor Vehicle Act it is provided that in all cases,

except for offenses constituting a felony, the arresting officer shall proceed in the following manner, after having stopped the person whom he knows to be guilty of violating the speed laws; The arresting officer shall, upon the production of the operator's license of the person arrested or from other satisfactory evidence of his identity, take the name and address of such person, the number of his motor vehicle, and notify him in writing to appear at a time and place to be specified in such notice, or, upon demand of the person arrested, take him immediately before some magistrate. It is further provided that whenever any such person refuses to give his written promise to appear or demands appearance he shall be forthwith taken before a magistrate, etc. Referring to section 148 of the Penal Code, we find that it specifies that any person who willfully refuses, delays, or obstructs a public officer in the discharge or attempt to discharge any duty of his office, etc., is punishable, etc. Under any view of the evidence in this case, the officer was attempting to discharge the duties of his office. He had already actual knowledge of the violation of the Motor Vehicle Act by the defendant in traveling at a speed in excess of 45 miles per hour, which violation is not contested, and he was proceeding according to section 154 of the Motor Vehicle Act to ascertain the facts necessary to give the defendant the proper notice to appear and answer the charge of speeding, and while he was discharging and attempting to discharge this duty of his office the defendant pushed him from the running board and endeavored in this way to prevent the officer acquiring the information and performing his duty according to the section of the Motor Vehicle Act to which we have referred. Whether the defendant was thereafter arrested upon a proper charge is immaterial, for it appears beyond question that the officer was resisted at the time when he was attempting to discharge the duty imposed upon him by law."

People v. Martensen, 76 Cal.App. 763, at page 766, 245 P. 1101, at page 1102.

Section 736, California Vehicle Code, is based upon Section 154 of the Motor Vehicle Act of the State of California, Stats. 1925, p. 415. It is true that such statute then provided that "whenever any person is arrested for any violation of the provisions of this act, unless such violation is herein declared to be a felony, or unless such person demands the right to an immediate appearance before a magistrate, the arresting officer shall, *upon production but without surrender of the operator's or chauffeur's license of the person arrested, or other satisfactory evidence of the latter's identity* * * *" issue a written citation requiring the person to appear and, upon obtaining his written promise to appear, "forthwith release him from custody".

C.V.C. § 736 is a negative statement of procedure which was formerly prescribed in the affirmative by Motor Vehicle Act, § 154. The requirement that the operator produce satisfactory evidence of identity continues to be imposed upon him, even though the present law states it in negative terms.

Appellant contends that the District Attorney is bound by such particularity in the pleading. It is urged by the District Attorney that the inclusion of "descriptive material" concerning purpose of the attempted arrest is surplusage. In this regard, we note that, immediately prior to completion of the plaintiff's case, the District Attorney moved to amend the complaint by striking the language in Count III relating to purpose of the attempted arrest. The trial court, upon denial of such motion, commented that in his opinion such language was surplusage. He further noted, however, that the Count sufficiently charged a violation of Penal Code, § 148 in that it alleged the defendant had delayed, resisted, and obstructed a peace officer in the performance of his duty. The motion

was denied with the observation by the Court that the surplusage contained in the allegations of the charging portion of Count III was not prejudicial to the defendant, even though he might be deprived of a possible defense, i.e., resistance to unlawful arrest.

[8] We are of the opinion that the trial court was correct in its views on the motion, and it must be further observed that defendant was not, thereafter, under any misapprehension as to the views of the trial court with respect to this situation.

It appears to this Court that such portions of the charge in the complaint might have been stricken without destroying the sufficiency of the allegation to state a public offense. We cannot say, however, that the refusal to strike such portions resulted in any prejudice to the defendant. Section 950, Subdivision 2, of the Penal Code requires "a statement of the public offense or offenses charged therein". The statement of the charge according to Section 952 "may be made in ordinary and concise language without any technical averments or any allegations of matter not essential to be proved". Failure to allege the essential elements of the crime in the accusatory pleading may constitute reversible error under certain circumstances and absence of due process under others. Defendant was well aware of the facts and circumstances surrounding the transaction and, although he may have believed he had a right to resist an unlawful arrest, this does not excuse him from conduct in violation of Penal Code, § 148, which constituted delaying, resisting and obstructing a peace officer in the performance of his duties.

[9–12] Defendant assigns as error of the trial court the overruling of objections to testimony concerning transactions or facts occurring after the alleged commission of the offenses charged. Such testimony was clearly admissible since it related to circumstances which, in point of time, had evidentiary value in corroborating or disproving facts related as having occurred at the time of the commission of the offenses. Defendant also complains that the trial court refused to allow cross-examination of a prosecution witness concerning his ability to estimate the speed of vehicles. A review of the transcript indicates that objection was sustained to an argumentative question, and after the witness had stated he was unable to estimate speed. The ruling was proper. Another assignment of error urged by defendant was the ruling of the trial court that personnel and employment records of the California Highway Patrol, relating to Officers Kling and Thomas, were immaterial and privileged. It is defendant's position that he was entitled to such records for the purpose of proving the ability and judgment, or lack thereof, possessed by these officers in the performance of their duties and in the making of a lawful arrest. The record fails to disclose the contents of these records or documents, and no formal offer of proof was made or received thereon. As far as we are able to determine it appears that such records might have been related only to efficiency ratings within the internal operation of the California Highway Department. We need not comment upon the privileged nature of these records, since we have no information as to their precise nature or contents. The same observation may be made with respect to their materiality. In connection with this contention the defendant also refers to comments made by the District Attorney in arguments to the jury, and with reference to the past record of these officers. Such comment was to the effect that, if the officers had a record of past brutality in the performance of their duties, then the defense undoubtedly would have presented evidence thereof. The comment exceeded the bounds of proper argument in view of the prior discussions between court and counsel concerning the admissibility of the official records. We cannot say, however, that it had any particular effect upon the jury, nor that it was prejudicial to the defendant.

[13] Defendant asserts that the trial court misdirected the jury in giving the following instruction:

> "If an arrest is lawful there is no right to resist even though in fact the person arrested is not guilty of the crime which forms the basis of the arrest or no crime has in fact been committed."

This instruction, in the form given, is a substantially correct, even though somewhat incomplete and anomalous statement of the law. The police officer is neither judge nor jury, and is not responsible for ultimate conviction or acquittal of the person arrested. It is true that, in misdemeanor cases, the arrest may lawfully be accomplished only upon circumstances specified in Penal Code, § 836, and for misdemeanor (without warrant) only for a public offense committed or attempted in the presence of the officer. The trial court also instructed the jury in the applicable language of Penal Code, § 836 and C.V.C. sections 510–11, and 577. While we would criticize the giving of the instruction of which defendant complains, it appears that the subject was correctly and adequately covered in other instructions which were not inconsistent or in conflict therewith.

The final ground urged by defendant for reversal of the judgment of conviction is the alleged prejudicial misconduct of the District Attorney. Reference is made in appellant's brief to several instances in which the conduct of the District Attorney is alleged to be prejudicial. We have considered these portions of the proceedings in connection with a reading of the entire transcript—numerous pages of which are devoted to colloquy and argument between counsel and, in some cases, with the active participation of the trial court. It must be admitted that both counsel were most enthusiastic in the advocacy of their respective causes, and that such enthusiasm often resulted in the injection of immaterial matters into the record. We cannot fairly say, however, that there was any misconduct upon the part of the District Attorney, and it appears that the defendant was most ably represented.

Judgment of conviction and order denying motion for new trial is affirmed.

MITCHELL, J., deems himself disqualified from participating in this opinion.



148 Cal.App.2d 30

In the Matter of the ESTATE of Bertha MARLER, also known as Bertha Elizabeth O'Dell Marler, Deceased.

Hershel C. MARLER and Cleta M. Sworm, Contestants and Appellants,

v.

Sara WURM and Roy Wurm, Proponents and Respondents.

Civ. 5526.

District Court of Appeal, Fourth District, California.

Jan. 25, 1957.

Will contest. The Superior Court of Orange County, Robert Gardner, J., entered order striking pleadings and admitting will to probate and contestants appealed. The District Court of Appeal, Griffin, J., held that court did not abuse discretion in denying contestant right to amend pleading in attempt to show he was party in interest, but it was error to dismiss other contestant's pleading which was sufficient to raise issues as to validity of will even though it was not filed until day of trial.

Order admitting will to probate reversed.

1. Wills ⇨283

Where answer filed by proponents of will alleged that contestant was not an interested party, even though there was

no special demurrer on that ground, answer sufficiently raised question and precluded waiver of right to raise question on motion for judgment on pleadings. West's Ann.Code Civ.Proc., § 434.

2. Wills ⇐281

Burden of alleging sufficient facts showing that contestant was an interested person in will proceeding rested upon contestant, and proponents by answering objections filed without demurring, did not cure defects in contestant's pleading which failed to show that he was an interested person.

3. Pleading ⇐343
Wills ⇐284

A motion for judgment on the pleadings is in the nature of a general demurrer and on such a motion allegations of objections, in a will contest, must be taken as true, and the motion granted only where there is entire absence of some essential allegation.

4. Wills ⇐281

The statutory right to maintain a will contest is a necessary allegation in the pleading. West's Ann.Prob.Code, § 370, 380.

5. Wills ⇐229

A "person interested in will contest" is one who has a pecuniary interest in the devolution of the testator's estate which would be impaired or defeated by probate of will or be benefited by setting it aside. West's Ann.Prob.Code, §§ 370, 380.

See publication Words and Phrases, for other judicial constructions and definitions of "Person Interested In Will Contest".

6. Pleading ⇐350(2)

One who is entitled to a judgment on the pleadings is not required to make a motion therefor before cause is set for trial or before any steps in that direction have been taken.

7. Pleading ⇐350(3)

A motion for judgment on the pleadings presents a question of law and not one of fact for determination of the jury.

8. Wills ⇐284

In will contest, where there was lack of essential allegation of interest of contestant, motion for judgment on pleadings could be granted before jury had been sworn and proponents had made a prima facie proof of due execution of the will. West's Ann.Prob.Code, § 229.

9. Appeal and Error ⇐959(1)
Pleading ⇐229

A certain degree of liberality should prevail in reference to allowance of amendments to pleadings, particularly where it is shown that an adequate amendment could be made; nevertheless the allowance or refusal of amendments to pleadings is a matter so largely within the sound discretion of the trial court that ordinarily its exercise will not be disturbed in absence of a showing of abuse of discretion.

10. Wills ⇐285

In will contest, where nine months elapsed after proponents filed answer which raised question whether contestant was an interested person and contestant did not attempt to amend his pleadings, under the circumstances there was no abuse of discretion in refusing to permit amendment on date of trial. West's Ann. Prob.Code, § 229.

11. Wills ⇐230

Person proposing to contest will before probate does not forfeit his right to do so merely by reason of failing to file opposition at or prior to time so designated in notice for hearing.

12. Wills ⇐259

If objections to probate of will were properly served on attorney for proponents and filed before time to which hearing of petition for probate had been continued, it was timely and was a bar to admission of will to probate until disposed of in the manner provided by law.

13. Wills ⇐282

Pleading, in order to raise contest as to will, must in addition to the formal parts and prayer, contain a statement of facts

constituting the contestant's cause of action in ordinary and concise language, and such statement of facts must answer all requirements of general rules of pleading prescribed by the code for complaints. West's Ann.Prob.Code, § 370.

14. Wills ⇐282

In will contest, pleading was sufficient to state a cause of contest on ground that the decedent was of unsound mind and incapable of making a will.

A. G. Van Deventer, Pasadena, for appellants.

John K. Ford, Los Angeles, for respondents.

GRIFFIN, Justice.

Contestant and appellant Hershel C. Marler brought this action on January 21, 1955, before probate, contesting the will of deceased, Bertha Marler, alleging that her purported will was not genuine, not the free and voluntary act of decedent, that it was obtained by fraud and undue influence, and coercive acts of proponent Sara Wurm, named as executrix, and her husband, and that deceased was not of sound mind. No mention is made as to the relationship of the contestant to the deceased or as to his claimed interest in said estate. On February 18, 1955, respondents filed an answer denying generally these allegations and particularly alleged that Marler was not a party in interest, nor an heir at law, being only a nephew of Thomas C. Marler, deceased husband of decedent herein, and dismissal of the contest was sought. On March 30, 1955, contestant demanded a jury trial. The case was set for April 27, 1955. On October 26, 1955, attorney Ford was substituted as attorney for proponents. On November 7, 1955, the date to which the trial and hearing on the petition for probate of the will had been continued, Cleta M. Sworm, beneficiary under the will, and a claimed heir at law of decedent, filed an answer and joined with the contestant Marler in contesting the probate of the will on somewhat similar grounds, including one additional ground. A jury was in attendance. Proponents moved for judgment on the pleadings and to strike the answer of Cleta M. Sworm. Counsel for appellant Marler moved to amend his pleadings. This was denied. Judgment was entered that Marler take nothing by the contest, and the motion to strike the answer was granted. Both Hershel C. Marler and Cleta M. Sworm appealed from the order admitting the will to probate.

[1] Appellants now claim: (1) That by the failure of proponents to specially demur to the appellants' contest to the probate of the will on the ground of lack of showing of relationship to the deceased, they waived the right to raise the question on the motion for judgment on the pleadings, citing Sec. 434 of the Code of Civil Procedure. The answer filed by respondents alleged contestant was not an interested party. This sufficiently raised the question. In re Estate of Eskridge, 51 Cal.App.2d 634, 125 P.2d 527. We see no merit to this contention.

[2] (2) That by answering the objections filed without demurring it cured any defects in appellants' pleading. The burden of alleging sufficient facts showing that contestant was an interested person rested upon contestant. In re Estate of Land, 166 Cal. 538, 137 P. 246.

[3–8] (3) That the court erred in granting the motion for judgment on the pleadings before the jury had been sworn and proponents had made a prima facie proof of the due execution of the will, citing Swift v. Superior Court, 39 Cal.2d 358, 247 P.2d 6. A motion for judgment on the pleadings is in the nature of a general demurrer and on such a motion the allegations of the objections, in a will contest, must be taken as true, and the motion granted only where there is an entire absence of some essential allegation. The statutory right to maintain such a contest is a necessary allegation. In re Estate of Land, supra; Smith v. Beauchamp, 71 Cal.

App.2d 250, 162 P.2d 662; Secs. 370 and 380 Probate Code; 26 Cal.Jur. p. 1083, Sec. 344. A person interested has been defined as one who has such a pecuniary interest in the devolution of the testator's estate as would be impaired or defeated by the probate of the will or be benefited by setting it aside. In re Estate of Land, supra. One who is entitled to a judgment on the pleadings is not required to make a motion therefor before the cause is set for trial or before any steps in that direction have been taken. McNew v. Mulcahy, 24 Cal.App.2d 656, 76 P.2d 143; In re Estate of Sherwood, 123 Cal.App.2d 209, 266 P.2d 580; Morel v. Morel, 203 Cal. 417, 264 P. 760; Budrow v. Wheatcraft, 115 Cal.App.2d 517, 522, 252 P.2d 637. The holding in Swift v. Superior Court, supra, has no application to such a motion which is a question of law and not one of fact for the determination of the jury. 21 Cal.Jur. 234, sec. 163. There is also some indication that it was agreed between the parties that the motion and objections to the reception of any evidence could be made and ruled upon before the jury was sworn, and the court so believed although counsel for appellant claimed he did not intend such an agreement.

(4) That the court abused its discretion in not allowing appellant Marler the right to amend. The record shows that after answer was filed alleging that contestant was not an interested party, he made no effort to amend his objections to probate until the day of trial. At that time this objection was pointed out and counsel for contestant claimed that *any person* could contest a will before probate, but if the court felt otherwise he offered to amend the written objections by interlineation to show that contestant Marler was a nephew of the predeceased husband, Mr. Marler. He contended that under section 229 of the Probate Code he was an interested party. He also contended that if it was shown that the will failed, Mrs. Marler would die intestate and the entire estate would go to this contestant under that section. The trial court concluded that there was no document or pleading indicating the ultimate fact that contestant Marler was a real party in interest or that there was sufficient showing made that if the objections were amended, as requested, he would become an interested person under that section. A mere examination of this section shows that many conditions would attach before contestant would become an interested party, and there is no indication in the pleadings or amendment as proposed that these conditions would not be applicable to this contestant. It was further indicated by the trial court that there was no sufficient allegation of fraud or undue influence; that since counsel for contestant waited nine months after being apprised by respondents' answer that he was not an interested party entitled to contest the will, and since he did nothing about amending his pleading during that period to show his true interest, his application to amend came too late. His request to so amend was denied and the objections to the introduction of testimony was sustained and the jury dismissed. The motion to strike Mrs. Sworm's attempted contest was granted apparently on the ground that it came too late and was filed without the permission of the court. Appellants claim this was an abuse of discretion.

[9, 10] It is the rule that a certain degree of liberality should prevail in reference to the allowance of amendments to pleadings, particularly where it is shown that an adequate amendment could be made, but ordinarily the allowance or refusal of amendments is a matter so largely within the sound discretion of the trial court that its exercise will not be disturbed in the absence of a showing of abuse of discretion. Unreasonable and unexplained delay has been held sufficient to justify denial. Jew Fun Him v. Occidental Life Insurance Co., 88 Cal.App.2d 246, 249, 198 P.2d 711; Scholle v. Finnell, 167 Cal. 90, 102, 138 P. 746; In re Estate of Sheppard, 149 Cal. 219, 221, 85 P. 312. Here the contestant was apprised of the fact that his interest in the contest was not sufficiently alleged, and for nine months no action was taken to seek the amendment above suggested. A

jury was in attendance to try the cause and it did not affirmatively appear that contestant could amend so as to show such an interest as would entitle him to maintain the contest. This, in itself, was a sufficient showing to justify the order as to appellant Marler. Although the trial court might well have granted permission to amend, as indicated, we cannot hold, as a matter of law, that the trial court abused its discretion. In re Estate of Matthiessen, 10 Cal. App.2d 323, 327, 52 P.2d 248; Stanley v. Kawakami, 127 Cal.App.2d 277, 279, 273 P.2d 709; Plaza v. City of San Mateo, 123 Cal.App.2d 103, 266 P.2d 523; Barr v. Carroll, 128 Cal.App.2d 23, 274 P.2d 717.

[11, 12] (5) The answer or contest filed by appellant Sworm, if amounting to a contest of the will itself, was not filed until the morning of the hearing, although it was served on respondents' counsel a few days prior thereto. It is not labeled a contest or objections to probate of will but is labeled as an answer to the objections filed by Marler. In this answer she joins with him in said objections and, in effect, attempts to admit the allegations of his pleading. However, she sets forth the same general grounds of contest with the additional ground that the will was revoked in December, 1954, and prays that the petition for probate of the will be denied. She demanded no jury trial as to the issues she attempted to raise, no citation was issued thereon, and if it amounted to a contest on her part it stood subject to demurrer or answer. Sec. 370, Probate Code. She alleges therein that she is an heir at law and her relationship appears to be that of a niece of the testatrix and a devisee of certain jewelry. If it amounted to a contest of the will on her part, regardless of the label given it, the question arises as to the authority of the trial court to summarily dispose of it by striking it and proceeding to hear evidence on the petition for probate of the will. If her pleading was sufficient to state a ground of contest, then the trial court erred in admitting the will to probate without allowing her to be heard as to those claimed grounds which are properly pleaded. Respondents' motion to strike her "so-called answer" was based upon the ground that no permission was granted by the court to file it and because it was filed too late. Apparently it was upon these claimed grounds that it was stricken. It was also indicated by the trial court that the questions of fraud and undue influence were not sufficiently pleaded and accordingly no evidence could be produced under those two claimed causes of contest. Looking to the substance, rather than the label of the so-called answer, it appears to be an independent contest of the will by her. Section 370 of the Probate Code does not prescribe when the written opposition must be filed in order to entitle it to be considered. Obviously, to be effectual as a contest before probate, it must be filed before the alleged will is admitted to probate, and the statute contemplates that it will be filed at or before the time designated in the notice for the hearing of the petition for probate. But the person proposing to contest before probate does not forfeit his right to do so merely by reason of failing to file his opposition at or prior to the time so designated in the notice for hearing. If the objections were properly served on the attorney for the petitioner, and filed before the time to which the hearing of the petition for probate has been continued, it is in time and must be considered, and is a bar to the admission of the will to probate, until disposed of in the manner provided by law. 26 Cal.Jur. p. 1086, sec. 345, and cases cited.

[13] It does not appear that permission of the court to file a contest is required. Sec. 370, Probate Code. The question then is whether there is any claimed ground of contest in this instrument which would require consideration by the court before it could admit the will to probate. It is the established rule that the written opposition is to be considered the first pleading in the proceeding to contest the admission of the propounded writing, and it is subject to the same grounds of demur-

rer as any other complaint. Therefore, this pleading, in addition to the formal parts and the prayer, must contain a statement of facts constituting the contestant's cause of action in ordinary and concise language, and such statement of facts must answer all requirements of the general rules of pleading prescribed by the code for complaints. 26 Cal.Jur. p. 1093, sec. 349; In re Estate of Ramey, 62 Cal.App. 413, 431, 217 P. 135.

[14] In paragraph 1, it is alleged that the purported will is not genuine. This allegation is not sufficient and is but a conclusion of the pleader. The particulars in which it is not genuine are not alleged. Paragraph 2 alleges it was obtained by fraud and undue influence exercised upon the decedent prior to its execution. This allegation is but a pure legal conclusion without setting forth the facts supporting it. In re Estate of Bixler, 194 Cal. 585, 589, 229 P. 704; In re Estate of Carson, 184 Cal. 437, 94 P. 5, 17 A.L.R. 239. Paragraph 3 alleges that at the time of the execution of the will decedent acted through fear and intimidation practiced upon her by her then husband. This allegation, standing alone, is not sufficient, but when considered in conjunction with paragraph 4, that decedent was not acting voluntarily or freely and was not then "capable of making testamentary disposition", there may be a cause of contest stated indicating that decedent was of unsound mind or not capable of making a will. This has been held to be a sufficient pleading. In re Estate of Kilborn, 158 Cal. 593, 112 P. 52; 26 Cal.Jur. p. 1095, sec. 350. Paragraph 5 alleges that decedent revoked all wills made by her prior to December, 1954. The will here under consideration was executed on July 15, 1954. As to this fifth paragraph it has been definitely held that contestant's pleading should contain an averment of the facts relied upon to establish revocation. In re Estate of Streeton, 183 Cal. 284, 191 P. 16; 26 Cal.Jur. p. 799, sec. 133. Under the circumstances the court was not authorized to admit the will to probate before the determination of the issues presented. The pleading of this alleged contestant, under section 370 of the Probate Code, is still subject to demurrer and answer after citation issues.

The order for judgment on the pleadings as to contestant Marler must be affirmed. The order striking the so-called answer and contest of Cleta M. Sworm must be reversed and accordingly said answer or contest should be reinstated. Since the will may not be admitted to probate until there is a proper disposition of this claimed contest, the order admitting the will to probate should be reversed.

Order admitting will to probate reversed.

BARNARD, P. J., and MUSSELL, J., concur.



147 Cal.App.2d 760

In the Matter of the ESTATE of Rose PLUMER, Deceased.

Andrew E. PERKINS, Appellant,

v.

Mitchell LEWIS et al., Respondents.

Civ. No. 21958.

District Court of Appeal, Second District, Division 1, California.

Jan. 23, 1957.

Hearing Denied March 20, 1957.

Will contest. The Superior Court of Los Angeles County, Burdette J. Daniels, J., entered order denying contest and admitting to probate a dated but unsigned holographic document as part of last will of deceased and contestant appealed. The District Court of Appeal, Doran, J., held that sheet of paper which was entirely in deceased's handwriting and which was clipped to two sheets of valid holographic

will constituted a valid part of such will, although such sheet was unsigned.

Affirmed.

1. Wills ⇐98

Under doctrine of integration, dated sheet of paper which was entirely in handwriting of deceased and which was entitled "Memorandum for Executors" and which was clipped to two sheets of valid holographic will constituted a valid part of such will, although such sheet was unsigned.

2. Appeal and Error ⇐1010(1)

Where findings of trial court are supported by substantial evidence in the record, a reviewing court may not enter upon a reconsideration or revaluation of evidence.

3. Wills ⇐98

"Integration" is the association of disconnected writings by their internal sense, their coherence, or adaption of parts; the doctrine of integration is distinguished from that of "incorporation by reference," and integration applies where it is clear that two or more separate writings are intended by the testator to be his will.

See publication Words and Phrases, for other judicial constructions and definitions of "Incorporation by Reference" and "Integration".

4. Wills ⇐72

The mere intention of testatrix cannot cure defects of invalid will.

5. Wills ⇐97

A will may consist of several sheets of paper and it does not matter in and of itself that one of such sheets standing alone would not constitute an executed will.

6. Wills ⇐405

In will contest involving issue whether an unsigned sheet of paper attached to valid holographic will constituted a part of such will, there was no abuse of discretion in allowing defendants to recover costs from unsuccessful contestant. West's Ann.Prob. Code, § 1232.

Mantalica, Barclay & Teegarden, Lewis C. Teegarden, Los Angeles, for appellant.

Henshey & Beeman, Hollywood, for respondents, Mitchell Lewis, et al.

Edmond Gattone, Los Angeles, for respondent, Mary Edwards.

DORAN, Justice.

[1] A few hours after the death of Rose Plumer, who died on March 3, 1955, an envelope was found in decedent's apartment containing three sheets of paper written entirely in Rose Plumer's handwriting. The three pages were found clipped together at the top with a paper clip and folded together, and the containing envelope was endorsed, "Rose Plumer's Will". All three sheets were dated in decedent's handwriting, November 15, 1948, but only one of the sheets bore Rose Plumer's signature. It is conceded that two of the sheets constitute a valid, holographic will. The contest herein relates to the third sheet entitled "Memorandum for Executors", dated and written in decedent's handwriting but unsigned.

On the first page of the admittedly valid holographic will, executors were named and instructions given for burial. At the bottom of this first page the decedent started a list of assets which list is continued on the second page. After leaving a blank space of several inches, Mrs. Plumer dated and signed this page. No legatee or devisees are therein named nor is there any disposition of property.

The third sheet here under discussion, folded and clipped to the other two sheets, entitled "Memorandum for Executors", is in decedent's handwriting, and commences with the statement, "I want my friends to be remembered", followed by nine names, the last of which has been deleted and initialed by decedent. The paper then

states: "The cash in envelope marked 'Mitchell Lewis Personal'—is to be used to pay funeral expenses & remainder to be, after,—Executors fees & expenses, divided with the above named friends". Several items of jewelry and furnishings are likewise mentioned which are to be given to certain designated persons. The name of one beneficiary has been changed, the alteration being initialed by the decedent. As hereinbefore indicated, this third sheet is unsigned. In addition to the three sheets folded and clipped together, the envelope contained two other papers neither dated nor signed, one of which contained a list of war bonds while the other gave information concerning decedent's safe deposit box. These last mentioned sheets are not claimed to be a part of the will.

The trial court found "That the three sheets (original will and Memorandum for Executors) * * * are each testamentary in character and constitute one instrument and should be read and construed together as a complete, harmonious and homogeneous Will"; that the three sheets are "integrated", and "that the signature of Rose Plumer on the second page of the Will was written by her with the intention that it should serve as a token of execution by her of her Will consisting of three pages".

[2] That these findings of the trial court find substantial support in the record cannot be doubted. Such being the situation, a reviewing court may not enter upon a reconsideration or revaluation of the evidence. Moreover, the determination arrived at would seem to give proper effect to the intentions of Mrs. Plumer without doing violence to established rules of law.

It is appellant's contention that "On the question of the proper execution of a will, the intention of the testatrix is entitled to no consideration". It is also argued that "The legislature did not intend that a separate document headed 'Memorandum for Executors' dated but unsigned should constitute a part of a will which is complete in itself and signed at the bottom", and that strict adherence to statutory requirements is required in order to prevent fraud.

[3] Such contentions, however, lose sight of the fact that the doctrine of integration in connection with testamentary disposition is well established in this state, and clearly applicable to the present situation. In re Dumas' Estate, 34 Cal.2d 406, 411, 210 P.2d 697, integration is defined as the association of disconnected writings by their internal sense, their coherence, or adaption of parts. This doctrine is distinguished from that of "incorporation by reference", and applies where "it is clear that two or more separate writings are intended by the testator to be his will". This case contains various appropriate citations involving situations where "several writings, connected by sequence of thought * * * folded together * * * or physically forming one document * * * have been admitted to probate as constituting an holographic will." [In re Estate of Wunderle, 30 Cal.2d 274, 281, 181 P.2d 874, 878.]"

So also, in Re Estate of Moody, 118 Cal. App.2d 300, 311, 257 P.2d 709, 713, the reviewing court says: "If the papers are all holographic and there is a dating and signing somewhere among them, it is immaterial when or where the dating or signing was done so long as it may be reasonably inferred that the testator meant all the papers together to constitute his will and that the signature was written with the intent that it should there serve as a token of execution".

[4, 5] Although it is true that mere intention of a testatrix cannot cure the defects of an invalid will, the testamentary document herein considered cannot be deemed an invalid will. Again quoting from the Moody case, just cited, a will "may consist of several sheets of paper, and it does not in and of itself matter that one of such sheets standing alone would not constitute an executed will". Appellant's argument that "where the possibility of fraud

exists, the courts are strict" in reference to such matters, can have no application to the present controversy in which no issue of fraud is presented.

[6] Finally, it is appellant's contention that "Costs should be deferred to the conclusion of the matter and then should be charged to the estate". The trial court, "in its discretion", as provided in Section 1232 of the Probate Code, ruled that defendants "are entitled to recover their costs from contestant". There has been no showing of any abuse of discretion in this ruling.

As hereinbefore indicated, the court's findings that all three pages were intended as the will of testatrix and that the sheets in question are all properly integrated, are amply supported by both law and evidence, and no reversible error has been pointed out.

The order is affirmed.

WHITE, P. J., and FOURT, J., concur.



148 Cal.App.2d 168

MATHEWS PAINT COMPANY, a corporation, Plaintiff and Appellant,

v.

SEASIDE PAINT & LACQUER COMPANY, a copartnership composed of Harold Friedland and Bernard Friedland, doing business under the fictitious firm name of Seaside Paint & Lacquer Company, at Long Beach, California, and Martin Goldflam and H. M. Rousselot, Defendants and Respondents.

Civ. 21792.

District Court of Appeal, Second District, Division 3, California.

Jan. 30, 1957.

Former employer engaged in manufacture and sale of paint and lacquer brought action against former employees and their new employers for injunction to compel former employees and new employees to cease doing business with former employer's former customers and for an accounting of profits. The Superior Court of Los Angeles County, Philbrick McCoy, and A. Curtis Smith, JJ., entered judgment adverse to former employer, and former employer appealed. The District Court of Appeal, Shinn, P. J., held that complaint was deficient in its allegation of facts on which a right to an injunction was asserted.

Judgment affirmed.

1. Injunction ⇐56

If customer list of former employer is not secret and confidential, it is not the property of the former employer, and former employer is not entitled to injunctive relief to prevent former employee and his new employer from using the customer list.

2. Master and Servant ⇐60

A salesman necessarily becomes somewhat acquainted with the particular requirements of his customers, but the knowledge that he obtains in such manner is not in and of itself confidential information which is the property of the employer.

3. Injunction ⇐118(1)

In action by former employer engaged in manufacture and sale of paint and lacquer against former employees and their new employers for injunction to compel former employees and new employers to cease doing business with former employer's former customers, complaint was deficient in its allegations of facts, on which a right to any injunction was asserted.

4. Injunction ⇐56

Injunctive relief should be granted a former employer against a former employee to restrain former employee from doing business with former employer's customers only on convincing proof of harmful violation of the former employer's rights, and instances in which rights are violated by a former employee's misuse of information gained during his employment

with former employer constitute an exceedingly small proportion of the whole.

5. Master and Servant ⇐60

A salesman, who leaves one employer, has right to enter the employment of a competitor of the former employer.

6. Injunction ⇐118(2)

The doctrine under which injunctive relief is granted to former employer against former employee to restrain former employee from doing business with former employer's customers should not be given application that would overemphasize the former employer's right to the detriment of the former employee by treating as confidential and secret all knowledge and information which were gained by the former employee, and which might be of assistance to the former employee and his new employer.

G. Harold Janeway and W. Alan Thody, Los Angeles, for appellant.

Max Z. Wisot, Long Beach, for respondent Seaside Paint & Lacquer Company.

Charles S. Litwin, Long Beach, for respondents Martin Goldflam and H. M. Rousselot.

SHINN, Presiding Justice.

The present action is against Harold Friedland and Bernard Paul Friedland doing business as Seaside Paint & Lacquer Company, Martin Goldflam and H. M. Rousselot, against whom an injunction is sought compelling the defendants to cease doing business with former customers of plaintiff. The complaint also seeks an accounting of profits derived by defendants from business done with plaintiff's former customers. Demurrers were sustained to plaintiff's second amended complaint with leave to amend; plaintiff declined to amend and the action was dismissed as to all defendants pursuant to the provisions of section 581(3), Code of Civil Procedure.

The complaint contains two causes of action. The material allegations of the first cause of action are the following: Plaintiff has been engaged in the business of manufacturing and selling paints and lacquers for many years. Goldflam was in plaintiff's employ as a salesman, and Rousselot as a chemist, for about 22 years prior to May 1955 when they left plaintiff's employment and entered the employment of Seaside. Among plaintiff's former customers were 18 firms engaged in the manufacture of furniture, cabinets or fixtures and the finishing of such products. These firms are listed in the complaint. Goldflam and Rousselot, while in the employ of plaintiff, learned the names and addresses of plaintiff's customers who were being served by Goldflam as a lacquer specialty salesman and he learned the individual and specific requirements and needs respecting the type and quality of lacquer products desired by the customers; he transmitted this information to Rousselot who would make and originate the products desired by lacquer customers. Due to this special service many of the customers developed a preference for plaintiff's products and purchased them consistently. This relationship was due to many years of satisfactory business dealings with plaintiff and the furnishing of products which met the needs of the customers. Plaintiff invested more than $30,000 in special equipment for the manufacture of lacquers and other products sold through the efforts of Goldflam and Rousselot and still maintains personnel to originate and develop paint and lacquer formulas adapted to meet the requirements of plaintiff's said customers for the products which were made under the formulas of Rousselot and were sold by Goldflam. It is alleged that the requirements of plaintiff's said customers as to the type, quality, specification and design of lacquers and paint products are peculiarly and exclusively within the knowledge and memory of said defendants. When Rousselot and Goldflam severed their employment with plaintiff they became employed by Seaside and became financially interested in Seaside's business and they solicited and have continued to solicit plaintiff's former customers. Rousselot represented that plain-

tiff no longer had a competent lacquer chemist and that Seaside was able to supply products identical with those formerly furnished by plaintiff and that he, Rousselot, was using the formulas formerly used by plaintiff. Both Rousselot and Goldflam have succeeded in taking away a large part of the business of plaintiff's former customers and will continue to do so. Plaintiff has at all times been able and willing to meet the requirements of its said former customers. It is alleged that defendants "labeled, numbered and otherwise identified products manufactured by Seaside Paint & Lacquer Company in such manner, and in such fashion that such products correspond in style, identifying number and appearance as the products manufactured by plaintiff" and they represent that products of Seaside "come from the same origin and source as those products manufactured and sold by plaintiff." The second cause of action adds little to the first. It alleges that Goldflam learned and made available to Rousselot the particular lacquer needs and requirements of each customer and that this knowledge was not imparted to nor made available to any of plaintiff's other salesmen. It is alleged that plaintiff has been damaged in sums aggregating more than $80,000. The complaint prays for an injunction preventing defendants from selling to firms who were plaintiff's customers while Goldflam and Rousselot were in plaintiff's employ; for an accounting of all business done by defendants with said customers and for damages in the amount of profit plaintiff would have made had it supplied said customers with its own merchandise.

In California Intelligence Bureau v. Cunningham, 83 Cal.App.2d 197, 188 P.2d 303, an injunction against the former employes of the plaintiff was affirmed. On pages 201 and 202 of 83 Cal.App.2d on page 305 of 188 P.2d of the opinion two groups of cases are listed, one, the so-called "route cases," in which injunctive relief was held proper, and another group in which it was denied. To the "route cases" that are listed may be added Cornish v. Dickey, 172 Cal. 120, 155 P. 629; New Method Laundry Co. v. MacCann, 174 Cal. 26, 161 P. 990; Mackechnie Bread Co. v. Huber, 60 Cal. App. 539, 213 P. 285; Santa Monica Ice & Cold Storage Co. v. Rossier, 42 Cal. App.2d 467, 109 P.2d 382 and Langendorf United Bakeries v. Phillips, 5 Cal.2d 150, 53 P.2d 363. The opinion enumerates the features which cast a given case into one group or the other. Without repeating it we adopt what was said as to the basis for classification. The opinion proceeds, 83 Cal.App.2d at page 203, 188 P.2d at page 306: "The fundamental difference in the decisions, as we read them, is whether in a given case the knowledge gained by an employee is secret and confidential. If it is, its use by a former employee will be enjoined. If it is not, its use by a former employee will not be enjoined. Some knowledge gained by an employee is of such a general character that equity will not restrict its later use. An employee has a right, after cessation of employment, to use anything that is not the property of his employer. Trade and business secrets and confidential information are the property of the employer and cannot be used by the employee for his own benefit." This is the principle that controls in the instant case.

Our first inquiry is whether the complaint alleges that plaintiff's former employes acquired trade and business information and knowledge that was not readily accessible to others. This could have consisted of knowledge of the use of secret formulas or methods of manufacture, or knowledge of a secret list of customers.

We consider first the allegations respecting the type and character of lacquer which plaintiff produces and sells to its customers. For many years its lacquers were manufactured under formulas known to and employed by Rousselot. It is not alleged that they were secret formulas or that plaintiff had any proprietory interest in them. In the absence of allegation of these facts it should be presumed that plaintiff had not been using formulas or methods other than

those that were known and used generally throughout the trade. Defendants had a right to use the same formulas and methods.

The 18 customers listed in the complaint are for the most part manufacturers of furniture. A few are listed as furniture refinishers, upholsterers or as manufacturers whose specialities are not listed. It is obvious that they are purchasers of lacquer in wholesale quantities and that they are generally known in the business world as being engaged in their various businesses. They are firms who would be known to and recognized by producers of lacquers as potential customers. Such businesses are commonly listed in the classified telephone directories. It is not alleged that other producers of lacquer were not at all times competing with plaintiff for the sale of their products to the firms listed and to others in the same category. In other words, it is not alleged that among plaintiff's customers were any that were not equally well known to plaintiff's competitors as buyers at wholesale. Plaintiff's list of customers was not a secret one and it was not one in which plaintiff could have a proprietary interest. In all the cases we have read in which injunctive relief was granted against the use of customer lists, such lists were of retail customers in the category of bakery routes, laundry routes, ice routes, milk routes, etc., where not only the names and addresses were kept in route books for the use of drivers in a particular territory, but, as a rule, the books also contained information as to the days when the driver was to call, the nature and quantity of the goods usually required and other information which prepared the driver to render the particular type of services required by the many housewives who were his customers. The lists had been prepared after much inquiry and effort and they were in such form that if one driver quit his employment another could take his place to carry on effectively the business of his employment in the particular district covered by the route. It has been held without exception that information that has been accumulated and compiled in this manner is the property of the employer and that any knowledge of the same possessed by the employe has been acquired in confidence which the employe is not at liberty to break.

[1] The cases in which the courts have denied injunctive relief to prevent the use of customer lists by a former employe are considerably fewer in number than those in which relief has been granted. But the principles that are applicable are just as firmly established. If the customer list is not secret and confidential it is not the property of the employer. The rule is aptly stated in the headnote to Avocado Sales Co. v. Wyse, 122 Cal.App. 627, 10 P.2d 485, as follows: "An injunction will not be granted at the instance of one engaged in the business of selling avocados to retailers, such as grocery-stores, vegetable or fruit stands, clubs, hotels and cafes, to enjoin former employees, engaged in the same business, from soliciting business from such retailers to whom the former employer, through its former employees, sold avocados, where such retailers were solicited and sold to by other firms and individual sellers, and a list of such retailers cannot be said to constitute confidential information or a trade secret." The court aptly said: "In all of the California cases in which the injunction has been granted the customers were individuals being ultimate consumers of commodities or individual customers of laundry, bread, ice, or milk concerns, and the lists of names and addresses were secret lists; but can a list of grocery stores, vegetable or fruit stands, etc., where avocados are sold to the general public, where displays are made to attract the attention, be considered as anyone's private list? Can it constitute confidential information and a trade secret? Could not any salesman see at a glance where to attempt to sell his wares? Both the plaintiff and defendant are wholesale firms selling only to retailers, and it is shown that these

retailers are solicited by other firms and individual sellers. It is also generally known that the better class of hotels, cafés, and clubs serve avocados. These people are not buying exclusively from one person or firm, as in the cases heretofore before the court. It would be unusual for the people to patronize more than one laundryman, iceman, or milkman, allowing him to solicit at their doors. If the list, against which the plaintiff seeks to enjoin, is not confidential, the plaintiff can have no proprietary interest therein. If the defendants had possessed no knowledge gained through their employment, would not the exercise of just ordinary perspicacity have sent them to these very places to solicit buyers? We think so." 122 Cal.App. at pages 633–634, 10 P.2d at page 488. A comparable case is Continental Car-Na-Var Corp. v. Moseley, 24 Cal.2d 104, 148 P.2d 9, which reversed a judgment granting an injunction. The plaintiff was a producer and seller of compounds for the finishing, cleaning and treatment of floors and of tools and appliances for that purpose. The defendant had been employed by plaintiff for 22 months and he had prepared a card index containing information as to the name, address and purchases of each customer. He had no "route." When he left the plaintiff's employ there were between 500 and 600 of such cards. He copied between 250 and 300 of them and he later solicited these customers. As a reason for reversal of the judgment the court stated, 24 Cal.2d at page 109, 148 P.2d at page 12: "Plaintiff had been in open competition with other floor wax manufacturers in the area for a number of years, and Moseley sold such products as he could in an open, competitive market. For this reason the list of customers could not be said to be a trade secret or to constitute 'confidential' information."

[2] It is alleged that Rousselot and Goldflam became familiar with the requirements of plaintiff's customers "insofar as they relate to the type, quality, design and specification required by said customers." It is not alleged that there was anything secret about those requirements; so far as alleged, information concerning them could have been acquired by any of plaintiff's competitors and may have been as well known to the competitors as they were to plaintiff or Rousselot or Goldflam. And the competitors may have been as well prepared to fulfill the requirements of the customers as was the plaintiff. A salesman necessarily becomes somewhat acquainted with the particular requirements of his customers but the knowledge that he obtains in this manner is not in and of itself confidential information which is the property of the employer. Continental Car-Na-Var Corp. v. Moseley, supra, 24 Cal.2d 104, 111, 148 P.2d 9; DeLuxe Box Lunch & Catering Co. v. Black, 86 Cal.App.2d 434, 194 P.2d 715.

[3–6] In all the particulars we have discussed the complaint is deficient in its allegation of facts upon which a right to an injunction is asserted. Injunctive relief should be granted only upon convincing proof of a harmful violation of the plaintiff's rights, and the instances in which such rights are violated by an employe's misuse of information gained during his employment constitute an exceedingly small proportion of the whole. A salesman who leaves one employer has a right to enter the employment of a competitor. He necessarily is possessed of information gained in the earlier employment which will enable him to better succeed in later ones. The doctrine under which injunctive relief is granted should not be given application that would overemphasize the employer's right to the detriment of the employe by treating as confidential and secret all knowledge and information gained by the employe that might be of assistance to him and a later and competing employer. Here defendants Rousselot and Goldflam are accused of nothing except selling to former customers of plaintiff in a field that is known to and open to all competitors of

plaintiff. This would have been the natural thing to do if they had been in the plaintiff's employ and yet had never learned the names and addresses of plaintiff's customers.

It is alleged that the defendants "have labeled, numbered and otherwise identified products manufactured by their present employer, defendant, Seaside, in such manner and such fashion that such products correspond in style, identifying number and appearance to the products manufactured by plaintiff. That defendants, and each of them, have represented to the public and to customers of plaintiff that the products sold by defendants, Seaside, come from the same origin and source as those products manufactured and sold by plaintiff." But it is not alleged that plaintiff has any property right in the labels, the numbering or other identifying appearance of its own products or that there is anything in the appearance of Seaside's products which would tend to deceive the public into the belief that they were plaintiff's products or which would otherwise constitute unfair competition. The representation by defendants that the products sold by Seaside come from the same origin and source as those products manufactured and sold by plaintiff is not alleged to be false in any particular. Plaintiff does not claim any exclusive right to develop lacquers or other products from any particular origin or source, and it is not alleged that the origin and source of plaintiff's products differ in any respect from those that are common to the products of plaintiff's competitors.

Upon the facts alleged plaintiff was not entitled to an injunction.

The judgment is affirmed.

PARKER WOOD and VALLEE, JJ., concur.

Merriman HAMBLIN, Petitioner and Appellant,

v.

STATE PERSONNEL BOARD OF The State of CALIFORNIA, Walter Rapaport, Director of Mental Hygiene of the State of California, The Department of Mental Hygiene of The State of California, Stockton State Hospital, and Freeman H. Adams, Superintendent and Medical Director of said Stockton State Hospital, Respondents.

Civ. 8970.

District Court of Appeal, Third District, California.

Jan. 28, 1957.

Rehearing Denied Feb. 26, 1957.

Hearing Denied March 27, 1957.

Proceeding upon petition for writ of mandate to compel reinstatement to permanent civil service position as physician and surgeon. The Superior Court, San Joaquin County, Thomas B. Quinn, J., denied petition, and petitioner appealed. The District Court of Appeal, Van Dyke, P. J., held that rule of State Personnel Board that failure of employee to return to his position at termination of leave of absence is automatic resignation from state service, was invalid, as in conflict with statute which then made absence without leave, whether voluntary or involuntary, for ten consecutive working days an automatic resignation, and other statutory provision relating to cases involving inexcusable absence without leave for periods less than ten days.

Judgment reversed.

States ⚖53

Rule of State Personnel Board that failure of employee to return to his position at termination of leave of absence is automatic resignation from state service, was invalid, as in conflict with statute which then made absence without leave, whether voluntary or involuntary, for ten consecutive working days an automatic resignation, and other statutory provision relating to cases involving inexcusable absence without

leave for periods less than ten days. West's Ann.Gov.Code, §§ 19503, 19571, 19572(k), 19582; West's Ann.Const. art. 24, § 2.

William Wear Clark, Stockton, for appellant.

Edmund G. Brown, Atty. Gen., by Willard A. Shank, Deputy Atty. Gen., for respondents.

VAN DYKE, Presiding Justice.

This is an appeal from a judgment denying a petition for a writ of mandate which was sought to compel appellant's reinstatement to his permanent civil service position as a physician and surgeon, Grade II, at the Stockton State Hospital.

The agreed statement of facts on appeal sets forth the following: On December 1, 1952 appellant requested and was granted a three-months leave of absence. Prior to the expiration of that leave, he requested and was granted a leave of absence for an additional nine months. From an interview with the Superintendent of the Stockton State Hospital on November 21, 1953, appellant "understood" that the superintendent would check the records, not at the moment available, and would notify appellant in advance as to the exact date when his leave would terminate. The superintendent, however, did not gain such an understanding from the interview, and appellant was not given the notice he understood he would receive. On the contrary, on December 8, 1953, he was advised by telegram that his leave had terminated on November 30, 1953. Appellant reported for duty on the following morning, but he was not permitted to resume his duties, and on December 14, 1953, he was given written notice that his failure to return to work on December 1st constituted an automatic resignation from his position under Rule 369 of the State Personnel Board, which provided that: "The failure of an employee to return to his position at the termination of a leave of absence is an automatic resignation from state service, * * *." Within the time limit prescribed by Section 19503 of the Government Code, appellant made application for reinstatement, which was denied for reasons not appearing in the record now before us. Appellant's petition for rehearing was likewise denied, and the agreed statement on appeal contains a concession that appellant exhausted his administrative remedies. He then petitioned the superior court for a writ of mandate to compel his reinstatement, and the trial court denied the same on the expressed ground that, contrary to appellant's contentions, Rule 369 as above quoted was valid and not in conflict with either the Constitution or any statute of this state. With this conclusion we do not agree. We hold it to be in conflict with the controlling statute.

If appellant's absence without leave had continued for ten consecutive working days, then, by statutory definition, it would have constituted an automatic resignation, for Section 19503 of the Government Code then provided that: "Absence without leave, whether voluntary or involuntary, for 10 consecutive working days is an automatic resignation from state service, as of the last date on which the employee worked." (By amendment in 1955 the period was shortened to five days.) By thus prescribing the period which must elapse before absence without leave would constitute automatic resignation, the legislature put it beyond the power of the board to designate a shorter period. The power given to the board, Const. Art. XXIV, Sec. 2, "to adopt rules and regulations * * * is not a grant * * * of legislative power * * and in promulgating such rules it may not alter or amend the statute or enlarge or impair its scope." Whitcomb Hotel, Inc. v. California Employment Commission, 24 Cal.2d 753, 759, 151 P.2d 233, 237, 155 A.L.R. 405. Rule 369 was not a mere regulation promotive of the policy formulated by the legislature as was the rule under consideration in Nelson v. Dean, 27 Cal.2d 873, 881–882, 168 P.2d 16, 168 A.L.R. 467, upon which respondent relies. It went further and sought to supplant the legislative declaration that absence without leave must

endure for ten days before it would constitute automatic resignation. By the statute the legislature made an inexcusable absence without leave for a shorter period of time than that specified a cause for discipline, Gov.Code, Sec. 19572(k), for which punitive action could be taken, Gov. Code, Sec. 19571 and a "just and proper" decision rendered, Gov.Code, Sec. 19582. Thereby, the legislature has declared what sanctions may be imposed for an absence without leave short of ten days and the board could not, by rule, provide for different or more stringent penalties. Tolman v. Underhill, 39 Cal.2d 708, 712, 249 P.2d 280. Rule 369 conflicts with the legislative enactment and must yield.

The judgment appealed from is reversed.

PEEK and SCHOTTKY, JJ., concur.

47 Cal.2d 903

DOUGLAS AIRCRAFT COMPANY, Inc. (a Corporation), and Industrial Indemnity Company (a Corporation), Petitioners,

v.

INDUSTRIAL ACCIDENT COMMISSION of the State of California, John A. MacDowell et al., Respondents.

L. A. 24416.

Supreme Court of California.

In Bank.

Feb. 8, 1957.

Rehearing Denied March 5, 1957.

Proceeding to review award of workmen's compensation to employee who sustained injuries in fall from scooter. The Supreme Court, McComb, J., held that evidence sustained finding that even though employee was inebriated at time of accident, extent of such inebriation was not sufficient to impair his ability to ride scooter and to observe ordinary hazards which he might encounter.

Award affirmed.

Opinion, 303 P.2d 26, vacated.

1. Workmen's Compensation ⇐1939

When fact finding of Industrial Accident Commission is attacked on ground that there is not any substantial evidence to sustain it, power of appellate court begins and ends with determination whether there is any substantial evidence, contradicted or uncontradicted, which will support finding.

2. Workmen's Compensation ⇐1939

Findings of Industrial Accident Commission are not subject to review on ground of insufficiency of evidence to support them except insofar as they may have been made without any evidence whatever in their support.

3. Workmen's Compensation ⇐626

Where employer or person in authority over particular employee acquiesces in actions of employee with knowledge of their character, finding that employee was within scope and course of his employment at time of injury is sustained on basis that employer has impliedly authorized employee's action.

4. Workmen's Compensation ⇐1592

In proceeding to review of award of workmen's compensation to employee who sustained injuries in fall from scooter, in view of evidence that employee had regularly gone out on scooter each night, returning blueprints to blueprint room and picking up others, and of fact that lead man knew that employee had performed these services and had passively condoned and approved practice, evidence sustained finding that employee was injured within course of employment.

5. Workmen's Compensation ⇐798

That employee was inebriated at time of employment accident would not require finding that proximate cause of accident was his inebriation. West's Ann.Labor Code, § 5705(b).

6. Workmen's Compensation ⇐1935

Upon review of award of compensation to employee, Supreme Court would be required to view evidence most favorably to sustaining finding of commission, and to disregard conflicting evidence.

7. Workmen's Compensation ⇐1604

In proceeding to review of award of workmen's compensation to employee who sustained injuries in fall from scooter, evidence sustained finding that even though employee was inebriated at time of accident, extent of such inebriation was not sufficient to impair his ability to ride scooter and to observe ordinary hazards which he might encounter. West's Ann.Labor Code, § 5705(b).

Kearney, Scott & Clopton and Mort L. Clopton, Los Angeles, for petitioners.

Everett A. Corten, San Francisco, Edward A. Sarkisian, Los Angeles, and Daniel C. Murphy, San Francisco, for respondents.

McCOMB, Justice.

This is a petition to review an award of compensation made by respondent commis-

sion in favor of respondent MacDowell (hereinafter referred to as the "employee") against petitioner Industrial Indemnity Company as the insurance carrier of petitioner Douglas Aircraft Company, Inc.

Facts: The employee was working for Douglas Aircraft Company, Inc., as a tool control dispatcher. He was employed on the night shift, and it was customary for him on two or three occasions each night to take a three-wheeled motor scooter to deliver blueprints to the blueprint room, pick up other blueprints, and return them to the toolroom.

About 10:40 p. m. on December 11, 1954, he took the motor scooter, went to the blueprint room, picked up blueprints and while returning to the tool booth where he worked he "struck a bump" in the road which threw him off the motor scooter. As a result of this fall he was injured.

The commission found:

First: The employee was inebriated at at the time of the accident;

Second: The employee sustained injuries within the course of his employment; and

Third: The evidence failed to establish that the employee's injuries were caused by his intoxication.

This is the question presented for our determination: *was there substantial evidence to sustain the second and third findings of the commission?*

Yes. This conclusion is governed by these rules:

[1] (1) When a finding of fact of the Industrial Accident Commission is attacked on the ground that there is not any substantial evidence to sustain it, the power of an appellate court *begins* and *ends* with a determination as to whether there is any substantial evidence, contradicted or uncontradicted, which will support the finding of fact.

[2] The findings of the commission are not subject to review on this ground except insofar as they may have been made without any evidence whatever in their support. (Ethel D. Co. v. Industrial Acc. Comm., 219 Cal. 699, 705 [5], 28 P.2d 919; Cadotte v. Industrial Acc. Comm., 86 Cal. App.2d 754, 757, 194 P.2d 563; cf. Primm v. Primm, 46 Cal.2d 690, 693 [1], 299 P.2d 231.)

[3] (2) Where the employer or person in authority over a particular employee acquiesces in actions of the employee with knowledge of their character, a finding that the employee was within the scope and course of his employment at the time of an injury is sustained on the basis that the employer has impliedly authorized the employee's action. (Jimeson v. Industrial Acc. Comm., 23 Cal.App.2d 634, 638, 73 P.2d 1238; Department of Public Works of California, Division of Highways v. Industrial Acc. Comm., 128 Cal.App. 128, 131, 16 P.2d 777; Joshua Hendy Iron Works v. Industrial Acc. Comm., 74 Cal. App.2d 191, 195 [5], 168 P.2d 203; Pacific Employers Ins. Co. v. Chavez, 5 Cal.2d 247, 252, 54 P.2d 701.)

(3) The burden of proving that an injury to an employee arising out of and occurring in the course of his employment was caused by his intoxication rests with the employer asserting such as a matter of defense. (Lab.Code, § 5705(b).[1])

Applying these rules to the instant case, the record discloses ample evidence to sustain each of the questioned findings. For example:

Second Finding

[4] Petitioners contend that the employee was injured while engaged in an act not within his assigned duties. It is true that there was evidence to this effect. However, there was uncontradicted evidence that the employee had been on the same job about six months, had regularly

1. Section 5705 of the Labor Code reads in part as follows: "The burden of proof rests upon the party holding the affirmative of the issue. The following are affirmative defenses, and the burden of proof rests upon the employer to establish them: * * * (b) Intoxication of an employee causing his injury."

gone out on the scooter three or four times each night returning blueprints to the blueprint room and picking up others which he took back to the toolroom. The fact that the employee had performed these services was known to the "lead man," who had passively condoned and approved the practice. Therefore, under rule (2), supra, the record sustains this finding.

Third Finding

[5] Petitioners contend that since the commission found that the employee was inebriated at the time of the accident it necessarily follows that the proximate cause of the accident was his inebriation. This is a non sequitur.

[6] The record discloses there was a conflict in the evidence relative to the employee's intoxication. Viewing, however, as we must in accordance with rule (1), supra, the evidence most favorable to sustaining the finding of the commission and disregarding conflicting evidence, the record reveals that prior to the accident on the evening in question the employee, during his lunch time (7:30 to 8 p. m.), consumed two or three bottles of beer with a sandwich. Two fellow workers testified he was not at all intoxicated, that from his appearance there was no indication he had been drinking, and they noted no odor of alcohol about his person. In addition, the "lead man" testified he noticed the employee and thought he had had a few drinks but was not going to bother him and left him alone. The employee himself testified that he never drank to the extent of reaching a drowsy stage and that he always quit if he felt drowsiness coming on. He further testified that he was thrown from the scooter when it struck a bump, and there is no evidence to the contrary.

In view of the foregoing evidence it is obvious that a question of fact as to whether or not the employer's defense that the inebriation was a proximate cause of the employee's accident was presented to the commission for its determination.

[7] It is likewise evident that the evidence sustains the finding of the commission that even though the employee was inebriated at the time of his accident, the extent of such inebriation was not sufficient to impair his ability to ride a scooter and observe the ordinary hazards he might encounter.

The evidence also supports the finding of the commission that the accident was caused, as the employee testified, by his striking a bump in the road rather than by his inebriation.

Therefore, petitioners failed to sustain the burden of proof resting upon them, and the finding of the commission is binding upon this court.

The award is affirmed.

GIBSON, C. J., and SHENK, CARTER, TRAYNOR, SCHAUER, and SPENCE, JJ., concur.



47 Cal.2d 819

The PEOPLE of the State of California, Plaintiff and Respondent,

v.

Willie GREENWOOD, Defendant and Appellant.

Cr. 5975.

Supreme Court of California.
In Bank.
Feb. 5, 1957.

Prosecution for assault by means of force likely to produce great bodily harm. The Superior Court, Los Angeles County, Thomas L. Ambrose, J., entered judgment of conviction and order denying defendant a new trial and defendant appealed. The Supreme Court, Spence, J., held that where defendant, in support of motion for new trial, presented affidavit of one of his witnesses to effect that witness

himself had committed the crime, but there was no affidavit stating defendant did not know of the facts contained in confessing witness' affidavit until after his conviction and it was indicated that defendant was aware of witness' "situation" prior to the termination of defendant's trial, trial court did not abuse its discretion in denying new trial.

Judgment and order affirmed.

Opinion, 300 P.2d 753, vacated.

1. Criminal Law ⇐938(1)

The granting or denial of a motion for a new trial on the ground of newly discovered evidence rests in the sound discretion of the trial court. West's Ann. Pen.Code, § 1181, subd. 8.

2. Criminal Law ⇐905, 1156(1)

Motions for new trials are looked upon with disfavor, and an appellate court will not interfere except upon a clear showing of an abuse of discretion by the trial court. West's Ann.Pen.Code, § 1181, subd. 8.

3. Criminal Law ⇐938(3)

Facts that are within knowledge of a defendant at time of trial are not newly discovered even though he did not make them known to his counsel until later, and it must appear that evidence, rather than its materiality, be newly discovered in order to support a motion for a new trial on that ground. West's Ann.Pen.Code, § 1181, subd. 8.

4. Criminal Law ⇐938(3)

On motion for a new trial on the ground of newly discovered evidence, knowledge of the facts themselves, rather than knowledge of the precise manner of their recital, is the important factor in determining whether the evidence subsequently presented is evidence which defendant could not, with reasonable diligence, have discovered and produced at the trial. West's Ann.Pen.Code, § 1181, subd. 8.

5. Criminal Law ⇐938(3)

Where defendant, in support of motion for new trial, presented affidavit of one of his witnesses to effect that witness himself had committed the crime, but there was no affidavit stating defendant did not know of facts contained in confessing witness' affidavit until after his conviction, and it was indicated that defendant, and perhaps his counsel, were aware of the witness' "situation" prior to termination of defendant's trial, trial court did not abuse its discretion in denying new trial. West's Ann.Pen.Code, §§ 245, 1181, subd. 8.

Melvin Simon and Stuart Kesner, Los Angeles, for appellant.

Edmund G. Brown, Atty. Gen., and James L. Mamakos, Deputy Atty. Gen., for respondent.

SPENCE, Justice.

Defendant was charged with assault by means of force likely to produce great bodily injury, a felony, committed on the person of Raymond James on or about November 11, 1955. Penal Code, § 245. After a plea of not guilty, defendant waived a jury trial, and it was stipulated that the cause be submitted on the testimony taken at the preliminary hearing, with each side reserving the right to submit further evidence. Both sides introduced additional testimony and defendant testified in his own behalf. He was found guilty as charged. Following the denial of his application for probation and his motion for a new trial, defendant was sentenced to a term of six months in the county jail. He appeals from the judgment and from the order denying the motion for a new trial.

Defendant's sole contention on this appeal is that the trial court abused its discretion in denying his motion for a new trial, which motion was based upon the ground of alleged newly discovered evidence. Pen.Code, § 1181, subd. 8. After a review of the record, however, we have concluded that defendant's contention cannot be sustained.

The evidence shows that on the night of November 11, 1955, between 10 and 11

o'clock, the complaining witness James, who operated a shoe shine stand on Central Avenue, in the City of Los Angeles, was struck on the head and arm with a shoe shine form. James and a bystander who saw the assault testified that defendant was the assailant. Defendant had previously owned the shoe shine stand, at which time James had asked for a job there but defendant had told James that he could not afford a helper.

Defendant denied the assault. He testified that he was at home asleep at the time of the alleged offense, and he produced two witnesses to support his alibi. Defendant also called William J. Hartwell, who testified that he was near the scene of the assault at the time it occurred, that he saw somebody run by him, but that defendant was not the man.

Upon this conflicting evidence, the trial court found defendant guilty. Defendant then moved for a new trial on the ground of newly discovered evidence. Pen.Code, § 1181, subd. 8. That section provides: "When a verdict has been rendered or a finding made against the defendant, the court may, upon his application, grant a new trial, in the following cases only: * * * 8. When new evidence is discovered material to the defendant, and which he could not, with reasonable diligence, have discovered and produced at the trial * * *."

In support of his motion for a new trial, defendant filed the affidavit of Hartwell, defendant's witness at the trial. In that affidavit Hartwell purported to confess that he himself had committed the assault on James, and stated that defendant was innocent and knew nothing of what happened that night because "he wasn't on the scene." At the time the motion was heard, the court observed at the outset: "Well, the first thing I noticed was the affiant [Hartwell] stating that he told [defendant] about the situation either before the trial or possibly before the preliminary." The court then asked defendant's attorney how he could "say it is newly discovered evidence if the defendant knew about it," and said attorney only answered: "I heard rumbles abou it." Defendant's attorney then stated that the first time he knew about Hartwell's affidavit was when he "was called by the probation officer," that he did not see it until he "came up here in court" and that he had "nothing further to add." The court denied the motion.

[1–3] The granting or denial of a motion for a new trial on the ground of newly discovered evidence rests in the sound discretion of the trial court. People v. Beard, 46 Cal.2d 278, 282, 294 P.2d 29. It is also well settled that such motions are looked upon with disfavor, People v. Yeager, 194 Cal. 452, 491, 229 P. 40; People v. Mandell, 48 Cal.App.2d 806, 818, 120 P.2d 921, and that an appellate court will not interfere except upon a clear showing of an abuse of discretion by the trial court. People v. McGarry, 42 Cal.2d 429, 432–433, 267 P.2d 254; People v. Gompertz, 103 Cal. App.2d 153, 163, 229 P.2d 105. Facts that are within the knowledge of the defendant at the time of trial are not newly discovered even though he did not make them known to his counsel until later, People v. English, 68 Cal.App.2d 670, 673, 157 P.2d 429; People v. Farber, 19 Cal.App.2d 189, 192, 64 P.2d 1138; and it must appear that evidence, rather than merely its materiality, be newly discovered in order to support a motion for a new trial on that ground. People v. Beard, supra, 46 Cal.2d at page 282, 294 P.2d at page 31; People v. Urquidas, 96 Cal. 239, 242, 31 P. 52.

[4] In the light of the foregoing rules it cannot be said that the trial court abused its discretion in this case. It appears that if there were any truth in Hartwell's affidavit concerning his guilt, defendant knew of this "situation" prior to the trial. Nevertheless, defendant used Hartwell as a witness and remained silent while Hartwell gave testimony purporting to implicate some unidentified third person. At the hearing on the motion for a new trial neither defendant nor his attorney presented any affidavit to show that they did not previously know the facts which they now claim to be the true facts. While defend-

ant's attorney may not have known of the actual existence of Hartwell's purported confession in affidavit form until after the trial, he admittedly had previously "heard rumbles about it [the confession]." Knowledge of the facts themselves, rather than knowledge of the precise manner of their recital, is the important factor in determining whether the evidence subsequently presented is evidence which defendant "could not, with reasonable diligence, have discovered and produced at the trial." Pen.Code, § 1181, subd. 8.

[5] Defendant's position is not fortified by his reliance on People v. Shepherd, 14 Cal.App.2d 513, 58 P.2d 970. While there the motion for a new trial on the ground of newly discovered evidence also involved the presentation of an affidavit of confession, these further factors were present: At the hearing and after seeing the confessing affiant, the complaining witness expressed "doubt" as to his previous identification of one of the convicted defendants as his assailant; and the deputy district attorney thereupon stated "in view of the inherent weakness in identification of the original case" and the "newly discovered evidence," he would withdraw opposition to the motion for a new trial. 14 Cal. App.2d at page 516, 58 P.2d at page 971. In contrast here, defendant, the alleged assailant, was unequivocally identified by James, the victim, and by another witness who was present at the scene. The credibility of James' identification was strengthened by the fact that some months prior to the assault he had unsuccessfully applied to defendant, the previous owner of the shoe shine stand, for work and thus had previously known the defendant. The trial court, having heard this positive testimony as to identification and having observed Hartwell when he testified, had ample opportunity to gauge the reliability of the opposing witnesses. Moreover, in support of the motion for a new trial in the Shepherd case, the convicted defendants filed affidavits stating that they did not know any of the facts contained in the confessing affiant's affidavit until after their conviction. Here no such affidavit was produced by defendant, and the above-mentioned colloquy between the court and defendant's attorney indicated that defendant, and perhaps his counsel, were aware of the Hartwell "situation" prior to the termination of the trial. Under these circumstances, the trial court's denial of a new trial does not appear to have been an abuse of discretion and its order will not be disturbed. People v. Sing Yow, 145 Cal. 1, 4–5, 78 P. 235.

The judgment and order are affirmed.

GIBSON, C. J., and SHENK, CARTER, TRAYNOR, SCHAUER and McCOMB, JJ., concur.



47 Cal.2d 801

William A. KEELER, Plaintiff and Appellant,

v.

Ruth SCHULTE, Constance Hostler, Earl Hostler, Ross Simpson, James A. Long, Theosophical Endowment Corporation, The Theosophical Society, and Kirby Van Meter, Defendants and Respondents.

L. A. 23838.

Supreme Court of California.
In Bank.
Feb. 1, 1957.

Representative suit on behalf of incorporated lodge to set aside deed of lodge property and to enjoin attempted dissolution of lodge. The Superior Court, San Diego County, Dean Sherry, J., sustained defendants' demurrer, with leave to amend, and plaintiff appealed from judgment dismissing action upon his refusal to amend. The Supreme Court, Spence, J., held that refusal of plaintiff to amend complaint to join lodge as party warranted dismissal of action, since lodge was indispensable party.

Judgment affirmed.

Opinion, 300 P.2d 51, vacated.

1. Beneficial Associations ⇐7
Dismissal and Nonsuit ⇐56

Refusal of plaintiff, in representative suit on behalf of incorporated lodge in which plaintiff sought to set aside deed of lodge property and to enjoin dissolution of lodge, to join lodge as party, warranted dismissal of action, since lodge was indispensable party.

2. Corporations ⇐592

A California corporation can only be dissolved in the manner and under the conditions prescribed in the Corporations Code of California. Wests' Ann.Corp.Code, §§ 4600–4692.

3. Corporations ⇐592

The withdrawal of a corporation's charter under ecclesiastical rules of law and order does not work a corporate dissolution in regard to state law. West's Ann. Corp.Code, §§ 4600–4692.

4. Appeal and Error ⇐1099(1)

Where opinion on former appeal did not decide question of propriety of prosecution of representative action on behalf of incorporated lodge without including lodge as party, question was not foreclosed by decision on former appeal affirming order granting plaintiff new trial on ground of insufficiency of evidence to support verdict for defendants. West's Ann.Corp. Code, §§ 4600–4692.

Johnson & Johnson and Edwin L. Johnson, San Diego, for appellant.

Rinehart, Merriam, Parker & Berg and Jay D. Rinehart, Pasadena, for respondents.

SPENCE, Justice.

This is the second appeal in this case. By a representative suit on behalf of San Diego Lodge No. 1, American Section of The Theosophical Society, a California corporation, plaintiff seeks to set aside a deed of the lodge property and to enjoin the attempted dissolution of the lodge. The action was tried and judgment was entered for defendants. Plaintiff moved for a new trial, and it was granted on the grounds of insufficiency of the evidence and that the decision was contrary to the law. On defendants' appeal, the order granting a new trial was affirmed. Keeler v. Schulte, 119 Cal.App.2d 132, 259 P.2d 37.

Plaintiff then amended his complaint, alleging the same general facts but asking additional declaratory relief by way of an accounting and the appointment of a receiver to take charge of the property of the lodge pending disposition of the action. Defendants demurred generally and specially to the amended complaint, and moved to strike portions thereof. The trial court overruled the demurrers and struck out an immaterial part of the amended complaint. Defendants then answered and filed a counterclaim for certain money and property of the lodge.

The second trial began and some evidence was received. Then the trial court decided that anticipated lengthy and "acrimonious" testimony as to "alleged slanderous statements" at the time of the claimed dissolution of the lodge should be presented to a referee for findings. Both plaintiff and defendants were ordered to advance $700 for costs. Plaintiff failed to make the required deposit. Defendants renewed their motion to strike and demurrers. The motion was granted and the demurrers were sustained with leave to plaintiff to amend his complaint. The claimed insufficiency of plaintiff's pleading was the failure to include the lodge as a party to the action. Plaintiff declined to so amend, and defendants moved to dismiss the action. The trial court agreed with defendants that plaintiff's complaint failed to state a cause of action because of the failure to include the lodge as a party, and that therefore no judgment could be entered declaring its rights or setting aside the deed. Accordingly, a judgment of dismissal was entered, and plaintiff appeals therefrom. We have concluded that the trial court's judgment should be affirmed.

[1] "The corporation is an indispensable party to a representative action brought

on its behalf; its rights, not those of the nominal plaintiff, are to be litigated, and the court has no jurisdiction to adjudicate its rights in its absence as a party." Beyerbach v. Juno Oil Co., 42 Cal.2d 11, 27–28, 265 P.2d 1, 11. Here plaintiff in a representative capacity is attempting to recapture the lodge's funds and property. He challenges the validity of a deed and certain transfers of property belonging to the lodge. On the prior appeal it was declared that "sufficient facts" were shown concerning the lodge's property rights to make plaintiff's action a "proper representative suit," citing Rosicrucian Fellowship v. Rosicrucian Fellowship Non-Sectarian Church, 39 Cal.2d 121, 245 P.2d 481. Keeler v. Schulte, supra, 119 Cal.App.2d 132, 137, 259 P.2d 37, 41.

[2, 3] Plaintiff now claims that the propriety of his prosecuting this action without including the lodge as a party thereto was adjudicated upon the former appeal. But the former opinion did not decide the point and did not discuss these vital considerations: the unrefuted fact of the lodge's pleaded status as a corporation; the continuance of its corporate existence and legal rights under California law despite any purported dissolution and surrender of its charter according to theosophical law; and its absence as a party to this action. A California corporation can only be dissolved in the manner and under the conditions prescribed in the Corporations Code of this state, §§ 4600–4692, and the withdrawal of a corporation's charter under ecclesiastical rules of law and order would not work a corporate dissolution in disregard of such state law. The above-cited Rosicrucian case held that members of one faction of a religious society can sue members of another faction, each in a representative capacity, for the determination of property rights; but there the church corporations involved were parties to the litigation and the problem of "representing" a non-party corporation was not presented.

[4] The affirmance of the order granting a new trial on the prior appeal in this case was apparently based upon the ground that the "insufficiency of the evidence" was a matter for the trial court to determine in the exercise of a "broad discretion" and there appeared to have been "no abuse" thereof. Keeler v. Schulte, supra, 119 Cal. App.2d at page 137, 259 P.2d at page 41. Since the question of the necessity of joining the lodge corporation as a party to this action was not discussed in the prior opinion, it manifestly cannot affect the determination of that essential issue here. We therefore conclude that when plaintiff thereafter refused to amend his complaint so as to join the corporation as a party, the action could not continue on its behalf and the trial court had no alternative but to order its dismissal. Beyerbach v. Juno Oil Co., supra, 42 Cal.2d 11, 28, 265 P.2d 1.

The judgment is affirmed.

GIBSON, C. J., and SHENK, CARTER, TRAYNOR, SCHAUER and McCOMB, JJ., concur.



47 Cal.2d 729

Inga A. BRANDELIUS and Pierre Brandelius, Plaintiffs and Appellants,

v.

CITY AND COUNTY OF SAN FRANCISCO, a municipal corporation, Jesse Mosley et al., Defendants and Respondents.

S. F. 19552.

Supreme Court of California.
In Bank.
Jan. 25, 1957.

Action was brought against municipality and others for wrongful death of deceased passenger, who, after alighting from one of municipality's cable cars, was fatally injured when struck by another cable car coming from the opposite direction. The Superior Court of the City and County of San Francisco, Sherrill Halbert, J.,

entered an order granting defendants' motion for new trial, on ground of the giving of allegedly erroneous instructions, and the plaintiffs appealed. The Supreme Court, Spence, J., held that the "last clear chance doctrine" may be invoked if, and only if trier of facts finds from the evidence that plaintiff was in position of danger and, by his own negligence became unable to escape from such position by use of ordinary care, either because it became physically impossible for him to escape or because he was totally unaware of the danger, that defendant knew that plaintiff was in position of danger and further knew, or in exercise of ordinary care should have known that plaintiff was unable to escape therefrom, and that thereafter defendant had last clear chance to avoid accident by exercise of ordinary care but failed to exercise such last clear chance and accident occurred as proximate result of such failure.

Order affirmed.

Carter, J., dissented.

Opinion, 296 P.2d 415, vacated.

1. Appeal and Error ⇐977(3)

The granting of a motion for a new trial rests so completely within the discretion of the trial court that its action will not be disturbed on appeal unless a manifest and unmistakable abuse of discretion clearly appears.

2. Appeal and Error ⇐933(1)

On appeal, all presumptions are in favor of order granting a new trial.

3. Appeal and Error ⇐854(6)

Order granting new trial will be affirmed on appeal if it may be sustained on any ground, though reviewing court might have ruled differently in the first instance.

4. Carriers ⇐247(4)

Ordinarily, relation of passenger and carrier terminates when street car passenger alights on public street and clears street car from which he alights, but there are certain qualifications to the rule.

5. Carriers ⇐321(23)

In action against municipality and others for wrongful death of passenger who, after alighting from one of municipality's cable cars, was fatally injured when struck by another car coming from the opposite direction, evidence authorized giving of instructions dealing with responsibility imposed by law on a carrier to provide a reasonably safe place where passengers may board or alight from cable cars.

6. Carriers ⇐320(2)

In action against municipality and others for wrongful death of passenger who, after alighting from one of municipality's cable cars was fatally injured when struck by another car coming from the opposite direction, question whether carrier-passenger relationship had terminated at time of accident was properly left to jury as a question of fact for its determination.

7. Carriers ⇐321(21)

In action against municipality and others for wrongful death of passenger who, after alighting from one of municipality's cable cars, was fatally injured when struck by another car coming from the opposite direction, trial court properly gave an instruction on the presumptions of due care on part of deceased passenger at time of accident.

8. Negligence ⇐135(6)

If last clear chance doctrine is to be applied and a recovery is to be permitted despite contributory negligence of injured person, there must be substantial evidence to show that defendant had the last clear chance to avoid the accident by the use of ordinary care following the time that the injured person lost any similar opportunity to avoid the accident by use of such care.

9. Carriers ⇐348(12)

In action against municipality and others for wrongful death of passenger who, after alighting from one of municipality's cable cars, was fatally injured when struck by another car coming from

the opposite direction, instruction on the last clear chance doctrine should have correctly instructed concerning the time for municipality's required exercise of any alleged last clear chance.

10. Negligence ⇐83.8

Defendant is not liable under the last clear chance doctrine unless, after time that he is chargeable with required knowledge of injured person's inability to escape, he has the last clear chance to avoid the accident by exercising ordinary care.

11. Negligence ⇐83.7

Under the last clear chance doctrine, actual knowledge by defendant of plaintiff's position of danger is required, but constructive knowledge by defendant of plaintiff's inability to escape will suffice.

12. Negligence ⇐83.4

The "last clear chance doctrine" may be invoked if, and only if trier of facts finds from the evidence that plaintiff was in position of danger and, by his own negligence became unable to escape from such position by use of ordinary care, either because it became physically impossible for him to escape or because he was totally unaware of the danger, that defendant knew that plaintiff was in position of danger and further knew, or in exercise of ordinary care should have known that plaintiff was unable to escape therefrom, and that thereafter defendant had last clear chance to avoid accident by exercise of ordinary care but failed to exercise such last clear chance and accident occurred as proximate result of such failure.

See publication Words and Phrases, for other judicial constructions and definitions of "Last Clear Chance Doctrine".

13. Carriers ⇐348(12)

In action against municipality and others for wrongful death of passenger who, after alighting from one of municipality's cable cars, was fatally injured when struck by another car coming from the opposite direction, last clear chance instruction, which, in confusing manner, amplified into six subdivisions the last clear chance formula, interchanged terms "position of danger" and "perilous situation" without any clear indication whether such terms were or were not intended to be synonymous, and by its fifth subdivision conditioned commencement of time for exercise of last clear chance solely on municipality's acquisition of "actual knowledge of the perilous situation" of deceased passenger, was erroneous.

14. New Trial ⇐27

Section of the constitution dealing with reversal for error resulting in miscarriage of justice should control action of trial court in considering motion for new trial. West's Ann.Const. art. 6, § 4½.

15. Appeal and Error ⇐978(1)

Where trial court has determined that error in instruction was prejudicial and has therefore granted motion for new trial, sole issue before reviewing court is whether trial court abused its discretion.

16. New Trial ⇐39

A wide discretion should be allowed to the trial court in granting a motion for a new trial on ground of erroneous instructions.

17. Appeal and Error ⇐978(1)

Order granting new trial on ground of erroneous instuctions, should not be disturbed on appeal unless there appears to be an abuse of discretion.

18. Appeal and Error ⇐854(6)

Action of trial court in granting motion for new trial on ground of erroneous instructions, can be reversed on appeal only if questioned instruction was absolutely accurate and under no reasonable interpretation could possibly have misled or confused the jury.

Hoberg & Finger and Ingemar Hoberg, San Francisco, for appellants.

Dion R. Holm, City Atty., and Jerome Cohen, Deputy City Atty., San Francisco, for respondents.

SPENCE, Justice.

Plaintiffs appeal from an order granting defendants' motion for a new trial in an action for alleged wrongful death. The order specifies that the new trial was granted "solely" because the court felt that "the jury was not properly instructed." The propriety of the order therefore depends upon a determination of whether the trial court had correctly instructed the jury. The challenged instructions relate to the following subjects: (1) the degree of care required of a carrier with respect to an alighting passenger; (2) the presumption of due care in relation to the deceased's conduct; and (3) the doctrine of last clear chance.

[1–3] It is well settled that the granting of a motion for a new trial rests so completely within the discretion of the trial court that its action will not be disturbed unless a manifest and unmistakable abuse of discretion clearly appears. Mazzotta v. Los Angeles Ry. Corp., 25 Cal.2d 165, 169, 153 P.2d 338; Fennessey v. Pacific Gas & Elec. Co., 10 Cal.2d 538, 544, 76 P.2d 104. On appeal all presumptions are in favor of the order granting a new trial, Abercrombie v. Thomsen, 59 Cal.App.2d 331, 335, 138 P.2d 701; Weaver v. Shell Oil Co., 129 Cal.App. 232, 233, 18 P.2d 736, and the order will be affirmed if it may be sustained on any ground, Brown v. George Pepperdine Foundation, 23 Cal.2d 256, 262, 143 P.2d 929; Follett v. Brown, 118 Cal.App. 198, 200, 5 P.2d 51, although the reviewing court might have ruled differently in the first instance. Hall v. Desser, 8 Cal.2d 29, 30, 63 P.2d 809; Whitfield v. Debrincat, 18 Cal.App.2d 730, 733–734, 64 P.2d 960. In the light of these settled rules, we have concluded that the order granting a new trial in the present case must be affirmed.

The accident occurred about 8:05 o'clock on the morning of May 6, 1952, at the intersection of Powell and California Streets in San Francisco. The city operates a northerly-southerly cable car line on Powell Street and an easterly-westerly one on California Street. The deceased was struck by a northbound Powell Street cable car after he had alighted from a southbound one. He was on his way to work at the Stanford Court Apartments, which are situated at the southwest corner of the intersection. To take on and discharge passengers, the southbound cable car stops in the southwest part of the intersection with its front in the southern crosswalk across Powell Street. The car has an open front part, with the gripman operating the car from his position in a space between two benches extending along the car's longitudinal axis. The passengers on the front left-hand bench have no access to any other part of the car and must alight to the left between the southbound and northbound tracks. As shown by the scale map in evidence, the distance between these tracks is 5 feet 10 inches; the tracks in each direction are 4 feet wide. A cable car, according to the scale model in evidence, is 8 feet wide, with a wheel distance of 4 feet and an overhang 2 feet wide at each side. The free space between two passing cable cars is therefore 1 foot 10 inches.

The first point to be determined is whether there was error in giving instructions on the degree of care required of a carrier toward an alighting passenger. The court instructed as follows: "The responsibility imposed by law upon a carrier of passengers for hire, such as the operation of a cable railway, includes the duty to provide a reasonably safe place where the passengers may board or alight from the cable cars.

"If you find from the evidence that the deceased was exercising ordinary care for his own safety and that he had been discharged as a passenger at and was occupying a place designed by defendant City and County as a regular stopping place for the discharge of passengers, then the defendant City and County owed to the deceased the duty to exercise the highest degree of care to avoid injuring him.

"A place to discharge passengers, as used in these instructions, refers to any place at which it is the practice of the

carrier to stop for the purpose of discharging passengers. This includes such places immediately adjacent to the track which must be used, or reasonably may be expected to be used, by persons being discharged from the cable cars.

"The relationship of carrier and passenger, and the obligation to exercise the utmost care and diligence to provide safe carriage of passengers, continues until such time as an alighting passenger has reasonable opportunity to reach a place outside of the immediate sphere of activity of the carrier which might reasonably constitute an active hazard to the passengers."

The parties agree that these instructions correctly state the law. However, defendants contend that these principles are not applicable because "the carrier-passenger relationship had terminated as a matter of law when deceased alighted from the cable car and cleared the car from which he alighted." But such conclusion here would too rigidly restrict the carrier-passenger relation and the duty of utmost care which attaches to it.

[4] It is true that ordinarily the relation of passenger and carrier terminates when a street car passenger alights upon a public street and clears the car from which he alights, MacLean v. City & County of San Francisco, 127 Cal.App.2d 263, 271, 273 P.2d 698; McAlpine v. Los Angeles Ry. Corp., 67 Cal.App.2d 486, 489, 154 P.2d 911; Choquette v. Key System Transit Co., 118 Cal.App. 643, 652–653, 5 P.2d 921, but there are certain qualifications to be noted according to the circumstances of the case. In Dayton v. Yellow Cab Co., 85 Cal.App.2d 740, at page 745, 193 P.2d 959, at page 962, it was said that "until the passenger reaches a place outside the sphere of any activity of the carrier which might reasonably constitute a mobile or animated hazard to the passenger, the rule of utmost care and diligence set forth in Civil Code, section 2100, still applies." In Boa v. San Francisco-Oakland T. Rys., 182 Cal. 93, at pages 100–101, 187 P.2d, at page 4, approval is given to the principles that "responsibility continues until the passenger has had a reasonable opportunity of getting away from the car without injury"; that it is for the jury to decide whether or not the carrier allowed its passenger "a reasonable opportunity to leave its car in safety and thus to pass beyond its care"; and that these rules apply to streetcar passengers specifically in cases of accidents "caused by the negligent use by the railway company of its own instrumentalities." See also Lagomarsino v. Market Street Ry. Co., 69 Cal.App.2d 388, 158 P.2d 982.

Reinhardt, an eye-witness, testified as to the happening of the accident: That he saw the deceased, when 6 feet south of the rear end of the stopped southbound cable car, walking north between the southbound and northbound tracks; that at the same time a northbound Powell Street cable car was approaching with its front in the southern crosswalk across Powell Street and then about 20 feet behind the deceased; that as the latter car drew near, the deceased turned around, throwing up his hands as he faced the oncoming car; and that evidently after being hit, the deceased staggered backwards a few feet and fell to the pavement.

[5, 6] This evidence would support the conclusion that the deceased, sitting on the left front bench of the southbound cable car and after it had stopped, alighted in the only possible way between the tracks; that the narrow space between passing cars—1 foot 10 inches—was not safe for the discharge of passengers if a car from the south should then approach, especially when unnoticed; and that the deceased had not had a reasonable opportunity to get away before being struck. We therefore conclude that the foregoing instructions were properly given, and that the question of whether the carrier-passenger relationship had terminated was properly left to the jury as a question of fact for its determination.

[7] Nor was it improper for the trial court to give an instruction on the presump-

tion of due care on the part of the deceased at the time of the accident. While under some circumstances there is no room for the presumption where the party whose claimed negligence is at issue either himself testifies or introduces evidence in his own behalf as to his acts and conduct immediately preceding and at the time of the accident, Speck v. Sarver, 20 Cal.2d 585, 587–588, 128 P.2d 16, Zollars v. Barber, 140 Cal. App.2d 502, 506, 295 P.2d 561, the benefit of the presumption is available if such person be deceased and the testimony of plaintiffs' witnesses respecting the deceased's acts and conduct at the time involved is not "wholly irreconcilable" with such presumption. Gigliotti v. Nunes, 45 Cal.2d 85, 93, 286 P.2d 809. Our review of the record here leads to the conclusion that the testimony of plaintiffs' witnesses was not wholly irreconcilable with the presumption.

The parties' final dispute is twofold with respect to the instruction on "last clear chance." Defendants contend that no instruction on that subject should have been given; and that, in any event, the instruction given was erroneous. We shall consider these two contentions in inverse order.

The instruction given, BAJI 205, read as follows:

"There has grown up in our law a certain reasoning process that we sometimes call to our aid in analyzing the facts of an accident case, and which is known as the doctrine of last clear chance. It is permissible to use the doctrine only after we first find, and you may not use it unless and until you first shall have found, that in the events leading up to the accident in question, both the deceased and defendants were negligent.

"The doctrine of last clear chance may be invoked if, and only if, you find from the evidence that these six facts existed:

"First: That deceased, by his own negligence, got himself into a position of danger.

"Second: That thereupon, either it was physically impossible for him, through the exercise of ordinary care, to escape from the danger, or he was totally unaware of impending danger in his position.

"Third: That the defendant had actual knowledge of the perilous situation of the deceased.

"Fourth: That it appeared to the defendant, or would have appeared to him in the exercise of ordinary care, that deceased either was unaware of the danger impending in the situation or was unable to escape therefrom through the exercise of ordinary care.

"Fifth: That after the defendant acquired actual knowledge of the perilous situation of the deceased, he had a clear opportunity to avoid the accident and could have done so by exercising ordinary care.

"Sixth: That the defendant did not avail himself of that opportunity, but by negligent conduct proximately caused the accident.

"If all the conditions just mentioned are found by you to have existed with respect to the accident in question, then you must find against the defense of contributory negligence, because under such conditions, the law holds the defendant liable for any injury suffered by the [deceased] and proximately resulting from the accident, despite the negligence of the [deceased]." While this instruction has appeared in certain recent cases such as Daniels v. City & County of San Francisco, 40 Cal.2d 614, 255 P.2d 785, and Peterson v. Burkhalter, 38 Cal.2d 107, 237 P.2d 977, the correctness of the instruction was not there questioned.

Defendants contend that the challenged instruction fails to state correctly the vital time element embraced in the last clear chance doctrine. Their argument is compelling when the instruction is compared with the essential elements of the doctrine as set forth in our decisions. The formula for the application of the last clear chance doctrine was enunciated in Girdner v. Union Oil Co., 216 Cal. 197, 202, 13 P.2d 915, and has been reiterated in several recent cases. Doran v. City & County of San Francisco, 44 Cal.2d 477, 483, 283 P.2d 1; Daniels v. City & County of San Francisco, supra, 40 Cal. 2d 614, 619, 255 P.2d 785; Rodabaugh v.

Tekus, 39 Cal.2d 290, 293, 246 P.2d 663; Peterson v. Burkhalter, supra, 38 Cal.2d 107, 109–110, 237 P.2d 977; Selinsky v. Olsen, 38 Cal.2d 102, 104, 237 P.2d 645.

[8, 9] In analyzing the required conditions for the application of the doctrine as set forth in said decisions, it should be noted that the time element is the all important factor. In other words, if the doctrine is to be applied and a recovery is to be permitted despite the contributory negligence of the injured party, there must be substantial evidence to show that the defendant had a last clear chance to avoid the accident by the use of ordinary care following the time that the injured party had lost any similar opportunity to avoid the accident by the use of such care. Under such circumstances, the injured person's contributory negligence does not bar a recovery, for it has been said that "When the doctrine applies, plaintiff's negligence becomes remote rather than proximate in causation. If it does not apply, his negligence remains proximate in its causation and will bar his recovery." Girdner v. Union Oil Co., supra, 216 Cal. 197, 204, 13 P.2d 915, 918. It is therefore essential that the jury be correctly instructed concerning the time for defendant's required exercise of any alleged last clear chance.

The formula, as enunciated in the Girdner case, purports to delineate all the essential elements for the application of the doctrine. It appears, however, that many attempts have since been made to amplify the formula when instructing juries upon the subject. Many of these attempts have resulted in confusion. One of such attempted amplifications is exemplified by the BAJI instruction which was given here. In this connection, it is of interest to note that while said instruction has appeared in the generally excellent and useful work known as BAJI (California Jury Instructions, Civil), and while the giving of said instruction has gone unchallenged in certain cases, it has been held erroneous by the district courts of appeal on the only two occasions on which its accuracy has been questioned. Moreno v. Los Angeles Transit Lines, Cal. App., 286 P.2d 923; and the present case, Brandelius v. City and County of San Francisco, Cal.App., 296 P.2d 415. Hearings were granted by this court in both the last cited cases for the purpose of giving consideration to the question. It also appears that there are other cases, such as Mason v. Hart, 140 Cal.App.2d 349, 295 P.2d 28, in which the BAJI modification has been further modified. In Mason v. Hart, supra, the trial court attempted to cure the defect in the BAJI instruction by adding the following emphasized language to the fifth subdivision thereof, 140 Cal.App.2d at page 354, 295 P.2d at page 31:

"Fifth: That after the defendant acquired actual knowledge of plaintiff's perilous situation, *and knew, or in the exercise of reasonable care should have known, that plaintiff could not escape from such a perilous situation,* he had a clear opportunity to avoid the accident and could have done so by exercising ordinary care." Having in mind the apparent difficulty encountered in instructing upon this doctrine, we have re-examined the formula with the view of determining whether there may be need for clarification. Such re-examination, including a reading of the authorities upon which the formula is based, has led us to the conclusion that there is certain loose language in some of the decisions, and that the formula itself might be stated more clearly.

It would serve no useful purpose to explore the origin of the last clear chance doctrine or the theory upon which it is based. We need only note that "In nearly all jurisdictions the strict rules as to the defense of contributory negligence have been modified by the doctrine of last clear chance. This doctrine, which usually is justified only by vague statements in terms of 'proximate cause,' places its emphasis upon the time sequence of events, and holds the defendant liable if, immediately prior to the harm, he has the superior opportunity to avoid it." (Prosser on Torts, Second Ed., 1955, p. 290.) This state has followed the majority of the other jurisdictions and has

recognized this humanitarian doctrine for many years. The development of the formula prescribing the conditions for its application in this state may be traced through the authorities cited in the Girdner case, and to these may be added many others which preceded that decision. Hoy v. Tornich, 199 Cal. 545, 250 P. 565; Wallis v. Southern Pacific Co., 184 Cal. 662, 195 P. 408, 15 A.L.R. 117; Young v. Southern Pacific Co., 182 Cal. 369, 190 P. 36; Basham v. Southern Pacific Co., 176 Cal. 320, 168 P. 359; Arnold v. San Francisco-Oakland T. Rys., 175 Cal. 1, 164 P. 798; Starck v. Pacific Electric Ry. Co., 172 Cal. 277, 156 P. 51, L.R.A.1916E, 58; Thompson v. Los Angeles, etc., Ry. Co., 165 Cal. 748, 134 P. 709; Bennichsen v. Market Street Ry. Co., 149 Cal. 18, 84 P. 420; Lee v. Market Street Ry. Co., 135 Cal. 293, 67 P. 765; Wahlgren v. Market Street Ry. Co., 132 Cal. 656, 62 P. 308, 64 P. 993; Herbert v. Southern Pacific Co., 121 Cal. 227, 53 P. 651; Everett v. Los Angeles, etc., Ry. Co., 115 Cal. 105, 43 P. 207, 46 P. 889, 34 L.R.A. 350; Holmes v. South Pac. Coast Ry. Co., 97 Cal. 161, 31 P. 834; Meeks v. Southern Pac. R. Co., 56 Cal. 513; Needham v. San Francisco & S. J. R. Co., 37 Cal. 409.

The formula, as reiterated in the recent cases in three numbered subdivisions, reads as follows: "(1) That plaintiff has been negligent and, as a result thereof, is in a position of danger from which he cannot escape by the exercise of ordinary care; and this includes not only where it is physically impossible for him to escape, but also in cases where he is totally unaware of his danger and for that reason unable to escape; (2) that defendant has knowledge that the plaintiff is in such a situation, and knows, or in the exercise of ordinary care should know, that plaintiff cannot escape from such situation, and (3) has the last clear chance to avoid the accident by exercising ordinary care, and fails to exercise the same, and the accident results thereby, and plaintiff is injured as the proximate result of such failure." Doran v. City & County of San Francisco, supra, 44 Cal.2d 477, 483, 283 P.2d 1, 5; Daniels v. City & County of San Francisco, supra, 40 Cal.2d 614, 619, 255 P.2d 785.

[10] This formula thus uses the term "position of danger" (sub. 1) and requires that "defendant has knowledge that the plaintiff is in such a situation" (sub. 2). It further requires that defendant "knows, or in the exercise of ordinary care should know, that plaintiff cannot escape from such situation" (sub. 2). Therefore the time for the exercise by defendant of any last clear chance, as defined in the formula, commences only at such time as defendant has both (1) actual knowledge of the injured person's "position of danger" and (2) actual or constructive knowledge that the injured person "cannot escape from such situation." It seems entirely clear that the time when defendant is chargeable with actual knowledge of the injured person's position of danger may substantially precede the time when defendant is chargeable with actual or constructive knowledge of the injured person's inability to escape therefrom; but defendant is not liable under the doctrine unless after the time that he is chargeable with the required knowledge of the injured person's inability to escape, he "has the last clear chance to avoid the accident by exercising ordinary care."

A simple example will illustrate the point under discussion. With a streetcar approaching a busy intersection, the motorman sees a pedestrian standing in the middle of the track at such intersection at a time when the streetcar is a considerable distance therefrom. The motorman then has actual knowledge of the presence of the pedestrian on the track and in a position of danger in the busy intersection. Being a considerable distance from the intersection, however, the motorman may not then have knowledge of any fact which would lead him, or any reasonable man, to believe that the pedestrian "is in a position of danger from which he cannot escape by the exercise of ordinary care." On the contrary, the circumstances might be such that any reasonable man could assume at that point of time that the pedestrian, in the exercise of ordinary care,

would no longer be in such position of danger when the streetcar ultimately reaches the intersection. It is only after the later point of time during the approach of the car when the motorman "knows, or in the exercise of ordinary care should know," that the pedestrian "cannot escape from such situation" that the motorman may become liable under the last clear chance doctrine, despite the pedestrian's negligence, for a failure to exercise his last clear chance, if any, "to avoid the accident by exercising ordinary care."

If the formula in its accepted form may be said to lack clarity, we believe it is by reason of the possible doubt concerning the relation between the term "position of danger," in the first subdivision, and the term "such a situation," in the second subdivision. We are convinced, however, that the term "such a situation" was intended to refer solely to the term "position of danger" in the first subdivision, for if it was intended to refer to the entire first subdivision and thereby require actual knowledge of plaintiff's inability to escape, the second half of the second subdivision, which requires only constructive knowledge of plaintiff's inability to escape, would be surplusage and meaningless. As the authorities require actual knowledge of plaintiff's position of danger, Darling v. Pacific Electric Ry. Co., 197 Cal. 702, 708, 711, 242 P. 703; Mason v. Hart, supra, 140 Cal.App.2d 349, 355, 295 P.2d 28; Young v. Carlson, 128 Cal. App.2d 743, 747–748, 276 P.2d 23; Alberding v. Pritchard, 97 Cal.App.2d 443, 446–447, 217 P.2d 1012; Dalley v. Williams, 73 Cal.App.2d 427, 432–434, 166 P.2d 595; Gillette v. City & County of San Francisco, 58 Cal.App.2d 434, 442–444, 136 P.2d 611, and, on the other hand, require only constructive knowledge of plaintiff's inability to escape, Sills v. Los Angeles Transit Lines, 40 Cal.2d 630, 637, 255 P. 2d 795; Daniels v. City & County of San Francisco, supra, 40 Cal.2d 614, 619–620, 255 P.2d 785; Peterson v. Burkhalter, supra, 38 Cal.2d 107, 111, 237 P.2d 977; Selinsky v. Olsen, supra, 38 Cal.2d 102, 105, 237 P.2d 645; Basham v. Southern Pacific Co., supra, 176 Cal. 320, 324, 168 P. 359, there appears to be no doubt concerning the meaning of the formula in this regard.

[11] Our conclusion regarding the nature of the requisite "knowledge" or "discovery" on the part of defendant is fortified by the following statement: "As to what it is necessary for the defendant to discover, there is further disagreement among courts adhering to the prevailing view. Some of them apparently hold that he must in fact realize the plaintiff's danger and his inattention; the greater number apply a more objective standard, and require only that he discover the situation, and that the danger and lack of attention be apparent to a reasonable man." (Prosser on Torts, Second Ed., 1955, p. 294.) Thus under the prevailing view elsewhere, as well as under the California cases, actual knowledge of plaintiff's position of danger is required, but constructive knowledge of his inability to escape will suffice.

In the light of these observations, we shall restate the formula in the hope that such restatement may result in greater clarity. In doing so, we shall use the word "plaintiff," as previously used in the accepted formula, rather than "deceased," as used in the challenged instruction. On the other hand, we shall use the past tense, as was done in the challenged instruction, and shall restate the formula in terms as simple as the subject will permit, in order that it may serve as the basis for instructions to juries. The first and last paragraphs of the challenged instruction will not be repeated here. These paragraphs appear appropriate as instructions to accompany the formula, but we are dealing here only with the formula itself.

[12] The formula may be restated as follows: The doctrine of last clear chance may be invoked if, and only if, the trier of the facts finds from the evidence: (1) that the plaintiff was in a position of danger

and, by his own negligence, became unable to escape from such position by the use of ordinary care, either because it became physically impossible for him to escape or because he was totally unaware of the danger; (2) that defendant knew that plaintiff was in a position of danger and further knew, or in the exercise of ordinary care should have known, that plaintiff was unable to escape therefrom; and (3) that thereafter defendant had the last clear chance to avoid the accident by the exercise of ordinary care but failed to exercise such last clear chance, and the accident occurred as a proximate result of such failure.

In restating the formula, it has not been our purpose to add to or detract from the conditions prescribed in the approved formula set forth in the Girdner case and reiterated in our recent decisions. On the contrary, the main purpose has been to state more clearly the vital time element involved in the application of the doctrine. Properly construed, both statements of the formula condition the commencement of the time for the exercise by defendant of any alleged last clear chance upon defendant's actual knowledge of plaintiff's position of danger *and* defendant's further knowledge, actual or constructive, of plaintiff's inability to escape therefrom. Amplification of the last clear chance formula in instructions to juries is not objectionable if such amplification does not tend to confuse and mislead the jury on the essential elements for the application of the doctrine.

[13] The vice of the challenged instruction in this case rests in the confusing manner in which it amplifies into six subdivisions the last clear chance formula, interchanges the terms "position of danger" and "perilous situation" without any clear indication of whether said terms are or are not intended to be synonymous, and by its fifth subdivision conditions the commencement of the time for the exercise of the last clear chance solely upon defendant's acquisition of "actual knowledge of the perilous situation" of the injured party. In ordinary usage, the terms "position of danger" and "perilous situation" would appear to be practically synonymous. But if the term "perilous situation," as used in the third and fifth subdivisions, was intended to be synonymous with the term "position of danger" as used in the first subdivision, the instruction is obviously erroneous, as the commencement of the time for the exercise of any last chance would then be conditioned solely upon defendant's actual knowledge of the injured party's "position of danger." It has been suggested that these terms are not synonymous as used in the challenged instruction. It appears, however, from the use of the term "actual knowledge" in relation to the term "perilous situation" in both the third and fifth subdivisions, that the terms "position of danger" and "perilous situation" were intended to be synonymous and would be so understood, as the further requirement of either actual or constructive knowledge on the part of defendant of the injured person's inability to escape is dealt with only in the separate fourth subdivision. At least, there is such ambiguity in the meaning of the instruction that it is misleading and confusing, and it cannot be held to be a correct exposition of the requirement of the last clear chance doctrine.

[14, 18] Whether the giving of this erroneous instruction was prejudicial need not be determined by this court on this appeal from the order granting a new trial. It is true that section 4½ of article VI of our Constitution should control the action of the trial court in considering a motion for a new trial, but when the trial court has determined that the error in the instructions was prejudicial and has therefore granted the motion, the sole issue before the appellate court is whether the trial court has abused its discretion. Mazzotta v. Los Angeles Ry. Corp., supra, 25 Cal.2d 165, 170–171, 153 P.2d 338; Bolton v. Martin, 126 Cal.App.2d 178, 179–180, 271 P.2d 991; Pope v. Wenisch, 109 Cal.App. 608, 611–612, 293 P. 622. As was said in Pope v. Wenisch, supra, 109 Cal.App. at pages 611–612, 293 P. at page 623: "There may be some doubt as to whether this error was prejudicial.

The trial court evidently believed that it was. In granting a motion for new trial on the ground of erroneous instructions, it is proper that a wide discretion should be allowed to the trial court, and the order granting the new trial should not be disturbed unless there appears to be an abuse of discretion. Thompson v. California Const. Co., 148 Cal. 35, 82 P. 367; Associated Fruit Co. v. Marone, 68 Cal.App. 358, 229 P. 868; 20 Cal.Jur. 140." And as was further said in Bolton v. Martin, supra, 126 Cal.App.2d at page 180, 271 P.2d at page 992: "Thus, on this appeal, the action of the trial court in granting the motion for a new trial because of the giving of the challenged instruction can be reversed only if, assuming the facts warranted instructions on last clear chance at all, the questioned instruction was absolutely accurate and under no reasonable interpretation could possibly have misled or confused the jury."

As the affirmance of the order here will result in a new trial, we should declare further that we find no merit in defendants' final claim that there was no substantial evidence to justify the giving of any instruction on the last clear chance doctrine. We need only note that conflicting inferences could be drawn from the testimony concerning the time that the gripman Mosley, "knew that [deceased] was in a position of danger and further knew, or in the exercise of ordinary care should have known, that [deceased] was unable to escape therefrom." The jury was not bound by Mosley's testimony that the deceased stepped off the southbound cable car when Mosley's northbound cable car was only 4 feet from the point of impact. There was other substantial evidence from which the jury could have inferred that the deceased had stepped off the car when Mosley's car was a considerable distance from the point of impact; that Mosley had an unobstructed view of the situation for at least 135 feet; that after alighting, the deceased had walked northerly between the tracks for approximately 20 or 30 feet before being struck; and that Mosley had a last clear chance to avoid the accident by the use of ordinary care, after actually having seen the deceased in his position of danger and after having knowledge, actual or constructive, that the deceased could no longer escape from his position of danger because of his unawareness of the approach of Mosley's car. Thus the evidence, although conflicting, would have warranted the giving of a proper instruction on the last clear chance doctrine, as the jury might have found from the evidence most favorable to plaintiff that the doctrine was applicable. Daniels v. City & County of San Francisco, supra, 40 Cal.2d 614, 623, 255 P.2d 785; Wright v. Los Angeles Ry. Corp., 14 Cal.2d 168, 178–179, 93 P.2d 135.

In view of our conclusion, however, that the last clear chance instruction which was given was erroneous and could have misled and confused the jury, we cannot hold that the trial court here abused its discretion in granting a new trial.

The order granting a new trial is affirmed.

SHENK, TRAYNOR, SCHAUER and McCOMB, JJ., concur.

CARTER, Justice.

I dissent.

Applying a finespun, hairsplitting technical construction to a jury instruction on the last clear chance doctrine is just as destructive of that doctrine as the refusal to submit a case to the jury on the last clear chance theory where the facts warrant such submission, see Rodabaugh v. Tekus, 39 Cal.2d 290, 246 P.2d 663; Doran v. City & County of San Francisco, 44 Cal.2d 477, 283 P.2d 1. Although I tried many cases, including Girdner v. Union Oil Co., 216 Cal. 197, 13 P.2d 915, involving the last clear chance doctrine, I am more confused, after reading the majority opinion, than ever before as to when the doctrine is applicable. It is my considered opinion that it is too much to expect of a judge or a lawyer, much less a juror, to follow the tortuous mental process resorted to by the majority here in holding that the trial court committed prejudicial error in giving BAJI in-

struction No. 205 to the jury. As I read that instruction there is clearly no error in its formulation which can justify the granting of defendants' motion for a new trial. The supposed error is that the jury, by meticulous analysis and application of the instruction, could relieve the plaintiff from the effect of the deceased's contributory negligence although the motorman, within the time in which he had a clear chance to avoid the accident, had no knowledge, actual or constructive, of the deceased's inability to escape from his position of danger. This interpretation can be drawn only by ignoring the effect of the instruction in its entirety. The reasoning of the majority appears to be that because the Fifth subdivision states: "That after the defendant acquired actual knowledge of the perilous situation of the deceased, he had a clear opportunity to avoid the accident and could have done so by exercising ordinary care," it follows that there is no requirement that defendant knew, or should have known, that it was impossible for the deceased to escape from the danger. The flaw in this reasoning is that it completely ignores the Fourth subdivision which requires the jury to find: "That it appeared to the defendant, or would have appeared to him in the exercise of ordinary care, that deceased either was unaware of the danger impending in the situation or was unable to escape therefrom through the exercise of ordinary care." If this requirement is to have any meaning at all it can only be that the deceased's inability to escape must become apparent to the defendant, actually or constructively, while the defendant still has an opportunity to avoid the accident. Any other interpretation renders the Fourth subdivision totally meaningless and it is unreasonable to conclude that a jury would so interpret and apply the instruction.

While it cannot be disputed that the trial court is vested with a wide discretion in granting a new trial on the ground of erroneous instructions, it is equally established that where the instructions are correct, the granting of a new trial is an abuse of discretion. Conner v. Southern Pacific Co., 38 Cal.2d 633, 241 P.2d 535; Parker v. Womack, 37 Cal.2d 116, 230 P.2d 823. Furthermore, as the court said in Mayfield v. Fidelity & Casualty Co., 16 Cal.App.2d 611, 629–630, 61 P.2d 83, 92, "It is fundamental that, in examining instructions, a part of one instruction may not be separated from its context and made the object of special criticism if the instructions taken in their entirety correctly advised the jury as to the law." It must be borne in mind that the trial court, in considering the propriety of a motion for a new trial, is guided by section 4½ of article VI of the state Constitution which provides, in part, that: "No judgment shall be set aside, *or new trial granted,* in any case, *on the ground of misdirection of the jury* * * * unless, after an examination of the entire cause, including the evidence, the court shall be of the opinion that the error complained of has resulted in a miscarriage of justice." (Emphasis added.) Accordingly, even though there be error in the charge to the jury, the granting of a new trial is not justified thereby unless the error is prejudicial. Sparks v. Redinger, 44 Cal.2d 121, 123, 279 P.2d 971; Brown v. George Pepperdine Foundation, 23 Cal.2d 256, 262, 143 P.2d 929; Nance v. Fresno City Lines, Inc., 44 Cal.App.2d 868, 872, 113 P.2d 244.

An examination of the case law reveals that error of a much more substantial nature than that which might be found in BAJI 205 is required to justify the ordering of a new trial. In Eames v. Haver, 111 Cal. 401, 43 P. 1120, an instruction which was admittedly obscure in its wording was held not to be prejudicially erroneous and, accordingly, the court reversed an order granting a motion for a new trial. In Moran v. Abbey, 63 Cal. 56, on an appeal from an order granting a new trial, it was urged that the charge to the jury was erroneous. This court said, at page 62, that: "Considered as a whole, in connection with the evidence and the pleadings, and construed with reference to the subject-matters in controversy, and the claims of parties before the court, it [the charge] was substantially correct. It fairly presented the case to the

jury, and there was nothing in it calculated to mislead the jury. There were therefore no grounds for a new trial." In Popejoy v. Hannon, 37 Cal.2d 159, 168, 231 P.2d 484, 490, we said that: "Prejudicial error does not necessarily result from the giving of an instruction which, subjected to meticulous analysis, might be given a 'possible construction' making it subject to 'criticism.'" In Sparks v. Redinger, supra, 44 Cal.2d 121, 123, 279 P.2d 971, 972, Mr. Justice Spence, there, as here, speaking for the majority, observed that "* * * the trial court, no less than the appellate court, is expressly enjoined by article VI, section 4½, of our Constitution from granting a new trial for error of law unless such error is prejudicial. If it clearly appears that the error could not have affected the result of the trial, the court is bound to deny the motion." In the Sparks case the majority of this court held that the failure of the trial court to give the plaintiffs' requested instructions on last clear chance in an accident case was *not* prejudicial error which would support the lower court's granting of plaintiffs' motion for a new trial.

In the cases which have affirmed the granting of a new trial on the ground of erroneous instructions there were obvious errors which were clearly prejudicial to the moving party. The three cases cited in the majority opinion are exemplary. In Mazzotta v. Los Angeles Ry. Corp., 25 Cal.2d 165, 153 P.2d 338, the instructions omitted the element of proximate cause as a requisite to the defendant's liability. In Bolton v. Martin, 126 Cal.App.2d 178, 271 P.2d 991, an instruction given on last clear chance failed to distinguish between the plaintiff's awareness of danger and her awareness of an approaching automobile regardless of its proximity at the time. In Pope v. Wenisch, 109 Cal.App. 608, 293 P. 622, the instructions failed to state that in order to relieve defendant from liability, plaintiff's contributory negligence must be the proximate cause of the injury. In each of these cases there were patent omissions of instructions on material issues and the trial court, accordingly, was held to be within the bounds of its discretion in ordering a new trial. Here, rather than an obvious omission or material misdirection, there is, at most, a theoretical and speculative uncertainty in construction. That it could have no prejudicial effect is forcefully demonstrated by the fact that the instruction has appeared, and been employed without objection, in its present form for more than thirteen years, during which time it has been subjected to the scrutiny of innumerable trial and appellate judges and attorneys. In Daniels v. City & County of San Francisco, 40 Cal.2d 614, at page 617, 255 P.2d 785, at page 787, we held that it was error to refuse to give BAJI 205 and said, that: "The form of the proposed instruction is not in question." See, also, Cole v. Ridings, 95 Cal.App.2d 136, 212 P.2d 597; Mangler v. Pacific Electric Ry. Co., 71 Cal. App.2d 815, 163 P.2d 774. The record in this case shows that the alleged error was not urged by counsel for defendants nor considered by the trial judge on the motion for new trial. Having thus escaped detection, it seems manifest that any error in the instruction is absolutely without consequence.

For this reason, I would reverse the order granting a new trial.

47 Cal.2d 814

In re Leon BINE On Habeas Corpus.
Cr. 5953.

Supreme Court of California, In Bank.
Feb. 1, 1957.

Habeas corpus proceeding to determine whether trial court exceeded its jurisdiction in modifying the terms of petitioner's probation. The Supreme Court, Shenk, J., held where trial court ordered hearing after a co-defendant submitted affidavit to correct an error of information available to court at time of the sentencing of another co-defendant, and the affidavit contained no reference, direct or indirect to petitioner, and no evidence was presented at the hearing as to petitioner, subsequent minute order modifying probation order as it related to petitioner was in excess of jurisdiction of the court.

Writ granted with directions.

1. Criminal Law ⇐982

Probation is an act of clemency and may be withdrawn if the privilege is abused, and an abuse of privilege is shown where defendant practices a deception upon the court at the time probation is granted, or violates any of the terms or conditions of probation. West's Ann.Pen.Code, § 1203.2.

2. Criminal Law ⇐982

Where defendant practices a deception upon the court at time probation is granted, or violates any of the terms or conditions of probation, trial court is authorized to modify and change any and all terms and conditions of probation. West's Ann.Pen.Code, §§ 1203.1, 1203.2.

3. Criminal Law ⇐982

While trial court has the wide discretion in imposing or modifying terms of probation, it may not act arbitrarily or capriciously and its determination must be based upon the facts before it. West's Ann.Pen. Code, §§ 1203.1, 1203.2.

4. Criminal Law ⇐1023(12)

An order granting probation to defendant found guilty of conspiring to defraud insurance companies was appealable. West's Ann.Pen.Code, § 1237, subds. 1, 3.

5. Criminal Law ⇐1023(12)

Should trial judge arbitrarily modify a probationary order without imposing judgment and sentence, an appeal would lie therefrom as an appeal from an order made after judgment affecting the substantial rights of the probationer. West's Ann. Pen.Code, § 1237, subds. 1, 3.

6. Habeas Corpus ⇐4

Habeas corpus may not be employed to serve the purpose of an appeal.

7. Habeas Corpus ⇐4

Where there was an uncertainty in law at time petitioner sought a writ of habeas corpus to review an order modifying probation and in absence of a judicial determination at that time as to whether order modifying probation was an appealable order, Supreme Court did not deny petitioner the use of writ for purpose of defining his rights.

8. Criminal Law ⇐982

Where trial court ordered hearing after a codefendant submitted affidavit to correct an error of information available at time of the sentencing of another codefendant, but affidavit contained no reference to petitioner, and no evidence was presented at the hearing as to petitioner, subsequent minute order modifying probation order as it related to petitioner was in excess of jurisdiction of court. West's Ann.Pen.Code, §§ 1203.1, 1203.2, 1237, subds. 1, 3.

9. Criminal Law ⇐982

Although an order modifying defendant's probation was void for the reason it was made in excess of jurisdiction of court, the original probationary order was not destroyed and defendant was still subject to the terms of original probationary order. West's Ann.Pen.Code, §§ 1203.1, 1203.2.

Irmas, Rutter & Halper and William A. Rutter, Beverly Hills, for petitioner.

William B. McKesson, Dist. Atty., Adolph Alexander, Chief Deputy Dist. Atty., Jere J. Sullivan, Lewis Watnick and Fred N. Whichello, Deputy Dist. Attys., Los Angeles, for respondent.

SHENK, Justice.

This is a proceeding in habeas corpus to determine whether the court exceeded its jurisdiction in modifying the terms of petitioner's probation.

Petitioner and four co-defendants, Jarosh, Chapman Sergent and Thrift, were charged with conspiracy to defraud certain insurance companies. Each pleaded guilty and requested probation. Probation reports were prepared in the probation department from information obtained from the defendants and from the investigation department of the district attorney's office. At the probation hearing on June 18, 1956, the court stated that it had read the probation report for this petitioner and granted him probation. The following minute order was thereupon entered: "Proceedings suspended, 5 years probation, fined $1,000, payable as directed by probation department, to obey all laws." On July 1, 1956, the probation department accepted as satisfactory an initial payment of $25 from petitioner. On July 17th the court, on its own motion set July 31st for hearing for modification of the terms of probation. Its action was precipitated by reason of an affidavit made by co-defendant Chapman dated June 19, 1956, which stated that the affiant wanted "to correct an error of information available to the Court at the time of the sentencing of Howard Jarosh." In ordering a hearing the court stated that it had had a further investigation made and had found "that there was outright deceit practiced upon the Probation Department and the court granting the original probation." Supplemental probation reports were furnished as to each defendant, including petitioner. The affidavit of Chapman contains no reference, dirct or indirect, to petitioner. The supplementary probation report states that "Subsequent investigation and questioning of [petitioner] does not materially modify or bring to light any information not included in the original report submitted to the Court." No evidence was presented at the hearing as to petitioner which was not before the court on June 18th. After the hearing a Minute Order was entered which provided, as to petitioner: "Probation modified, requirement of fine is vacated and set aside, defendant required to serve next 6 months in county jail, good time is recommended, honor farm or road camp recommended. Defendant remanded."

The question before us is whether the court exceeded its jurisdiction in modifying the probation of petitioner and whether the remedy of habeas corpus is available to him. It should be observed that no problem is here presented as to improper conduct by petitioner or violation of the terms of his original probation.

The record before us clearly indicates that there was no factual basis for the court's determination that the probation of petitioner should be modified and new terms imposed. Whatever may have appeared as to the other co-defendants, the record of which is not before us, it is apparent that the court reached a different conclusion upon the same facts which were before it at the time it imposed the original terms of probation.

[1–3] Probation is an act of clemency and may be withdrawn if the privilege is abused. An abuse of privilege is shown where a defendant practices a deception upon the court at the time probation is granted, People v. Sapienzo, 60 Cal.App. 626, 629, 213 P. 274, or violates any of the terms or conditions of probation. Pen. Code, § 1203.2. In such case the court is specifically authorized to modify and change any and all of the terms and conditions of probation. Pen.Code, § 1203.1. While it has a wide discretion in imposing or modifying the terms of probation, it may

not act arbitrarily or capriciously. In re Davis, 37 Cal.2d 872, 875, 236 P.2d 579; In re Dearo, 96 Cal.App.2d 141, 143, 214 P.2d 585. Its determination must be based upon the facts before it.

[4–6] The order of June 18th *granting probation* was an appealable order under the express terms of the 1951 amendment to subdivision 1 of section 1237 of the Penal Code. This section reads: "An appeal may be taken by the defendant: 1. From a final judgment of conviction; an order granting probation shall be deemed to be a final judgment within the meaning of this section. 2. * * * 3. From any order made after judgment, affecting the substantial rights of the party." The appealability of an order *modifying probation* has heretofore not been judicially determined. In People v. Robinson, 43 Cal.2d 143, 271 P.2d 872, we held that an order *revoking probation* is not an appealable order within the meaning of subdivision 3 of section 1237 of the Penal Code but remains an intermediate order reviewable on appeal from the judgment. There the order revoking probation and the judgment were entered at the same time. As stated in People v. Johnson, 134 Cal.App. 2d 140, 142–143, 285 P.2d 74, the purpose of revoking probation in the Robinson case was so that judgment and sentence could be pronounced. However the court has jurisdiction, upon revocation of probation, to place the defendant upon a new probation, with new conditions. Should it arbitrarily modify a probationary order without imposing judgment and sentence, an appeal would lie therefrom under subdivision 3 of section 1237 as an appeal from an order made after judgment affecting the substantial rights of the probationer. It is the general rule that the writ of habeas corpus may not be employed to serve the purpose of an appeal. In re Dixon, 41 Cal.2d 756, 264 P.2d 513.

[7] However, in view of the uncertainty in the law at the time the petitioner sought the writ and in the absence of a judicial determination at that time as to whether an order modifying probation is an appealable order, we are disposed to apply the rule suggested in Phelan v. Superior Court, 35 Cal.2d 363, 371, 217 P.2d 951, and to hold under the circumstances here appearing that the petitioner should not be denied the use of the writ of habeas corpus for the purpose of defining his rights as against the order complained of when the court now for the first time is deciding that the order was appealable. We issued an order to show cause why a writ of habeas corpus should not be granted. A return to the order to show cause has been filed which, together with the showing made in the petition, serves as a record upon which the application may be determined.

[8, 9] It is clear that the order of July 31, 1956, insofar as it relates to the petitioner, was made in excess of the jurisdiction of the court for the reason that there was no factual basis to support it. It was therefore ineffective. But the void order of modification did not destroy the original probationary order. The petitioner is still subject to the terms of that order and is in the custody of the Superior Court in and for the County of Los Angeles with supervisory control through the probation officer of the court.[1]

1. Penal Code, § 1203.1 provides, in pertinent part, "* * * in all cases where confinement in a county jail has not been a condition of the grant of probation, the court shall place the defendant or probationer in and under the charge of the probation officer of the court, for the period or term fixed for probation * *." Cf. In re Albori, 218 Cal. 34, 38, 21 P.2d 423, where a petitioner was ordered to be released upon parole and to be committed to the custody of the board of prison terms and paroles. Penal Code, § 1493 provides that "In cases where any party is held under illegal restraint or custody, or any other person is entitled to the restraint or custody of such party, the Judge or Court may order such party to be committed to the restraint or custody of such person as is by law entled thereto."

The writ is granted. The return to the order to show cause shall stand as the return to the writ. The petitioner is discharged from the custody of the sheriff of Los Angeles County and remanded to the custody of the probation officer of the Superior Court in that county pursuant to the order of that court made and entered June 18, 1956.

GIBSON, C. J., and CARTER, TRAYNOR, SCHAUER, SPENCE and McCOMB, JJ., concur.



47 Cal.2d 884

Paul R. ENSIGN, Plaintiff, Cross-Defendant and Respondent,

v.

PACIFIC MUTUAL LIFE INSURANCE COMPANY, Defendant, Cross-Complainant and Appellant.

L. A. 24049.

Supreme Court of California. In Bank.

Feb. 8, 1957.

Action by insured for disability benefits allegedly due under terms of an income policy. The Superior Court, San Diego County, Dean Sherry, J., entered judgment for insured and insurer appealed. The Supreme Court, Schauer, J., held that where policy provided insurer would pay indemnity for continuous and total loss of all business time, insurer was liable for disability payments for disability sustained by insured which prevented him from returning to work, even though, at time disability occurred, insured was retired and might or might not have had an intention to resume work.

Judgment affirmed.

Spence, J., dissented.

Opinion 299 P.2d 289, vacated.

1. Insurance ⇐524

Where an income policy provided insurer would pay indemnity for continuous and total loss of all business time, insurer was liable for disability payments for disability sustained by insured which prevented him from returning to work, even though, at time disability occurred, insured was retired and might or might not have had an intention to resume work.

2. Insurance ⇐524

Where income policy provided insurer would pay indemnity for total loss of all business time, but that indemnity would not be paid at a rate in excess of average earnings of insured for two years immediately preceding commencement of disability for which company was liable, insurer was liable for maximum indemnity specified in policy, notwithstanding fact insured had been unemployed during two-year period preceding his disability, since provision limiting disability, properly construed, was applicable only where insured had been actually employed during at least a part of two-year period preceding his disability.

Gray, Cary, Ames & Frye and Ward W. Waddell, Jr., San Diego, for appellant.

Chandler & Durham and Robert J. Durham, La Jolla, for respondent.

SCHAUER, Justice.

Plaintiff brought this action to recover disability benefits alleged to be due from defendant under the terms of an insurance policy. The court, sitting without a jury, gave judgment for plaintiff, and defendant appeals. We have concluded that plaintiff is entitled to recover under the terms of the policy, and that the judgment should therefore be affirmed.

The facts, as disclosed by the record, appear to be substantially undisputed. In 1929, plaintiff, a physician, took out a "Noncancellable Income Policy" of insurance

from defendant.[1] The policy provided for payments for disability due to illness or injury resulting in "continuous, necessary and total loss of all business time." By the terms of the policy plaintiff had the right to renew it yearly until he was sixty years of age, but defendant reserved no rights to cancel the policy if premiums were paid. No element of estoppel, therefore, arises from the mere acceptance of premiums, and it is to the terms of the policy alone that plaintiff must look for his right to recover.

When plaintiff entered the Army in 1940, defendant waived payment of premiums since war risks were not covered by the policy, and plaintiff was given the option to renew the policy upon discharge from service. Plaintiff suffered severe illness while in service and was discharged in 1946 with a permanent disability rating. Following release from service, plaintiff, by letter to the insurance company, inquired as to the effect his disability would have on his rights under the policy and defendant replied by letter that the policy would not cover this disability or others resulting from his military service[2] but "it would, of course, cover any illnesses or injuries in accordance with the terms of the policy. * * *" Plaintiff thereupon exercised his option to renew the policy. After renewal, the premiums were paid and the policy kept in force through 1952.

Plaintiff's service-incurred disability, while permanent, was not total, and he was physically able to return to the practice of medicine or to engage in other types of employment if he so desired. Instead, however, he chose to retire, at least temporarily, and the trial court found that he was not gainfully employed subsequent to his discharge from the Army in 1946.

In 1947, plaintiff filed a claim under the policy for disability payments due to an illness. In the claim plaintiff listed himself as a "Physician (retired)" but also indicated that he was self-employed, designated his usual duties as "Medicine & Surgery," and stated that he had stopped all work on March 18, 1947. Defendant's claims adjuster, when he interviewed plaintiff in 1947, relative to that claim, learned that plaintiff had not been practicing his profession since his discharge from service. Defendant then took the position that the illness was service-connected and on that ground alone denied the claim.

In September, 1952, plaintiff's doctor discovered that plaintiff was suffering from a heart ailment and advised plaintiff to stop all physical exertion. Plaintiff filed a claim with defendant for indemnity under the policy, the claim was refused, and plaintiff instituted this action. The trial court found that the ailment did in fact totally disable plaintiff and that it was not service-incurred, and gave judgment for plaintiff. This appeal followed.

Defendant's claim of non-liability rests on its construction of the terms of the policy. The policy provides, in pertinent portions:

"Part A. (1) The Company will pay indemnity at the rate of Two Hundred * * * Dollars per month for the period throughout which disability described above [which includes disability resulting from sickness] consists of continuous, necessary and total loss of all business time. * * *

"25. Indemnity for disability will not be paid under this policy at a rate in excess of the average earnings of the Insured for the period of time that he has been actually

1. The policy was originally issued by the Pacific Mutual Life Insurance Company of California. In 1936, pursuant to a rehabilitation and reinsurance agreement between defendant and the Insurance Commissioner of California, as conservator of the Pacific Mutual Life Insurance Company of California, the liabilities of the latter company, including the policy issued to plaintiff, were reinsured and assumed by defendant. We use the term "defendant" as referring either to defendant or the issuing company.

2. In section 21 of the policy it is provided: "This insurance does not cover * * * (3) disability resulting wholly or partly, directly or indirectly from (a) bodily injury sustained or sickness contracted or naval service in time of war. * * *" while the Insured is engaged in military

employed during the two years immediately preceding the commencement of the disability for which the Company is liable, and all premiums paid during said two years for that portion of the disability indemnity in excess of the amount of such earnings will be returned upon request of the Insured. * * *"

[1] The company raises two defenses: First, it asserts that plaintiff, as basic to the recovery sought, must bring himself within the terms of Part A(1) of the policy and show a loss of "business time," and that since plaintiff had not been working at all for six years prior to the disability in question and had had no intention of coming out of retirement at the time he incurred the disabling ailment, this requisite was not satisfied. Second, the company contends that in order to establish a measure of recovery under the terms of section 25 of the policy, plaintiff had to show average earnings in excess of zero during some part of the two prior years, and this he could not and did not do. The trial court rejected defendant's construction of the policy and determined that, construed favorably to the insured, the policy provides for recovery by plaintiff in the circumstances of this case.

As recently stated by this court, the following general rules govern the construction of ambiguous clauses in insurance contracts: "It is elementary in insurance law that any ambiguity or uncertainty in an insurance policy is to be resolved against the insurer. [Citations.] If semantically permissible, the contract will be given such construction as will fairly achieve its object of securing indemnity to the insured for the losses to which the insurance relates. [Citations.] If the insurer uses language which is uncertain any reasonable doubt will be resolved against it; if the doubt relates to extent or fact of coverage, whether as to peril insured against [citations], the amount of liability [citations] or the person or persons protected [citations], the language will be understood in its most inclusive sense, for the benefit of the insured." (Continental Cas. Co. v. Phoenix Const. Co. (1956), 46 Cal.2d 423, 437–438, 296 P.2d 801.)

Defendant, arguing in support of its contention that plaintiff does not come within the coverage of the policy because he lost no "business time," asserts that, according to the evidence, plaintiff undoubtedly would not have worked after the time of the disability whether he had incurred it or not. But while such a situation may have been probable, it is not for this court to engage in speculation as to whether plaintiff would or would not have worked in the future were it not for the disability. The fact is that prior to the heart ailment plaintiff *could* have worked had he so desired, whereas after the illness he could *not*. Defendant admits the obvious fact that even if plaintiff was not working at the date of a claimed disability and even if he had no present intention of returning to work, he might want to keep the policy alive (as in truth he did here) on the chance that he might later change his mind and take up some business activity. The policy therefore may be held to recognize that ability to work, not intention to work, possesses the character of "business time." This conclusion was reached in Pacific Mut. Life Ins. Co. v. Riffel (1941), 202 Ark. 94, 149 S.W. 2d 57, 59, where the court, interpreting a policy of the company containing a clause similar to Part A(1) here, stated that "business time" means "ability to engage in sustained effort of a character sufficiently substantial to negative the idea that there was not a total loss of power reasonably to continue the business or profession."

While the foregoing definition is not controlling here, it appears to be a sound interpretation of a policy such as the one under consideration. The company concedes that the purpose of the policy is not to insure against loss of income as such, but against loss of "business time"; this concession indicates that the essential attribute of "business time" is to be determined without reference to actual earnings, past or prospective.

The foregoing conclusions as to the character of "business time" also refute the contention of defendant that it is not liable under its policy because plaintiff's only occupation prior to disability was that of a *retired* physician, and that his disability would not prevent him from performing the "duties" of a "retired gentleman." (See Knapp v. Preferred Mut. Acc. Ass'n (1889) 53 Hun 84, 6 N.Y.S. 57, 58.) Regardless of what occupation plaintiff had been pursuing prior to the disability, the fact remains that before the disability, but not after it, he was physically able to go back to his former occupation as a physician or to undertake other gainful occupation suitable to his qualifications. In other words, until the onset of the last disability he had not suffered "*necessary* and total loss of all business time." (Italics added.)

[2] Even if plaintiff comes within the coverage of the policy, defendant urges, plaintiff is barred from recovery by the specific requirements of section 25 of the policy, hereinabove quoted. This provision, defendant argues, establishes that the measure of recovery is to be reduced below the general standard set by Part A(1) of the policy to the extent that plaintiff's average earnings during the two years preceding disability were less than such standard, and, as plaintiff earned nothing during the two years just prior to the disability, his measure of recovery must be zero. In support of this contention defendant suggests that there is no purpose to section 25 if it is not to provide that an insured cannot recover more than he has been earning. But the very stating of defendant's argument serves to emphasize that the meaning it urges for such section is at best a debatable inference, an inference favorable to the insurer and adverse to the insured.

The trial court construed section 25 to mean that "*if* the insured was gainfully employed for any portion of the two-year period mentioned, the insurer would be liable only for an amount not in excess of the average earnings of the insured for the time he has been *actually employed* during said two-year period." (Italics added.) This interpretation, we conclude, is tenable, and more in harmony with applicable rules of construction than that urged by defendant. Section 25 provides that the insured will not be paid at a rate in excess of his average earnings for the period of time that "*he has been actually employed*" (italics added) during the two prior years. If an insured was idle for two years, during which he continued paying premiums, then resumed employment and on the first day back on the job incurred a permanent and total disability, it would require language different from any found in the subject policy to disqualify him from indemnity merely because he had not worked for the previous two years. If he had *not* "been actually employed" at any time within the two years he simply would not come within the class or circumstance to which the limitation of section 25 is by its terms applicable.

Certainly there is nothing in the policy which suggests that an insured who has *voluntarily* chosen to remain idle for two years or more, but who has continued to pay accruing premiums, may not thereafter choose to resume gainful occupation, or, regardless of whether he has or has not resumed gainful occupation, may not thereafter suffer disability which for the first time results in "continuous, *necessary* and total loss of all business time." (Italics added.) The only consideration for the premiums charged by defendant and paid by plaintiff was the promise of the former to pay the stated sum for the period of disability consisting of such "continuous, necessary and total loss of all business time." It has been clearly established that plaintiff's *time for business* has been continuously, necessarily and totally lost to him through a cause contemplated by the contract. Defendant's attempt to invoke section 25 as absolvatory of its primary obligation does not, in the circumstances of this case, commend itself to us. It appears to us to be manifestly more reasonable to construe section 25 as applying only where the insured had been actually employed during at least a part of the prior

two-year period. In any event, since the meaning of section 25 is (at best, from defendant's standpoint) questionable, it must be construed favorable to the insured and adversely to the insurer. (Continental Cas. Co. v. Phoenix Const. Co. (1956), supra, 46 Cal.2d 423, 437–438, 296 P.2d 801.) So construing the policy, it is apparent that the trial court correctly awarded recovery to plaintiff.

For the reasons above stated, the judgment is affirmed.

GIBSON, C. J., and SHENK, CARTER and McCOMB, JJ., concur.

SPENCE, Justice.

I dissent.

The policy in question is clear and unambiguous in its application to the admitted facts; and, in my opinion, the result reached by the trial court and by the majority is erroneously based upon a "forced construction against the insurer." Coit v. Jefferson Standard Life Ins. Co., 28 Cal.2d 1, 11, 168 P.2d 163, 169, 168 A.L.R. 673; see also New York Life Ins. Co. v. Hollender, 38 Cal.2d 73, 81, 237 P.2d 510.

The policy here was a "Non-cancellable Income Policy" insuring only against disability resulting in "continuous, necessary and total loss of all business time," with the amount of indemnity limited in two respects: (1) a maximum possible indemnity of two hundred dollars per month and (2) a general limitation set forth in section 25 providing that "Indemnity for disability will not be paid under this policy at a rate in excess of the average earnings of the Insured for the period of time that he has been actually employed during the two years immediately preceding the commencement of the disability. * * *"

The trial court found: "That it is true that Plaintiff has been voluntarily retired and has not been gainfully employed since January of 1946 and it is true that Plaintiff has had no earnings at any time during the two years immediately preceding the commencement of his disability which occurred on September 17, 1952." This finding, which is based upon admitted facts, clearly demonstrates that plaintiff is not entitled to recover any indemnity under the terms of the policy.

It is difficult to follow the reasoning of the majority opinion. It declares that the meaning of section 25 is "questionable" and that it is "more reasonable to construe section 25 as applying only where the insured had been actually employed during at least a part of the prior two-year period." Thus the majority's construction of the policy produces the following illogical results: if the insured had had average earnings of fifty dollars per month while employed during the preceding two-year period, he would have been limited in his recovery of indemnity to fifty dollars per month during his disability; but as the insured had had no employment or earnings during the preceding two-year period, he is entitled to recover the maximum possible indemnity of two hundred dollars per month during his disability. I cannot agree. The provisions of section 25, limiting the indemnity to a rate not in excess of the insured's earnings during the specified period, whether read alone or in conjunction with the other provisions of the policy, are too clear and unambiguous in their application to the admitted facts to permit any such unreasonable and "forced construction" in support of plaintiff's recovery.

In conclusion, it should be said that there appears to be nothing unfair or inequitable in the terms of the policy as written. The policy was "non-cancellable" insofar as the insurer was concerned, but it could be terminated by the insured. The premium was no doubt fixed in the light of the clear limitations of the policy concerning the indemnity payments. The insurer could not refuse renewal premiums and manifestly could not control the insured's activities. The choice of renewal or termination rested each year solely with the insured, which choice could be made by him in the light of his probable plans and of the provision that "all premiums paid during said two years for that portion of the disability in-

demnity in excess of the amount of such earnings will be returned upon request of the Insured. * * *" Pursuant to that provision, and upon learning that the insured had had no earnings, the insurer here offered to return his premiums. Under the admitted facts and the plain provisions of the policy, he was entitled only to the return of such premiums and was not entitled to any indemnity.

I would reverse the judgment of the trial court.

TRAYNOR, J., concurs.



47 Cal.2d 804

CITY OF WALNUT CREEK, a Municipal Corporation, Petitioner,

v.

Edward J. SILVEIRA, City Treasurer of the City of Walnut Creek, Respondent.

S. F. 19671.

Supreme Court of California.

In Bank.

Feb. 1, 1957.

Mandamus proceeding brought to compel city treasurer to issue certain bonds. The Supreme Court, Carter, J., held that the Limited Obligation Bond Law was intended to classify a small city with a large surrounding urban population so as to permit the city to finance, by sales tax, local improvements necessary to accommodate influx of people from surrounding unincorporated area, and held that such statute was a valid general law rather than invalid special legislation.

Order accordingly.

1. Mandamus ⇐103

Signing of bonds is ministerial duty, and mandamus would be appropriate remedy to compel city treasurer to sign bonds, if proposed issue met requirements of law.

2. Statutes ⇐93(4)

Where legislation is based on population classification, there must be reasonable basis for such classification with respect to subject matter of legislation and legislation must relate to a municipal affair. West's Ann.Const. art. 11, § 6.

3. Evidence ⇐25(2)

Court could take judicial notice of rapid growth of population in state, of exodus of great portions of populations of cities into surrounding incorporated urban areas, and of problems confronting small cities with inadequate facilities for caring for such an increased population.

4. Municipal Corporations ⇐65

The "municipal affairs" which Constitution leaves subject to local control are internal business affairs of municipality. West's Ann.Const. art. 11, § 6.

See publication Words and Phrases, for other judicial constructions and definitions of "Municipal Affairs".

5. Statutes ⇐93(4)

The Limited Obligation Bond Law was intended to classify a small city with a large surrounding urban population so as to permit the city to finance by sales tax local improvements necessary to accommodate influx of people from surrounding unincorporated area, and such statute was a valid general law rather than invalid special legislation though it is applicable only to cities with a population of 4,000 or less. West's Ann.Const. art. 11, § 6; West's Ann.Gov.Code, §§ 34100 et seq., 34102, 43648, 43649.

6. Municipal Corporations ⇐915

Government Code section fixing maximum indebtedness for public improvements had no application to indebtedness under Limited Obligation Bond Law. West's Ann.Gov.Code, § 43605.

John A. Nejedly, City Atty., Walnut Creek, Kirkbride, Wilson, Harzfeld & Wallace, Charles J. Williams, San Mateo, Clark

A. Barrett, San Francisco, Kenneth I. Jones, Jr., Arthur J. Harzfeld and Ernest A. Wilson, San Mateo, for petitioner.

Richard M. Ramsey, Richard B. Maxwell and F. L. Manker, Santa Rosa, for respondent.

CARTER, Justice.

[1] By this proceeding in mandamus the petitioner, city of Walnut Creek, seeks to compel the city treasurer to issue certain bonds. The bonds were authorized to be issued pursuant to the Limited Obligation Bond Law of 1955, Stats.1955, ch. 1847, Government Code, §§ 43648–43702. Mandamus is an appropriate remedy to compel respondent treasurer to sign the bonds if the proposed issue meets the requirements of the law since the acts demanded are ministerial duties. City of Oxnard v. Dale, 45 Cal.2d 729, 731, 290 P.2d 859.

[2–5] The act here involved is applicable only to cities with a population of 4,000 or less, which population is not more than one-seventh of the total population of the city and the unincorporated urban area within a radius of three miles of its limits. Section 6 of Article XI of the state Constitution provides that "Corporations for municipal purposes shall not be created by special laws; but the Legislature shall, by general laws, provide for the incorporation, organization, and classification, in proportion to population, of cities and towns, which laws may be altered, amended, or repealed * * *."[1] The primary question presented here is whether the act here involved is a valid general law within the constitutional meaning or invalid special legislation.

The city of Walnut Creek is a "general law city", Gov.Code, § 34102. The 1949 merged version of the Classification Act and Municipal Corporation Bill was repealed in 1955, Stats.1955, ch. 624, p. 1120, and the Legislature established "chartered cities" and "general law cities." (See, Gov. Code, § 34100 et seq.) Pursuant to the Limited Obligation Bond Law, the city of Walnut Creek, after notice duly given, and a hearing, determined that the population formula was met and adopted a resolution in accordance with its findings, Gov.Code, §§ 43648,[2] 43649. Thereafter, at a regular meeting, the city council, by a two-thirds vote, passed and adopted a resolution that the public interest and necessity demanded the acquisition construction and completion of certain municipal improvements and provided for a municipal bond election. At a subsequent meeting an ordinance was adopted which called for a special election in the city of Walnut Creek to submit to the electors of the city a proposition for incurring a bonded indebtedness to cover the cost of said improvements. Notice was duly given. At a subsequent meeting, one section of the ordinance was amended and notice duly given thereof. The election was duly and regularly called and held in the manner provided by law; two-thirds of the votes cast at the election were in favor of, and authorized the issuance of the limited obligation bonds.[3]

The Limited Obligation Bond Law of 1955 defines limited obligation bonds as bonds which are to be paid solely from sales and use taxes imposed and to be imposed and collected by the city, § 43650. The law also provides that the bonds shall state that they are to be paid only from such revenues, §§ 43651, 43654; that the term of the bonds shall not exceed 31 years and that "The outstanding bonds shall not at any one time exceed an amount for which the average installments of principal and interest

1. It has been heretofore held that this section permits classification according to population, not only for the purposes of incorporation, organization and classification, but also permits the Legislature to supply the general laws required "by the varying needs of the municipalities so classified". Rauer v. Williams, 118 Cal. 401, 405, 406, 50 P. 691, 692.

2. The findings of the legislative body as to such population, made after notice and public hearing, shall be conclusive.

3. There is no contention that the city failed to comply with any provision in the law regarding notice or hearing, or with any other requirement thereof.

will exceed 66⅔ percent of the net revenues to be derived from the imposition of sales taxes at the rate established at the time of calling the election at which the proposition of authorizing their issuance is submitted, as determined by an independent audit and report made by a certified public accountant." § 43654.1. The general credit, or taxing power, of the city is not liable for the payment of the bonds or interest thereon; only the revenues derived from the sales and use tax are liable therefor, § 43663.

The city sold the bonds on August 14, 1956, at such a price that the average annual installments of principal and interest on the total proposed bond issue of $2,000,000 will not exceed 66⅔ per cent of the net revenues to be derived from sales taxes imposed at the rate of 1 per cent which was the rate established at the time of the adoption of the ordinance calling the election at which the issuance of the bonds was authorized. The respondent, city treasurer, refused to issue the bonds and this proceeding followed. This was in accord with the statutory provision.[4]

Limited Obligation Bond Law as a valid general law with respect to classification: It should be noted, preliminarily, that two principles concerning population classification and legislation based thereon have been established in this state, see, Rauer v. Williams, 118 Cal. 401, 50 P. 691; Ex parte Jackson, 143 Cal. 564, 569, 570, 77 P. 457: (1) That there must be a reasonable basis for such classification with respect to the subject matter of the legislation; and (2) that the legislation must relate to a municipal affair.

(1) *Reasonable basis rule:* In Darcy v. Mayor, etc., of San Jose, 104 Cal. 642, 645, 646, 38 P. 500, 501, it was said that "Legislatures and courts are not at liberty to disregard a policy so plainly manifested in the fundamental law. But, while the sovereign will is thus plainly expressed in the fundamental law, the rule must not receive an interpretation too absolute. It will not be presumed that it was intended to deprive the legislature of all power to adapt its laws to the varying conditions of its inhabitants. From necessity, it has been held that the legislature may classify, in order that it may adapt its legislation to the needs of the people. If this cannot be done, laws will not always bear equally upon the people. This classification, however, must be founded upon differences which are either defined by the constitution or are natural, and which will suggest a reason which might rationally be held to justify the diversity in the legislation. It must not be arbitrary, for the mere purpose of classification, that legislation really local or special may seem to be general, but for the purpose of meeting different conditions naturally requiring different legislation. Dougherty v. Austin [94 Cal. 601, 28 P. 834, 29 P. 1092, 16 L.R.A. 161]; City of Pasadena v. Stimson, 91 Cal. 238, 27 P. 604."

In the case under consideration, the legislation was intended to classify a small city with a large surrounding urban population so as to permit such small city to finance local improvements to accommodate the influx of people from the surrounding unincorporated area. For city residents and taxpayers alone to bear the burden of financing such improvements would obviously be inequitable. The only type of municipal revenue which is available from residents living outside the city is a sales and use tax within the city since such a tax would bear equally upon both residents and non-residents. It is stated by the city, and not denied by the respondent, that as of 1954 there were 115 cities of under 4,000 population in the state although there are no available figures as to whether all of these could meet the second population test set forth in the Limited Obligation Bond Law. It is argued by petitioner, and not denied by respondent, that the greatest single problem of municipalities today is the improvement and development of municipal facilities in order to keep pace with the needs pre-

4. Government Code, § 43654.1.

cipitated by the growth within and without their boundaries. The Limited Obligation Bond Law was passed as "an urgency measure necessary for the immediate preservation of the public peace, health or safety within the meaning of Article IV of the Constitution and shall take effect immediately. The facts constituting such necessity are:

"There is presently an unprecedented population growth under way within the State and the cities therein. In many cities this growth has caused the facilities within the commercial area of a city to be taxed beyond the general means of the city or for which no general benefit exists beyond the commercial area therein. The proceeds of sales taxes are derived from the sale of merchandise within such commercial areas and constitute an appropriate means of revenue for relieving the conditions existing within said commercial areas.

"Other improvements required by reason of said growth are of a more general benefit. However, by reason of said unprecedented growth, property taxes have seriously increased and it is required that other sources of revenue be provided to pay the costs of needed improvements." Stats.1955, ch. 1847, § 2, pp. 3429, 3430.

We said in Dribin v. Superior Court, 37 Cal.2d 345, 351, 352, 231 P.2d 809, 813, 24 A.L.R.2d 864, that "The following pertinent principles are well established: 'Wide discretion is vested in the Legislature in making the classification and every presumption is in favor of the validity of the statute; the decision of the Legislature as to what is a sufficient distinction to warrant the classification will not be overthrown by the courts unless it is palpably arbitrary and beyond rational doubt erroneous. [Citations.] A distinction in legislation is not arbitrary if any set of facts reasonably can be conceived that would sustain it.' (Sacramento M. U. Dist. v. Pacific G. & E. Co. (1942), 20 Cal.2d 684, 693, 128 P.2d 529; see also In re Herrera (1943), 23 Cal.2d 206, 212, 143 P.2d 345; Reclamation District No. 1500 v. Riley (1923) 192 Cal. 147, 156, 218 P. 762.) 'The existence of facts supporting the legislative judgment is to be presumed and the burden of overcoming the presumption of constitutionality is cast upon the assailant.' (Takahashi v. Fish and Game Com. (1947), supra, 30 Cal.2d 719, 728, 185 P.2d 805, Id., 334 U.S. 410, 68 S.Ct. 1138, 92 L.Ed. 1478; People v. Western Fruit Growers (1943), 22 Cal.2d 494, 507, 140 P.2d 13; see also In re Fuller (1940), 15 Cal.2d 425, 437, 102 P.2d 321; California Physicians' Service v. Garrison (1946), 28 Cal.2d 790, 803, 172 P.2d 4, 167 A.L.R. 306.) The classification should be reasonable; i. e. 'have a substantial relation to a legitimate object to be accomplished * * *. [I]t is not our concern whether the Legislature has adopted what we might think to be the wisest and most suitable means of accomplishing its objects. [Citations.]' (Lelande v. Lowery (1945), 26 Cal.2d 224, 232, 234, 157 P.2d 639, 175 A.L.R. 1109.)"

Applying the above principles to the legislation here involved, we cannot hold, as a matter of law, that the classification here concerned had no reasonable basis. We may take judicial notice of the rapid growth of population in the state; of the exodus of great portions of the population of cities into surrounding unincorporated urban areas; of the problems confronting small cities with inadequate facilities for caring for such an increased population.

(2) *Municipal Affair rule:* "Municipal affairs" as those words are used in the Constitution, refer to the internal business affairs of a municipality. Fragley v. Phelan, 126 Cal. 383, 387, 58 P. 923.

Section 43652 of the Limited Obligation Bond Law provides that "Such bonds shall be authorized and issued in the manner provided in the applicable provisions of Article 1 of this chapter, as now or hereafter provided, excepting Sections 43619, 43620, 43632, 43633, and 43634 thereof."

Section 43601 of article 1 provides as follows: "'Municipal improvement' defined. As used in this article, 'municipal improvement' includes bridges, waterworks, water rights, sewers, light and power works or plants, buildings for municipal uses, wharves, breakwaters, jetties, seawalls, schoolhouses, fire apparatus, street work, and other works, property, or structures necessary or convenient to carry out the objects, purposes, and powers of the city."

The improvements to be made in the instant case consist of covering Walnut Creek which traverses the business area so that it may be used; to provide new streets, to extend non-through streets, to widen other streets, in order to provide adequately for the greatly increased traffic circulation in the commercial area. There can be no question that the proposed improvements fall within the definition of municipal affairs as that rule is set forth in the decided cases, see, Byrne v. Drain, 127 Cal. 663, 60 P. 433; Ahlman v. Barber Asphalt Pav. Co., 40 Cal.App. 395, 181 P. 238; City of San Jose v. Lynch, 4 Cal.2d 760, 52 P.2d 919; Loop Lumber Co. v. Van Loben Sels., 173 Cal. 228, 159 P. 600. It has been held that the term "street work" includes the building and construction of streets, highways, and boulevards. City of San Diego v. Potter, 153 Cal. 288, 95 P. 146; City of Crescent City v. Moran, 25 Cal.App.2d 133, 77 P.2d 281; Gov.Code, § 43601.

We are of the opinion that the Limited Obligation Bond Law fulfills the second requirement that the legislation relate to a municipal affair.

[6] *Permissible Extent of Indebtedness:* Respondent raises a question as to whether section 43605 of the Government Code is applicable here. That section provides: "*Maximum indebtedness: 'Indebtedness.'* A city shall not incur an indebtedness for public improvements which exceeds in the aggregate 15 percent of the assessed value of all real and personal property of the city. Within the meaning of this section 'indebtedness' means bonded indebtedness of the city payable from the proceeds of taxes levied upon taxable property in the city. [Amended by Stats.1955, ch. 334, § 1.]" The just quoted section has nothing to do with the Limited Obligation Bond Law which carries its own provision limiting the outstanding bonds which might be issued, § 43654.1, heretofore set forth. The bonds issued under the Limited Obligation Bond Law are not payable from the proceeds of taxes levied upon taxable property in the city but are payable from one source only—the revenue collected from sales and use taxes, §§ 43650, 43651, 43656, 43658, 43659, 43660. It is specifically provided in section 43663 that "The general fund of the city is not liable for the payment of the bonds or their interest."

Insofar as the constitutionality of the Limited Obligation Bond Law is concerned, we held in City of Oxnard v. Dale, 45 Cal.2d 729, 733, 290 P.2d 859, 861, that "It is settled in California and recognized in almost all of the other states that, as a general rule, a constitutional provision such as section 18 of article XI is not violated by revenue bonds or other obligations which are payable solely from a special fund, provided the governmental body is not liable to maintain the special fund out of its general funds, or by tax levies, should the special fund prove insufficient. Department of Water & Power v. Vroman, 218 Cal. 206, 216 et seq., 22 P.2d 698; California Toll Bridge Authority v. Kelly, 218 Cal. 7, 10 et seq., 21 P.2d 425; In re California Toll Bridge Authority, 212 Cal. 298, 302 et seq., 298 P. 485 (discussing many cases from other jurisdictions); Shelton v. City of Los Angeles, 206 Cal. 544, 548 et seq., 275 P. 421; see Garrett v. Swanton, 216 Cal. 220, 227 et seq., 13 P.2d 725; 38 Am.Jur. 150 et seq. As pointed out in the case of In re California Toll Bridge Authority, supra, 212 Cal. at page 302, 298 P. at page 486, such an obligation is not considered to be an indebtedness or liability of the political subdivision or agency issuing the bonds, within the meaning of the constitutional limitation." And on page 737 of 45 Cal.2d, at page 863 of 290 P.2d, it was concluded that "an obligation which is payable out of a special fund is not an 'in-

debtedness or liability' of a governmental body within the meaning of section 18 of article XI of the Constitution if the governmental body is not required to pay the obligation from its general funds, or by exercise of its powers of taxation, should the special fund prove insufficient." See, also, Housing Authority v. Dockweiler, 14 Cal.2d 437, 94 P.2d 794; City of La Mesa v. Freeman, 137 Cal.App.2d 813, 291 P.2d 103; Board of State Harbor Com'rs v. Dean, 118 Cal.App.2d 628, 258 P.2d 590.

We conclude, therefore, that the Limited Obligation Bond Law is a valid general law, and no question having been raised that the city of Walnut Creek did not act in accordance therewith, it is ordered that pursuant to stipulation of the parties heretofore filed, waiving the statutory time within which such writ may issue, that such peremptory writ issue forthwith.

GIBSON, C. J., and SHENK, TRAYNOR, SCHAUER, SPENCE and McCOMB, JJ., concur.



47 Cal.2d 866

James Charles WEBB, Petitioner,

v.

The STATE BAR OF CALIFORNIA, Respondent.

L. A. 23814.

Supreme Court of California.

Feb. 8, 1957.

Proceeding to review recommendation of Board of Governors of the State Bar that petitioner be suspended from the practice of law for six months. The Supreme Court held that the evidence was insufficient to establish any such misconduct as would warrant disciplinary action against petitioner.

Disciplinary proceeding dismissed.

1. Attorney and Client ⇐53(2)

Evidence was insufficient to establish any such misconduct as would warrant disciplinary action against an attorney for participation in transactions by which clients allegedly concealed or transferred real and personal property for the purpose of hindering and defrauding creditors, particularly in view of positive denial of wrongdoing.

2. Attorney and Client ⇐57

In reviewing a disciplinary proceeding against attorney, reviewing court passes upon the sufficiency and weight of the evidence and is not bound by findings of fact of local administrative committee or Board of Governors of the State Bar, though attorney against whom disciplinary action has been recommended has the burden of showing that board's action was incorrect.

Frank J. Hill, Sr., Long Beach, for petitioner.

Russell B. Seymour, Los Angeles and Garrett H. Elmore, San Francisco, for respondent.

PER CURIAM.

[1] This is a proceeding to review a recommendation of the Board of Governors of The State Bar[1] that petitioner James Charles Webb, be suspended from the practice of law for a period of six months. We have concluded that the evidence against petitioner is of such unsatisfactory character that we cannot accept it as supporting the charges against him, and that the proceeding should be dismissed.

1. Adopted by the affirmative vote of 12 of the 13 board members present and voting.

Following hearings before a local administrative committee, which found against petitioner and recommended a three-months' suspension, the board made independent findings as follows: As to count one, that petitioner "in collaboration with Leona Spagnol, participated in transactions lacking in good faith, wherein * * Leona Spagnol, deeded her real property away and secreted certain personal property to hinder and delay a creditor." As to count two, that petitioner "in collaboration with one Otiemae Kennedy, participated in transactions lacking in good faith, wherein * * * Otiemae Kennedy, deeded away her real property for the purpose of hindering, delaying and defrauding her creditors." As to count three, that a purported signature of petitioner as the notary public on a certificate of acknowledgment attached to a deed of trust is his true signature, that petitioner took the acknowledgment as notary public, and "that his participation in said transaction ties in with, and constitutes part of, a pattern or program to hinder, delay and defraud the creditors of a client."[2] It may be noted that the board did not expressly find that petitioner "knowingly" participated in the transactions which allegedly lacked "good faith," although The State Bar urges that that is the fair meaning of the findings, in view of the board's recommendation of discipline.

[2] In reviewing a disciplinary proceeding this court passes upon the sufficiency and weight of the evidence and is not bound by the findings of fact of the local committee or the board, although the burden of showing that the board's action was incorrect is upon petitioner. Palmquist v. State Bar, 1954, 43 Cal.2d 428, 435, 274 P.2d 640; Choate v. State Bar, 1953, 41 Cal.2d 399, 405, 260 P.2d 609.

Petitioner is now 55 years of age, was admitted to practice in this state in 1940, and has no prior disciplinary record. During the period here involved, commencing in 1949, petitioner was also commissioned as a notary public and maintained a law office in Long Beach, in which most of the acts forming the basis of the subject charges allegedly occurred.

Count One

The substance of the first charge against petitioner is that in September, 1949, while acting as attorney for Mrs. Leona Spagnol in a divorce proceeding, petitioner advised the client to conceal household furniture upon which $1,500 was owing to a finance company, and to transfer her home, in which she had an equity of some $3,500, out of her name by means of a deed signed in blank, in order to avoid a levy thereon by the finance company, and that thereafter the name of petitioner's secretary was inserted in the deed as grantee. Petitioner denies advising Mrs. Spagnol to take any steps for the purpose of hindering or delaying the finance company, and claims that the deed was completely filled out at the time Mrs. Spagnol signed it and that it was given for the purpose of securing sums owing petitioner by Mrs. Spagnol and for the further purpose of handling the property during her absence from Long Beach.

Upon extended analysis of the conflicting testimonies of the several witnesses we are impelled to accept petitioner's testimony, much of which is corroborated by his secretary, in preference to that which opposes it. The finance company, asserted to have been the victim, or intended victim, of the alleged hindering activities, does not itself make any charge against petitioner. No representative of the company was even produced as a witness. The case against petitioner is based almost entirely upon the testimony of Mrs. Spagnol, whose

2. Although not specifically so stated in the record, it inferentially appears that these disciplinary proceedings against petitioner were initiated on the complaint of the Leona Spagnol named in count one, and of John Kennedy, former husband of the Otiemae Kennedy named in count two.

story is not only uncorroborated as to the pertinent details, but is contradicted in some material respect by every other witness who testified as to count one and is also inconsistent within itself as to any alleged misconduct on the part of petitioner. For example, Mrs. Spagnol testified that on the date she claimed petitioner advised her to secrete her furniture from the finance company, she was then able to pay the finance company the amount owed them, thus showing she was not then insolvent and that it was not to keep that company from taking the furniture that she moved it. There is no showing that the company suffered any prejudice or loss from any act of petitioner. Both Mrs. Spagnol's testimony and other evidence tends to show that she moved the furniture in order to secrete it from her husband, with whom she was having marital difficulties, and to induce him to make the payments on it. That she succeeded in this objective is established by Mr. Spagnol's testimony. He testified that Mrs. Spagnol told him she was losing the home and had the furniture in Hollywood and asked if he wouldn't try to help her pay for the furniture and reestablish the home; "She went back to this man in Hollywood [not connected with this proceeding], staying in the home with him; and she had borrowed $150.00 from this man, * * * and she said this man wouldn't give the furniture back unless she paid that $150.00 that she borrowed. * * * I paid the $150.00 and paid the $1,500.00 due on the furniture which she had agreed to assume when we separated [Mrs. Spagnol was not herself a signatory to the finance company paper]. * * * [S]he cried on my shoulder and I felt sorry for her." Mrs. Spagnol confirmed that Mr. Spagnol paid the finance company the $1,500 "after we reconciled."

Further, Mrs. Spagnol admitted that she was indebted to petitioner at the time she executed the deed to her home to him and that she had requested petitioner to handle the renting of the house for her and the making of payments on it to the holder of an encumbrance. It also appears that the key was delivered to petitioner for the purposes stated. Moreover, the evidence indicates that Mrs. Spagnol thereafter attempted unsuccessfully to borrow additional money from petitioner, and that she subsequently admitted to a witness that she had transferred the home to petitioner because of attorney fees she owed him, but that she now had him "before the Bar Association and was going to put him and his secretary behind bars because he had tried to take the home away from her. * * * She said, 'Well, I am going to teach him a lesson, so he won't do that to anyone else. * * * As soon as we win the case, me and Mr. Kennedy [involved in counts two and three of the charges against petitioner] are going to sue him for $10,000.00 damages and we are going to buy a Cadillac car. * * * We know that we will get the $10,000 and besides, we are going to put him behind bars.'" Actually, the home was reconveyed to Mrs. Spagnol following preliminary investigation by a State Bar committee and "just shortly" after petitioner "got the information that she was in financial difficulties and was in danger of losing her property."

In considering petitioner's defense against the charges, we must bear in mind that not every lawyer commands clients of such wealth and such character that it should reasonably be thought that they would not on their own initiative engage in activities of the type here alleged and then, for further gain, or to avoid payment of fees for legitimate services, charge the attorney who had rendered a proper service, with advising the misconduct which the clients themselves had originated.

By reason of the unsatisfactory nature of the evidence against petitioner and of his positive denials of wrongdoing, see Griffith v. State Bar, 1953, 40 Cal.2d 470, 474, 254 P.2d 22,[3] we are impelled to the

3. In the Griffith case this court commented: "While the foregoing might furnish some basis for the inference that petitioner permitted Hawkins [a person not

conclusion that no misconduct on his part has been established as to count one. See also Sullivan v. State Bar, 1946, 28 Cal.2d 488, 494, 170 P.2d 888.

Count Two

The substance of the second charge against petitioner is that in March and in July, 1949, he consulted with and assisted a client, Mrs. Otiemae Kennedy, to secrete and conceal from some of her creditors various parcels of real property owned by her, by means of various transfers to John L. Frogge, to "H. E. Thompson" (petitioner's secretary) and to petitioner himself, and to secrete and conceal from some of Mrs. Kennedy's creditors proceeds of sales of or loans against certain of her real property, in the amount of $4,000. Respondent The State Bar concedes that with respect to this count a problem exists as to the sufficiency of the evidence to support the board's finding of participation by petitioner in Mrs. Kennedy's transactions, but urges that certain testimony favoring petitioner is evasive and improbable and that it is reasonable to infer that certain admitted acts by petitioner's secretary were done as petitioner's agent.

Without detailing the circumstances of the various transfers admittedly made by Mrs. Kennedy, as to most of which petitioner, as notary, took her acknowledgment, it suffices for the purposes of this opinion to state that here again the character of the evidence against petitioner is unsatisfactory to us, as it seemingly also appeared to the board, which found merely that petitioner "participated in transactions lacking in good faith," wherein Mrs. Kennedy made transfers assertedly in fraud of creditors.

The entire case against petitioner with respect to this count seems to be based on inference piled on inference, whereas there is no direct testimony that Mrs. Kennedy actually made or intended to make transfers in fraud of creditors, that any creditor of hers was hindered or defrauded by her transfers, or that petitioner himself had any guilty knowledge or motives. In truth, every transfer appears to have been made to a creditor and was consistent with an attempt to pay off Mrs. Kennedy's debts. In those cases where the transfer was of property of a value substantially exceeding the amount owing to the transferee, the testimony of the transferee was that he or she took the property as security for the debt and agreed to pay off other creditors (including first mortgagees, who were in no wise prejudiced by the transfers) out of the proceeds to be raised by the properties. The only part played by petitioner in the transfers (except as to one to himself, which undisputed testimony shows he took to secure a substantial debt owed to him) was as the notary public who took the acknowledgment. As such, he needed only to know that the one acknowledging her signature as grantor was in fact the person she claimed to be; he was not required to know the purpose of the transfers, and the record indicates that, at least as far as petitioner was aware, Mrs. Kennedy was merely attempting to liquidate her assets and discharge her debts. Although he knew that her creditors were pressing her, she had told him that she had ample assets and that she knew what she was doing and had been advised by others that it was all right to make the transfers involved. The summary schedule of Mrs. Kennedy's debts and assets filed in her subsequent involuntary bankruptcy proceedings indicates that her assets substantially exceeded her debts.

It is to be noted that Mrs. Kennedy made no complaint against petitioner and her testimony supports his denials of wrong-

licensed to practice law] to use his office for the practice of law, permitted the use of his name on Hawkins' cards, and that the Vanderbush business was solicited by Hawkins for petitioner with his knowledge, we are not disposed to rely thereon as a basis for disciplinary action in the face of petitioner's positive testimony that he never authorized Hawkins to solicit business for him or use his name or office in the conduct of his business." At page 474 of 40 Cal.2d, at page 24 of 254 P.2d.

doing. As hereinabove indicated (footnote 2, supra), it inferentially appears that these disciplinary proceedings against petitioner were initiated on the complaint (in addition to that of Mrs. Spagnol) of John Kennedy, former husband of Mrs. Kennedy and former client of petitioner. Mr. Kennedy testified, among other things, that he had been convicted of two felonies in Texas, one for selling liquor and one for forgery, but had been pardoned in 1935; that he was one of the petitioning creditors in involuntary bankruptcy proceedings against Mrs. Kennedy, and had solicited two other creditors to join the petition, after telling them that Mrs. Kennedy had transferred her property for the purpose of defrauding them.

It appears that petitioner or respondent produced every possible witness who was involved in the allegedly improper transfers, and *every witness* gave testimony which in some material aspect supports the conclusion that there were no improper motives or knowledge on the part of petitioner, or, for the most part, on that of Mrs. Kennedy. In such a light, it seems difficult to conceive what more petitioner, however innocent, could have done in making his defense.

The impeachments and inconsistencies claimed by respondent to be running through the testimony were in the main as to minor matters, and do not appear to destroy the basic defense that, while petitioner may not have agreed with Mrs. Kennedy's course of action and while in some respects his secretary may have used his office more freely for her own purposes than petitioner was aware of, see Griffith v. State Bar, supra, 1953, 40 Cal.2d 470, 474, 254 P.2d 22, petitioner was not apprised of any improper actions or motives on the part of either of them. We are persuaded that petitioner is not shown to be guilty of any wrongdoing which supports discipline.

Count Three

Petitioner's name appears as notary public on the certificate of acknowledgment attached to a trust deed executed by his secretary as trustor and covering certain of the Kennedy property. In the body of the trust deed the secretary is described as "H. E. Thompson, a single woman, herein called Trustor," although she was actually then married to one James. It is charged that petitioner attested a notarial acknowledgement of her signature, although he knew she was married.

Petitioner denies that the signature appearing on the acknowledgment certificate is his and denies that he executed it, and states that he suspects the secretary placed his name thereon. Handwriting experts testified to directly conflicting opinions as to whether the signature was that of petitioner. It may further be noted that the notarial acknowledgment does not itself describe the secretary as being either single or married, but only as "the person whose name is subscribed to the within instrument." When this proceeding was before the board of governors for the second time, petitioner unsuccessfully sought leave to reopen, also for the second time, to present additional oral testimony of the secretary to the effect that petitioner was not present when his name was affixed to the trust deed and did not attest, or authorize the placing of his name on, the acknowledgment; the secretary's affidavit to this effect was submitted.

As conceded by respondent, this count is of less importance than counts one and two. Apparently it was intended to tie in with the count two charge against petitioner. In view of our conclusion that no discipline is warranted with respect to counts one and two, we are likewise of the view that little importance should be attached to the count three charge.[4] The evidence as to

4. There has also been lodged with this court a copy of an affidavit dated January 6, 1956, by petitioner's secretary, stating that the secretary signed petitioner's name to the acknowledgment certificate involved in count three. The State Bar states that it does not concede that the affidavit is part of the record

such charge falls short of establishing conduct warranting disciplinary action.

For the reasons above stated it is ordered that this proceeding against petitioner be, and it is, dismissed.



47 Cal.2d 749

The PEOPLE of the State of California, Plaintiff and Respondent,

v.

Wilbert Felix FRIEND, Defendant and Appellant.

Cr. 5800.

Supreme Court of California, in Bank.

Jan. 25, 1957.

Prosecution for first degree murder. The Superior Court, San Diego County, John A. Hewicker, J., entered judgment of conviction an imposed death penalty and upon denying defendant's motions for new trial defendant appealed. The Supreme Court, Schauer, J., held that evidence sustained conviction, but because of combination of circumstances in prosecution's argument, trial court's formal instructions as well as its oral instructions given in response to jurors' request for clarification, all giving impression that it was necessary to find mitigating circumstances before jury could assess punishment at life imprisonment, a new trial would be granted on issue of punishment only.

Judgment and order denying new trial on question of penalty reversed and remanded for retrial and judgment of conviction affirmed.

Spence, J., dissented in part.

1. Homicide ⇐253(1)

Evidence sustained conviction for first degree murder.

2. Homicide ⇐311

In prosecution for first degree murder, instruction of court that a prisoner sentenced to life imprisonment may be paroled after he has served at least seven years was not erroneous because analysis of median time served for first degree murder revealed that time served by person sentenced to life imprisonment for first degree murder was much more than seven years. West's Ann.Pen.Code, §§ 1203c, 3046, 4800.

3. Criminal Law ⇐1144(14)

In passing on propriety of instructions in first degree murder prosecution to the effect that a person sentenced to life imprisonment for first degree murder can be paroled after having served seven years, it would be presumed that defendant if he had sought to do so, would have been accorded opportunity to show other related pertinent facts as to minimum, median and maximum terms of imprisonment actually served for first degree murder. West's Ann.Pen.Code, §§ 1203c, 3046, 4800.

4. Homicide ⇐354

It is an untenable concept that under the law it is the duty of the jury to impose or to permit the judge to impose on a person found guilty of first degree murder, the death penalty unless there be evidence of mitigating circumstances, thus implying a limitation on jury's statutory function. West's Ann.Pen.Code, § 190.

5. Homicide ⇐311

In prosecution for first degree murder, where due to a combination of circumstances including prosecution's argument and court's formal instructions to jury, jurors had gained erroneous concept that in order to justifiably assess punishment at life imprisonment they must find mitigating circumstances, it was duty of court to have instructed jury specifically that

or that the facts therein stated are true. By reason of the conclusion we have reached on the record already filed with the court, no weight has been accorded to such affidavit.

they could in exercise of discretion consider evidence as to defendant's voluntary return and confession as material in selection of punishment and that in any event it was wholly unnecessary to find any evidence of mitigation as basis for fixing punishment at life imprisonment. West's Ann.Pen. Code, § 190.

6. Criminal Law ⇐863(2), 1186(4)

In prosecution for first degree murder where effect of prosecuting attorney's arguments and court's formal instructions gave erroneous impression that law favored imposition of death penalty in absence of mitigating circumstances, and jurors returned for further instruction during which time foreman stated that he was of the opinion that there were mitigating factors, court's remarks and oral instructions having effect of persuading foreman to a contrary view were prejudicial error resulting in a miscarriage of justice. West's Ann.Pen. Code, § 190; West's Ann.Const. art. 6, § 4½.

7. Criminal Law ⇐725

To aid a jury to act intelligently in assessing punishment for first degree murder, counsel may properly argue respective views as to which punishment will be more appropriate but jury must not be misled into thinking that their discretion in selection of penalty as between either of two alternatives of life imprisonment or death, is in any way circumscribed or limited by law as their discretion within that area is absolute and they should be so informed. West's Ann.Pen.Code, § 190.

8. Homicide ⇐311

In prosecution for first degree murder, trial court must inform jurors that they have no concern with punishment unless, under instructions applicable to trial of issue of guilty or not guilty, they shall find defendant guilty of first degree murder beyond all reasonable doubt and if they so find, duty of selecting penalty devolves on them and on them alone. West's Ann.Pen. Code, § 190.

9. Homicide ⇐311

With respect to assessment of punishment for first degree murder, jury should be instructed that beyond prescribing the two alternative penalties, life imprisonment or death, law itself provides no standard for their guidance in the selection of punishment and neither penalty attaches automatically or at all until the jury unanimously agrees upon their choice of punishment and designates same in their verdict. West's Ann.Pen.Code, § 190.

10. Criminal Law ⇐1186(4), 1189

In prosecution for first degree murder resulting in jury verdict of guilty, because of combination of circumstances resulting from prosecution's arguments, trial court's formal instructions as well as its oral instructions given in response to jurors' request for further clarification, all of which gave jury erroneous impression that it was necessary to find mitigating circumstances before it could assess punishment at life imprisonment, there was prejudicial error on issue of punishment and a new trial would be granted on such issue only. West's Ann.Pen.Code, §§ 190, 1203c, 1239 (b), 3046, 4800; West's Ann.Const. art. 6, § 4½.

John R. Sorbo, San Diego, for appellant.

Edmund G. Brown, Atty. Gen., and William E. James, Deputy Atty. Gen., for respondent.

SCHAUER, Justice.

[1] Defendant appeals (by virtue of paragraph (b) of section 1239 of the Penal Code) from a judgment which imposes the death penalty after a jury verdict which found defendant guilty of murder of the first degree and was silent as to penalty, and from an order denying defendant's motion for new trial. We have concluded that the issue of guilt was fairly tried and that the judgment and order denying a new trial should be affirmed insofar as relates to the conviction of murder of the first degree, but (in accord with People v. Green (1956),

47 Cal.2d 209, 302 P.2d 307) must be reversed and the cause remanded for a new trial on the issue of penalty only, because there were prejudicial errors which resulted in a miscarriage of justice (Cal.Const., art. VI, § 4½) affecting solely the issue of punishment.

At the trial no evidence was offered by defendant. From the prosecution evidence, including voluntary statements of defendant to officials which demonstrate abjectly honest attempts of defendant to recall and recount the circumstances of the killing, the following appears:

On the evening of August 31, 1936, defendant, after consuming an unknown quantity of gin and losing money playing pool, walked along the beach in La Jolla. Defendant needed funds and decided to rob any victim he might find. He removed a leg from a picnic table or bench with the purpose of using it as a club. Defendant walked until he saw Ruth Muir sitting alone on a bench. He approached her from behind, struck her on the head with the club, dragged her to a nearby ditch, and attempted to rape her. He was unable effectively to carry out his purpose to rob because Miss Muir had no valuable possessions. Her death was caused by fractures of the skull and many other injuries.

The body was discovered on September 1, 1936. On that day defendant was working as a caddy at a golf course; he there learned that his victim had died. Asked what he did then, he replied, "Oh, I stuck around there for two—three hours, and then I took off, caught a streetcar to San Diego, and I thought I'd try to get away from myself and I couldn't do it * * *" The preceding night's events, even at that time, he thought, seemed "like more or less a dream, * * * but I still had it in my mind what I did."

On September 12, 1936, police officers left a note on a tent which defendant used as a dwelling. The note asked defendant to call at the police station. Defendant returned to his tent shortly thereafter. He found the note and called at the police station as requested. He was questioned concerning the killing of Miss Muir, denied knowledge of it, and was not held. The crime remained an unsolved mystery for nearly nineteen years, until defendant, who had changed his manner of living, himself provided the solution.

In May, 1955, defendant, who had been living in Detroit, returned to California, telephoned a reporter, and stated that he wished to confess to the killing of Miss Muir. Defendant was subsequently arrested and made the above mentioned voluntary statements which are in evidence. Police at first doubted his confession but he persisted and satisfied them as to his veracity. He explained that he had previously refrained from confessing because he had not wanted to hurt people dear to him, and that he had determined to confess inasmuch as his father had died in 1945, his mother in 1953, and his wife in 1954, and there was no one left who would be particularly shamed or hurt by his confession.[1]

[2] Defendant complains of the italicized portion of the following instruction: "You may not consider the matter of punishment in determining whether or not the defendant is guilty, or if you find him guilty, in determining the crime or degree of crime of which he is guilty. However, if

1. Illustrative of the background of defendant during the intervening years is the following excerpt from the report of the probation officer (a report which does not appear to have been before the jury but which was before the court at the time of sentence and is included in the record here): "The subject was a heavy drinker and it was during his drunken periods that he would get into trouble. During the period from 1937 until 1941 the subject was involved in burglaries and sex crimes, the sex crimes including lewd and lascivious acts, contributing to the delinquency of minors, indecent exposure and rape. *He submitted to a double orchidectomy in 1941 and since that date he was arrested but once and that for drunk and disorderly conduct*, date September 21, 1952, for which he paid a $35 fine. His interest in sex diminished after the operation and never gave him more difficulty." (Italics added.)

you find the defendant guilty of murder of the first degree, you may then consider the consequences of the two possible sentences in determining what punishment the defendant should receive. *A prisoner sentenced to either death or life imprisonment may be pardoned or may have his sentence reduced by the Governor. A prisoner serving a life sentence may be paroled, but not until he has served at least seven years.*" (Italics added.)

On behalf of defendant it is suggested that this court should re-examine the decision in People v. Byrd (1954), 42 Cal.2d 200, 207–208, 266 P.2d 505, where the giving of the above quoted instruction was approved. (See also People v. Reese (1956), 47 Cal.2d 112, 301 P.2d 582). It is argued that the instruction is prosecution-slanted, because analysis of the periods of time served for first degree murder (Beattie (1951), California Prisoners, 1945–1949, p. 34, published by the Research Committee of the Board of Corrections) shows that the median time served by persons sentenced to life imprisonment for first degree murder is much more than seven years, particularly when the prisoner has a prior conviction of felony. (Defendant's previous criminal record, disclosed by the judgment and probation officer's report in this case, will be available for consideration of the Adult Authority should defendant be sentenced to life imprisonment. See Pen.Code, § 1203c.)

[3] The italicized portion of the quoted instruction correctly states code rules of law (Pen.Code, § 4800: "The general authority to grant reprieves, pardons and commutations of sentence is conferred upon the Governor by Article VII of the Constitution of the State of California"; Pen.Code, § 3046: "No prisoner imprisoned under a life sentence may be paroled until he has served at least seven calendar years").[2] The quoted rules are pertinent as matters of fact to be considered in determining the penalty rather than as propositions of law. It is to be presumed that defendant, if he had sought to do so, would have been accorded opportunity to show other related pertinent facts as to minimum, median, and maximum terms of imprisonment actually served for first degree murder. (People v. Green (1956), supra, at page 217 of 47 Cal.2d, at page 313 of 302 P.2d) In the circumstances it does not appear that defendant can complain as to the giving of the factually accurate statement of the rules of law.

[4] In this case, however, as in People v. Green (1956), supra, there is error which requires reversal and a new trial solely on the issue of punishment. Here, the error involves the same untenable concept that under the law it is the duty of the jury to impose (or to permit the judge to impose) the death penalty unless there be evidence of mitigating circumstances, thus implying a limitation on the jury's statutory function, but the error arose in a different manner than in the Green case. The court in its formal written instructions to the jury did not suggest, as it stated in Green (at page 217 of 47 Cal.2d, at page 313 of 302 P.2d), that "The discretion which the law invests in you * * * is to be employed only when you are satisfied that the lighter punishment should be imposed. If you find the defendant guilty of first degree murder and do not find extenuating facts or circumstances to lighten the punishment it is your duty to find a verdict of murder in the first degree and fix the penalty at death." Rather, the formal written instructions concerning the subject of punishment for first degree murder given here, after the instruction quoted at page 465 of 306 P.2d proceed as follows:

> "The law of this State provides that every person guilty of murder in the first degree shall suffer death or confinement in the State prison for life, at the discretion of the jury that finds him guilty. If you should find the

2. As the prosecuting attorney stated in argument concerning the last sentence of the instruction (concerning parole), "That doesn't mean that he will be; it just means that he may."

defendant guilty of murder in the first degree, it will be your duty to determine which of the two penalties shall be inflicted, the death penalty or confinement in the State prison for life. If you should fix the penalty as confinement in the State prison for life, you will so indicate in your verdict, using a form that will be handed to you when you retire to deliberate, but if you should fix the penalty as death, you will not specify the death penalty in the verdict, and you will say nothing about punishment in the verdict. In determining which punishment shall be inflicted, you are entirely free to act according to your own judgment."

The above quoted formal instructions, commendably, are free from any suggestion that the punishment fixed and favored by law is death (except insofar as an implication might in a combination of circumstances arise from the statement that "if you should fix the penalty as death, you will not specify the death penalty in the verdict, and you will say nothing about punishment in the verdict" [3]) and that only on a finding of mitigating circumstances is the jury free to exercise any discretion as to penalty, but unfortunately the written formal instructions were not the only ones given to the jury. The erroneous concept that death is the penalty preferred by the law in the absence of mitigating circumstances was conveyed to the jury by a combination of circumstances and events which are hereinafter related. It is emphasized at the outset that we are not holding that any of such circumstances or events, standing alone, would necessarily constitute error. But as they were combined here they acquired a gravely erroneous import and were clearly prejudicial on the issue of penalty.

The subject of "mitigation" was injected into the case by the prosecuting attorney in argument. (As is developed hereinafter, that subject properly could have been argued if evidence pertinent to mitigation had not been in effect excluded from the jury's consideration by unduly restrictive definitions and if the jury had been adequately informed as to the scope of their function, including unequivocal instruction that it was wholly unnecessary to find evidence of mitigation as a basis for fixing the penalty at life imprisonment.) After summarizing the facts the prosecutor said, "those facts certainly show no *mitigation*. I think it is an offense that is extremely aggravated. * * * There is certainly no provocation and there is no *mitigation* that I can see from the evidence. When you arrive at the position, after reviewing the evidence, that you feel this is a first degree case, then the question of penalty comes into play. * * *

"What penalty is justified on this evidence? You will be given, I am sure, two forms of verdict, one which if you feel life imprisonment is the proper penalty the verdict will so state. There is another penalty and that is the death penalty. *That is the penalty in which the defendant is found guilty of first degree murder and the jury makes no recommendation,*[4] *and when they make no recommendation there is only one sentence the Judge passes,* and that is execution, the death sentence. What penalty does this evidence show? The Judge will tell you it is a matter within your discretion. It is something you may consider, look over, and decide. You can come to your own conclusion. Now I asked you at the beginning of this case if you had any prejudice or beliefs against the death penalty. All of you stated that you did not, that you felt that you could vote for such a penalty in a proper case. And that is

3. This statement, as hereinafter pointed out, acquires significance when considered in the light of the prosecution argument and the oral instructions quoted *post*.

4. Strictly speaking, it is inaccurate to say that the jury makes a "recommendation." Under the statute the jury is not given the privilege of *recommending* a penalty; rather, the statute unqualifiedly imposes on the jury the function and duty of *fixing* the punishment at either death or life imprisonment. (Pen.Code, § 190.)

all I am asking you to do, is to say 'Is this a proper case?' The People contend that *this is a proper case. There is no mitigation,* there is not one factor in the case to show *mitigation.* What factor is there of any *mitigation* in this brutal assault upon Ruth Muir? *Not one single factor.*

"The People feel that this is an aggravated offense and it is an offense in which the death penalty is justified. The jury is justified in exercising their discretion in returning a penalty—*returning a verdict without fixing*[5] *the penalty,* a first degree verdict, which would mean the death penalty. * * *

"[W]e sincerely feel that from this evidence that the defendant is guilty of first degree murder and that there is no *mitigation* and that the death penalty should be exercised by this jury in this case, that there is no *mitigating factor.*" (Italics added.)

Defense counsel argued, concerning "mitigation," as follows:

"Mr. Low [the prosecuting attorney] said there were no mitigating circumstances. I think there are. I think the biggest one is the fact that the defendant turned himself in. Without him there would have been no solution to this crime. It would have gone down as another unsolved crime. I don't offer that to you as a suggestion for reducing the degree * * but I think it is a mitigating circumstance."

In closing argument the prosecuting attorney said, "I * * * do not take the death penalty lightly. I think it is a serious matter and should be carefully considered and I think the evidence is such in this case that there is no *mitigation* and no justification for what Mr. Friend did. * * *

"The only question in this case is the penalty. * * * Counsel said a *mitigating factor* was the fact he has confessed. * * * He has had nineteen years of freedom and of life, nineteen years more than Miss Muir [defendant's victim], and now because his wife is dead he has confessed. What is in *mitigation* in view of this offense because of that? *Not one thing in this case shows mitigation.* It is a brutal, unprovoked assault upon a defenseless woman * * * We feel from this evidence you should use your discretion, use it wisely, study the case, and feel when you come to the conclusion after you have thought it over that you will find this is a first degree case

5. This statement by the prosecutor (that "The jury is justified in exercising their discretion in returning a penalty—returning a verdict *without fixing* the penalty, a first degree verdict, which would mean the death penalty") is ambiguous and confusing. If the jurors understood therefrom—as conceivably they might—that they could return "A verdict without *fixing* the penalty," it presents the same vice which in People v. Hall (1926), 199 Cal. 451, 249 P. 859, was held to require reversal.

The erroneous implications of this statement that the jury could return a verdict without themselves *fixing* the penalty might be heightened rather than lessened by the statement (quoted at page 467 of 306 P.2d) that "when they [the jury] make no recommendation there is only one sentence *the Judge* passes, and that is * * * the death sentence." (Italics added.) Since the implied partial overruling of People v. Welch (1874), 49 Cal. 174 (and the cases following its basically erroneous concept), in People v. Hall (1926), supra, 199 Cal. 451, 456–458, 249 P. 859, it has been the law that the judge could not impose the death sentence (after a jury trial) unless there was "legal evidence" that the jury had unanimously agreed upon and *fixed* the penalty at death. Here, it appears that the jury must have understood what the result of the silent verdict would be and the error in that connection, as developed in the text, consists in misleading them, or in failing to correct their misapprehension, as to the substantive law and as to a limitation on their function, the limitation on their function being the implication that it would be improper under the law and in the view of the judge to fix the penalty at life imprisonment unless there was evidence of mitigating circumstances. As will also appear in the text, there was error in unduly limiting, by definition, the nature of the evidence which could be considered in mitigation of punishment.

and that the imposition of the death penalty is justified." (Italics added.)

As stated by the prosecutor, "The only question in this case is the penalty." That is what he told the jury and in that connection at least eleven times he stressed the asserted absence of "mitigation" or a "mitigating factor," and *implied a necessity for finding evidence of mitigation if the jury were to return other than the silent verdict.*

Obviously the greater emphasis of the prosecuting attorney's arguments above quoted is addressed to persuading the jury that there is an *absence of mitigating factors* rather than that there is *presence of aggravating elements.* This in itself suggests the view that the law prefers that the punishment shall be death, rather than life imprisonment, in the absence of mitigating circumstances. Such view (held erroneous in People v. Green (1956), supra, 47 Cal.2d 209, 302 P.2d 307) is clearly portrayed in the prosecutor's statement in his opening argument that "The People contend that this is a proper case [for the death penalty]. There is no mitigation, there is not one factor in the case to show mitigation * * * [W]e sincerely feel that from this evidence that the defendant is guilty of first degree murder and that there is no mitigation and that the death penalty should be exercised by this jury in this case, that there is no mitigating factor." It is true that the prosecutor also said that "The People feel that this is an aggravated offense," but by far the greater emphasis was placed on asserted absence of mitigating factors. We held in the Green case that (at page 218, 47 Cal.2d, at page 314 of 302 P.2d) "[6] It is *not* a function of the jury either to *lighten* [mitigate] the punishment or *increase* [aggravate] the punishment; they have no such power. The statute clearly and equally states two alternatives as punishment; it gives preference to neither. [7] It is the function and responsibility of the jury to select, and to designate in their verdict, which of the two punishments prescribed by the statute shall be imposed in any given case."

If a prosecutor is trying to persuade the jury to select the death penalty, it would seem more to the point and more consistent with the statute that he should place the greater emphasis of his argument on developing *aggravating* circumstances rather than the mere absence of *mitigating* factors. The statute no more suggests that the punishment should be death in the absence of mitigating circumstances than it suggests that the penalty be life imprisonment in the absence of aggravating circumstances. Neither penalty attaches automatically, or preferentially by law, in any case. The selection in every case is left entirely to the jury.

We recognize, of course, as we recognized in the Green case (at page 231 of 47 Cal.2d, at page 322 of 302 P.2d), "that trial judges and prosecuting officers have justifiably understood that legally they could continue to follow practices based on that line [the cases stemming from People v. Welch (1874), supra, 49 Cal. 174] although, commendably, many of them have voluntarily acceded to the admonitions hereinabove quoted [see page 227 of 47 Cal.2d, page 319 of 302 P.2d]." But it should also be recognized by all concerned that the meaning of the statute had been clear and undisputed for more than thirty (if not for more than sixty) years prior to the Green case, and that by the Green case we merely required "compliance with that law." (See page 226 of 47 Cal.2d, pages 318 and 322 of 302 P.2d; see also People v. Bollinger (1925), 196 Cal. 191, 207, 237 P. 25; People v. Leary (1895), 105 Cal. 486, 496, 39 P. 24.) More specifically, in our decision in the Green case we refused to longer tolerate the continuance of two conflicting lines of opinion, one of which permitted as "not error" the giving, in the uncontrolled discretion of the trial judge, of instructions based on the Welch line of cases, while the other recognized (without even a criticism of the latter view) that the trial judge could, in his sole discretion, instruct in accord with the statute and the

Leary-Bollinger line of cases. (See pages 218 and 231 of 47 Cal.2d, pages 314–318 and 322 of 302 P.2d.) The law of the Green case therefore is novel only in that it requires compliance by all judges and in all cases (of first degree murder) with the meaning of the statute which has been so long recognized as "clear beyond question." (People v. Bollinger, supra, 196 Cal. at page 207, 237 P. 25.)

That the prosecuting attorney's arguments became a pivotal factor in the jurors' debates is made unmistakably clear by what follows.

The jury did not readily come to an agreement as to punishment. They began their deliberations at 2:38 p. m. on August 2, 1955. At 11:35 p. m. on that day they returned to court, and there occurred the following colloquy between judge and jury:

"The Foreman: * * * We have a question *of a point of law and we feel it would be helpful to us in determining a verdict* * * * What we wish to know is *is there an interpretation of the law* which may aid the jury in determining whether the punishment should be a life sentence or the maximum penalty in a verdict of first degree murder, that is, *does the law consider any legal mitigation in this respect?* If it does, may we be made available of such?

"The Court: The only thing I can tell you is that it is entirely up to you folks. *I will ask you a question: Do you find any mitigating circumstances?*

"The Foreman: *I am of the opinion that there are circumstances which * * * may be considered to be in mitigation. I am not sure how the law defines mitigating and I don't know what Webster says on it either, frankly.*

"The Court: Get me the dictionary and I will read it to them. * * * Webster's New International Dictionary, Second Edition, * * * defines mitigate as follows: To render or become mild or milder; to mollify. 2. To moderate; to make or become less severe, violent, fierce, cruel, intense, harsh, rigorous, painful, and in those cases the word 'less' I presume is supposed to be before every word. It says 'or become less severe, violent, fierce, cruel, intense, harsh, rigorous, painful', and so forth, so it would mean less severe, less violent, less fierce, less cruel, less intense, less harsh, less rigorous, less painful. Next is to soften, appease; meliorate; diminish, lessen; temper; as, to mitigate heat or cold, grief, a punishment or an offense. Now mitigation means an act of mitigating, or state of being mitigated, abatement or diminution of anything painful, harsh, severe, afflictive, or calamitous, alleviation; moderation; palliation, as, the mitigation of pain, grief, rigor, punishment.

"The only thing I can say to you, ladies and gentlemen, is that you heard the evidence; you are the sole judges as to what the penalty or punishment is to be in this case. That is up to you. I can't tell you what to do. I gave you all the instructions. *You have the instructions with you and if you can find any mitigating circumstances in the case, why, if that is what you are looking for, why it is up to you to find them.* I can't tell you anything about them. If you want to argue some more about it I will let you go back; if you don't want to I will put you to bed. What do you want? *In my opinion there is absolutely no reason why you shouldn't arrive at a verdict.*

"The Foreman: We will return and try to come up with a verdict." (Italics added.)

At 11:31 a. m. on August 3, 1955, the jury returned their verdict which found defendant guilty of first degree murder and was silent as to punishment.

It is manifest to us, from the circumstances which have been hereinabove related, that the jurors had gained the erroneous[6] concept that, in the conscientious discharge of their *legal duty*, in order to justifiably return the form of verdict speci-

6. People v. Green (1956), supra, at page 216 of 47 Cal.2d, at pages 313–315, 322 of 302 P.2d.

fying the punishment of life imprisonment, as opposed to the form "in which the defendant is found guilty of first degree murder and the jury makes no recommendation," they must first find mitigating circumstances, and that the trial judge, when the jury sought enlightenment on the subject, although he told them "that it is entirely up to you folks," not only failed to effectively disabuse them as to their erroneous belief but, rather, affirmatively joined in compounding it by giving the oral instructions as to what might constitute mitigation, instructions which the jurors apparently interpreted to rule out for purposes of mitigation of punishment any consideration of the evidence which the foreman had thought "to be in mitigation." It will be remembered that defendant's counsel, answering the prosecutor's argument, told the jury, "I think there are [mitigating circumstances]. I think the biggest one is the fact that the defendant [after nineteen years while the crime remained unsolved] turned himself in. Without him there would have been no solution to this crime." The prosecutor replied, "What is in mitigation in view of this offense because of that? Not one thing in this case shows mitigation." Thereafter, when the foreman of the jury asked the court for "an interpretation of the law which may aid the jury in determining whether the punishment should be a life sentence or the maximum penalty in a verdict of first degree murder, that is, does the law consider any legal mitigation in this respect," the judge, in replying to the foreman's request, said, "* * * I will ask you a question: Do you find any mitigating circumstances?" And when the foreman answered, "I am of the opinion that there are circumstances which * * * may be considered to be in mitigation. I am not sure how the law defines mitigating * * *," the judge read the dictionary definitions hereinabove quoted and ended the colloquy by declaring, "In my opinion there is absolutely no reason why you shouldn't arrive at a verdict."

It is apparent to us that the jurors hearing the arguments of counsel and the statements of the judge must have understood that according to law (in the view of the judge) the prosecutor was correct in arguing that there was not a single factor in the evidence to mitigate punishment; that defense counsel was mistaken in his contention that the return and confession of defendant could be considered as mitigating factors in fixing the punishment; and that the foreman of the jury likewise was mistaken in his announced belief that there were circumstances (presumably the undisputed facts referred to by defendant's counsel) which could "be considered to be in mitigation." As hereinafter shown, under appropriate instructions the *weight* of the evidence as tending to indicate that the death penalty on the one hand or life imprisonment on the other might be more appropriate could properly have been argued. But it was not correct to assert that in relation to fixing the penalty, "Not one thing in this case shows mitigation." It is difficult to conceive of evidence any more pertinent to the end of mitigating punishment[7] in a first degree murder case with

7. The character and scope of evidence pertinent to punishment which should be received in a case wherein the jury is required to fix the penalty, is a subject which could well receive legislative attention. This state has long since accepted the view (as recognized and implemented by the indeterminate sentence laws and other acts) that, generally speaking, punishment should be fitted to the perpetrator of the crime, not merely to the crime. In tailoring punishment for most offenders the controlling agency has the benefit of a complete study of the person. In the whole life story the particular crime is an incident, a controlling one for the time being, probably, but only one of many which the board considers in reaching its ultimate conclusion. It seems, therefore, incongruous that in a case of first degree murder the jury conceivably may be given the responsibility of selecting life imprisonment or death as punishment, but in making that determination may be denied the full measure of enlightenment which for less drastic punishments is available to the administrative board.

the background of this one than that revealing the change in defendant's manner of living which culminated in his return to California and confession of the theretofore unsolved crime.

We have in mind that in People v. Barclay (1953), 40 Cal.2d 146, 157–158, 252 P.2d 321 a first degree murder case, it is said: "Since the issues of punishment and guilt are determined at the same time, there is danger that evidence or instructions offered on the former issue may influence the verdict on the latter issue. Accordingly, to avoid prejudice to either the People or the accused by injection of collateral issues into the case, evidence of the good or bad habits and background of the accused is generally held inadmissible [citations], and the consideration of the jury is limited to the facts and circumstances attending the commission of the offense itself. [Citations.]" The Barclay case, however, recognizes that it has been said (People v. Larrios (1934), 220 Cal. 236, 241–242, 30 P.2d 404), concerning evidence which "would have had no direct bearing on the homicide," that "a person on trial for his life should, as against technical objections, be permitted to state, within reasonable limitations, something of his background." We note also that the trend is toward the more liberal admission of evidence pertinent only to the selection of penalty. For example, it has become established practice to advise the jury *of the facts* concerning the possibilities of pardon, commutation, parole, etc. (See People v. Letourneau (1949), 34 Cal.2d 478, 493 [12], 211 P.2d 865; People v. Osborn (1951), 37 Cal.2d 380, 384–385, 231 P.2d 850; People v. Chessman (1951), 38 Cal.2d 166, 189–190, 238 P.2d 1001; People v. Barclay, (1953), supra, 40 Cal.2d 146, 157–158, 252 P.2d 321; People v. Byrd (1954), supra, 42 Cal.2d 200, 206–208 [2], 266 P.2d 505; People v. Reese (1956), supra, 47 Cal.2d 112, 301 P.2d 582; People v. Green (1956), supra, 47 Cal.2d 209, 302 P.2d 307. Obviously *the law* pertaining to pardons, commutations and paroles has not the slightest relevancy to the issue of guilt; it is pertinent only as a *fact* which may be considered in selecting the penalty to be imposed; i. e., it is evidence which may be considered as relevant to the "aggravation" or "mitigation" of punishment in the sense in which those terms have been used in relation to the selection of penalty. Here we are not concerned with any problem as to error in the admission or rejection of evidence pertinent to punishment (other than has hereinabove been disposed of) but we are concerned with instructions—the dictionary definitions—which the jurors apparently interpreted as ruling out of consideration (for purposes of mitigation) evidence which had been admitted.

[5, 6] In the state of the record we think that, if the dictionary definitions of "mitigate" were to be read, it was the duty of the court to have instructed the jury specifically that they could in the exercise of their discretion consider the evidence as to defendant's voluntary return and confession as material in their selection of punishment, and that in any event it was wholly unnecessary to find any evidence of mitigation as a basis for fixing the punishment at life imprisonment. Ever since People v. Leary (1895), supra, 105 Cal. 486, 496, 39 P. 24, it has been the recognized law of this state that by section 190 of the Penal Code, as amended, the Legislature has "confided the power to affix the punishment within these two alternatives [death or life imprisonment] to the absolute discretion of the jury" and in People v. Bollinger (1925), supra, 196 Cal. 191, 207, 237 P. 25, it was expressly declared that "the law places no restriction upon the jury's exercise of such discretion, nor does it attempt to confine its exercise to cases presenting palliating or mitigating circumstances." (See also People v. Green (1956), supra, at page 228 of 47 Cal. 2d, at page 320 of 302 P.2d and cases there cited.) Certainly under the rule above

It appears that in this respect the law, when and if so applied, continues the outmoded view that punishment must inexorably fit the crime, not the offender.

stated the undisputed fact that defendant voluntarily returned to California and confessed the unsolved crime could properly have been considered by the jury to constitute a substantial and persuasive factor to the end of "mitigating" (more accurately, in the process of *selecting)* the punishment. The jury foreman was correct, not mistaken, in his opinion "that there are circumstances which * * * may be considered to be in mitigation." Persuading him to the contrary view, as apparently was the effect of the judge's remarks and oral instructions during the colloquy, was gravely prejudicial error resulting in a miscarriage of justice.

[7] Nothing that we have said in this opinion is to be construed as holding either (1) that appropriate dictionary definitions, accompanied by relevant instructions as to the law, may not be read to the jury or (2) that counsel may not properly argue the effect of evidence in relation to the punishment which should be imposed. In this connection we point out that, accurately speaking, the issue as to penalty in a first degree murder case is not one of *mitigation* or of *aggravation* of punishment. Inasmuch as the statute provides *equally* the two alternative penalties of death and life imprisonment it necessarily follows that the function of the jury is not to "mitigate" or to "aggravate" punishment but is to make the selection as between the two penalties provided by law. To aid the jury to act intelligently in making their selection, counsel may properly argue their respective views as to which punishment, under all the circumstances shown, will be more appropriate and desirable in the cause of justice. To that end, appeals to reason in the exercise of the jury's discretion may be proper; so also may be appeals for clemency or for stern retribution. But the jury must not be misled into thinking (or be permitted to persist in an evidenced or known belief) that their discretion in the selection of penalty, as between either of the two alternatives, is in any way circumscribed or limited by law. Their discretion within that area is absolute and they should be so informed.

It is an onerous task which jurors are called upon to perform in the trial of a first degree murder case. They are citizens taken from the everyday walks of life. Suddenly they are confronted with the responsibility of finding guilt or innocence for a human being charged with one of the most serious crimes known to the law. The responsibility is a dual one: to the defendant on trial in defense of his life and liberty and to the state which brings him to trial in defense of its society. And when the jurors find guilt (of the class and degree we are discussing) they must face the grim business of selecting life imprisonment or death for a fellow human being. That is a responsibility which is theirs and concerning which there must be no equivocation in the instructions. They may be told that the state is responsible for the law which defines murder of the first degree and which prescribes that every person guilty of such offense "shall suffer death, or confinement in the state prison for life," but in that event they must further be told that by the very terms of the statute the responsibility of making the selection as between death or imprisonment for life is committed absolutely to the jury.

[8] Quite naturally jurors, in the conscientious discharge of their duty, are eager, as were those in this case, to have all the guidance the law can give them. This poses a delicate task for the trial judge but his duty is clear. He must, of course, inform the jurors that they have no concern with punishment unless, under the instructions applicable to the trial of the issue of guilty or not guilty, they shall have found that beyond all reasonable doubt the defendant is guilty of murder of the first degree as charged. When and if they so find, the duty of selecting the penalty devolves upon them, and on them alone, and they should be instructed as to the absolute nature of their power in the exercise of that function.

[9] From the discussion of the subject hereinabove and in People v. Green (1956), supra, 47 Cal.2d 209, 302 P.2d 307, it appears that there need be no error in counsel's advancing arguments as to which penalty will better serve the objectives of punishment,[8] or in contending that the effect of certain evidence is "mitigating" or "aggravating," as may affect their selection of the punishment to be imposed, provided that the jurors in every case are clearly and adequately instructed as to the full scope of their function. They should be told (in accord with the law as reviewed in People v. Green (1956), supra, and herein) that beyond prescribing the two alternative penalties the law itself provides no standard for their guidance in the selection of the punishment; that the law provides equally the two penalties of death or life imprisonment, but that neither penalty attaches automatically nor at all until the jury unanimously agree upon their choice of punishment and designate it in their verdict; that the choice as between the two penalties is in every case committed to their absolute discretion; that there is no rule of law which suggests that the punishment should be death unless there is evidence of extenuating or mitigating circumstances nor does the law suggest that the penalty shall be life imprisonment unless there is evidence in aggravation of the offense; murder of the first degree is in its very nature an aggravated offense, one of the most serious known to the law; hence it carries with it the most serious punishments known to the law, death or imprisonment for life. The jurors should understand that it is their duty to conscientiously consider all the evidence in the case in arriving at their decision but that it is not essential to their choice of either penalty that they find palliating or mitigating circumstances on the one hand or evidence in aggravation of the offense on the other hand; that insofar as selecting the penalty is concerned (as between the two alternatives) the law does not itself prescribe, nor authorize the court to innovate, any rule circumscribing the exercise of their discretion, but, rather, commits the whole matter of its exercise to the judgment and the consciences of the jury; that in deciding the question whether the accused should be put to death or sentenced to imprisonment for life it is within their discretion alone to determine, each for himself, how far he will accord weight to the considerations of the several objectives of punishment, of the deterrence of crime, of the protection of society, of the desirability of stern retribution, or of sympathy or clemency, of age, sex, human passion, ignorance or weakness, or (if appropriate under the evidence, of illness or intoxication or provocation not sufficient to reduce the degree or class of the crime), of the presumptions concerning, or possible uncertainties at-

8. For some years many courts and writers on criminal law and penology have held that the purpose of legally adjudicated punishment is not or should not be vengeance, but rather deterrence of the offender and other prospective offenders from crime, assistance in their rehabilitation, and the protection of society. (See generally 24 C.J.S., Criminal Law, § 1974, p. 1180; 15 Am.Jur., Criminal Law, § 506, p. 155; 14 Cal.Jur.2d, Criminal Law, § 265, p. 516; Hall, General Principles of Criminal Law (1947), pp. 50–54, 130–137, 171–173, 419–421, 543, 568–569; Wharton, Criminal Law (1932 ed.), §§ 1–13.) Yet it cannot be denied that there still exists authority that retribution can be considered as a factor relevant in the selection of punishment. (See Williams v. New York (1949), 337 U.S. 241, 248, 69 S.Ct. 1079, 93 L.Ed. 1337 ["Retribution is no longer the dominant objective of the criminal law. Reformation and rehabilitation of offenders have become important goals of criminal jurisprudence"]; Com. of Pennsylvania ex rel. Sullivan v. Ashe (1937), 302 U.S. 51, 55, 58 S.Ct. 59, 82 L.Ed. 43 [the state "may inflict a deserved penalty merely to vindicate the law or to deter or to reform the offender or for all of these purposes"]. For expression of the stark concept of retribution see the Mosaic law (Exodus XXI, 12, 24, 25): "He that smiteth a man, so that he die, shall be surely put to death. * * * Eye for eye, tooth for tooth, hand for hand, foot for foot, Burning for burning, wound for wound, stripe for stripe.")

taching to, life imprisonment, or of the irrevocableness of an executed sentence of death, or an apprehension that explanatory facts may exist which have not been brought to light, or any other consideration whatever which in the light of the evidence, the duty they owe to the accused and to the state, and the law as explained to them by the judge, appears to them to be important.

As has been hereinabove stated the error in this case arose from a combination of circumstances and events. The use of the so-called "silent verdict" form to imply the death penalty, together with the instruction concerning it, together also with the prosecuting attorney's arguments as to "mitigation" and regarding the "penalty in which the defendant is found guilty of first degree murder and the jury makes no recommendation," and the "verdict without fixing the penalty," are all circumstances which have necessarily been related in portraying the background upon which the error grew. It was from that background that the jury foreman asked for aid on "a question of a point of law" as to the selection of penalty, implied that the jury had gained the concept that the law expected "the maximum penalty in a verdict of first degree murder" unless there was "legal mitigation in this respect," declared positively that he was "of the opinion that there are circumstances which * * * may be considered to be in mitigation" but that he was "not sure how the law defines mitigating," and, as is made obvious by the verdict, was persuaded, after hearing the judge's oral instructions, that he had been mistaken in his opinion.

[10] How much any one of the circumstances which have been related may have contributed to produce the erroneous initial concept of the jury as to their duty in the absence of mitigating evidence we need not determine. We note, however, that we do not hold that the use of the so-called "silent verdict" form with its accompanying instruction is in itself error. Instructions as to the use of the "silent verdict" have been repeatedly upheld in varying circumstances. (See 13 Cal.Jur., Homicide, pp. 745, 746; 24 Cal.Jur.2d, Homicide, p. 864.) The instruction given on the subject in this case (quoted at page 466 of 306 P.2d) is No. 306 in California Jury Instructions, Criminal. We are, however, in view of the fact that the grave error which brought forth that form of verdict has been fully disclosed in our decision in People v. Green (1956), supra, 47 Cal.2d 209, 302 P.2d 307, bound to recognize four facts which shadow the practice of reading this instruction and providing an accompanying form of silent verdict: (1) Such practice is a remnant of the admittedly mistaken holding of this court in People v. Welch (1874), supra, 49 Cal. 174, 185, that "The jury need not declare that death shall be inflicted—in cases where they cannot agree on imprisonment—since, if the verdict is silent in respect to penalty, the Court must sentence the defendant to death"; (2) the language used in the instruction and form of verdict may in some circumstances tend to confuse jurors and lead to error; (3) such language may lend itself to the accentuation of errors such as those which occurred here in relation to the subject of mitigation and the function of the jury; and (4) the practice has the appearance of (if it is not in fact) an attempt to load the scales of justice—as to punishment—against a person on trial for his life.

Dramatic illustration of the danger of the use of the type of instruction now in question is found in People v. French (1886), 69 Cal. 169, 176–180, 10 P. 378. There the jury, after such an instruction had been given, retired to deliberate. They returned into court and the foreman reported that they had not agreed on a verdict and that a juror desired further information as to punishment. That juror said, "I am not willing to pass sentence * * * by which the man should be killed, because I think there were some mitigating circumstances." The court said, "The jury have the right to fix the penalty at death or imprisonment for life. * * * If the jury bring in a verdict of guilty of murder

in the first degree, without specifying the penalty, they may do so. * * * You are not compelled to do it."

The jury again retired and again returned for information on the question of punishment. The same juror said, "I got the impression that if the verdict was returned of guilty of murder in the first degree, without anything further, it inflicted the death penalty. Some of my fellow-jurors thought it did not. I want to be certain of that."

The court said, "I think it is the duty of the jury to fix the penalty, but at the same time, if you have agreed on a verdict of murder in the first degree, the court will receive it.

"If there is nothing specified as to the penalty, the court will have its duty to perform,[9] but what the duty will be the court will not say.

"I think it is a jury's duty to fix the penalty; they ought to do it."

Again the jury retired. As in the case at bar, they returned a verdict silent as to punishment. Defendant's counsel objected that the verdict had been returned under a misapprehension "and if the jury knew, as is the fact, that that means hang, they would not have brought in that verdict." The same juror said, "If that is the effect of my verdict, that is not my verdict." When the jury was polled and the clerk asked, "Is this your verdict?" the dissenting juror first said, "No, not if—" and murmured something which could not be heard. Asked by the court if that was his verdict, he said, "Yes, that is my verdict, and *I will leave the responsibility to the court.*" (Italics added.)

Judgment of death on this verdict was affirmed. This court cited People v. Welch (1874), supra, 49 Cal. 174 and held (People v. French (1886), supra, at pages 179–180 of 69 Cal., 10 P. 378), "Of the duty of the court upon receiving such a verdict, there could have been no doubt in the mind of the judge. As declared by this court in People v. Welch, 49 Cal. 185: 'If a jury shall agree that a defendant is guilty of murder in the first degree, but cannot agree that the punishment shall be imprisonment for life, or shall not declare that the punishment shall be such imprisonment, it will be the duty of the court to pronounce judgment of death. The jury need not declare that death shall be inflicted in cases where they cannot agree on imprisonment, —since, if the verdict is silent in respect to the penalty, the court must sentence the defendant to death.'

"In other words, a person convicted of murder in the first degree shall not escape punishment because the jury that convicted him by a valid verdict may have disagreed upon the question of punishment, or, which is equivalent to the same thing, returned a verdict which was silent as to the penalty."

In People v. Hall (1926), supra, 199 Cal. 451, 456, 249 P. 859, it was held, directly contrary to the Welch and related decisions, but not expressly overruling them, that "[3] Under the law the verdict * * * must be the result of the unanimous agreement of the jurors and the verdict is incomplete unless, *as returned*, it embraces the two necessary constituent elements; first, a finding that the accused is guilty of murder in the first degree, and, secondly, legal evidence that the jury has fixed the penalty in the exercise of its discretion. [4] The jury may exercise its discretion as to the penalty in one of three ways. It may fix the death penalty by so wording its verdict, or by remaining silent as to the penalty, or it may by so wording its verdict fix the penalty at life imprisonment. *When the penalty is fixed* at death or at imprisonment for life *by definite and specific wording of the verdict no difficulty is or has been encountered* * * *" (Italics added.) Under a misapprehension as to the holding in People v. Welch (1874), supra, 49 Cal. 174, 185 (its true significance is not readily ascertainable except upon a reading of the last paragraph of the opinion rendered on denying rehearing) that case was relied on as authority

9. Cf. 306 P.2d at pages 467, 469.

for the proposition that the jury "may fix the death penalty by * * * remaining silent as to the penalty" and that a silent verdict "affords conclusive evidence * * that the jury has * * * exercised its discretion and thereby fixes the penalty at death." As we have already shown, the Welch case actually holds that the jury need not agree upon or fix the death penalty; that they must agree upon and fix the penalty only if it is to be life imprisonment, and upon failure to agree as to penalty (but agreement as to guilt of first degree murder) the judge must sentence the defendant to death.

It is stated in a note in 36 Cal.L.Rev. 628, 632, that "Once guilt has been agreed upon, the discretion of the jury is in practice exercised by choosing between two printed forms of verdict. One of these declares that the jury have found the defendant guilty of first degree murder and recommends[10] life imprisonment; the other simply announces a finding of guilty of murder in the first degree and is silent as to the penalty. This in itself seems prejudicial to the defendant in cases in which the jurors cannot agree on the recommendation of life imprisonment, after having agreed that the defendant did commit murder in the first degree. Judicial instructions to the contrary notwithstanding, jurors may, in choosing the 'simple' verdict, feel no direct responsibility for the imposition of the death penalty; or, having agreed on the degree of the crime, they may feel, after fruitless debate on the determination of punishment, that they cannot refuse to bring in a verdict specifying only their agreement that the defendant is guilty of first degree murder."

Although as we have above indicated, the use of the silent verdict by trial courts relying on our earlier decisions may not in itself be held to constitute error, it would seem, now that the error in the decision creating the source of the practice[11] has been exposed (People v. Green (1956), supra, 47 Cal.2d 224, footnote 3, 302 P.2d 317), that the implication which is corrollary to this court's statement (in People v. Hall (1926), supra, 199 Cal. 451, 456, 249 P. 859) that *"When the penalty is fixed* at death or at imprisonment for life *by definite and specific wording of the verdict no difficulty is or has been encountered"* (italics added), should be considered as further emphasized, and that henceforth the practice itself should be discontinued. (See also People v. Crooker (1956), 47 Cal.2d 348, 303 P.2d 753. If continued, such practice, we apprehend, would often be urged as accentuating or contributing to the prejudice of any errors which conceivably could relate to punishment.

After consideration of the entire record we conclude that defendant has been fairly tried and convicted of the crime of murder of the first degree, insofar as guilt of the offense is concerned, but that he was not accorded the full measure of a fair trial on the issue of penalty. Hence, there has been a miscarriage of justice which necessitates a new trial on that issue. (Cal. Const., art. VI, § 4½; People v. Green (1956), supra, 47 Cal.2d 209, 302 P.2d 307.)

For the reasons above stated the judgment and order denying a new trial are affirmed insofar as relates to the adjudication that defendant is guilty of murder and that the murder is of the first degree; on the question of penalty the judgment and order denying a new trial are reversed and the cause is remanded for retrial and redetermination of such question of penalty only, and for the pronouncement of a new sentence and judgment in accord with such determination and the law applicable thereto.

GIBSON, C. J., and CARTER, TRAYNOR and McCOMB, JJ., concur.

SPENCE, Justice (concurring in part and dissenting in part).

10. See footnote 4, 306 P.2d at page 467.

11. People v. Welch (1874), supra, 49 Cal. 174.

I concur insofar as the judgment and order are affirmed, but I dissent insofar as the judgment and order are reversed.

The majority orders a partial reversal, purporting to rest its decision upon the authority of People v. Green, 47 Cal.2d 209, 302 P.2d 307, 326. I am of the view that the Green case is wholly inapplicable to the situation presented here and that the judgment should be affirmed.

In appears appropriate that I first make my position clear with respect to the decision in the Green case. I dissented in that case where the question involved was essentially one of statutory construction. I conceded in my dissent that if the question had then been an open one, "a plausible argument could be made for either construction." My dissent was based upon the ground that the question was not an open one; that recent decisions of this court had settled the rule; and that those recent decisions should be followed. The majority there, however, determined that those decisions should be overruled. The decision in the Green case has therefore declared a new rule which the trial courts are now required to follow. Under the circumstances, I do not believe that any useful purpose could be served by further dissent. I therefore yield to the views of the majority in the Green case regarding the construction to be placed upon section 190 of the Penal Code. It appears that the most important consideration now is to have a firmly established rule of construction for the guidance of the bench and bar in this important field of the law relating to the fixing of the penalty for first degree murder.

It does not follow, however, from my acceptance of the rule established in People v. Green, supra, that I should join in the partial reversal of the judgment here. The records in the two cases present entirely different situations, and I am of the view that the present majority opinion constitutes an unwarranted extension of the rule of the Green case.

The portion of the instruction which was challenged in the Green case read as follows: "The discretion which the law invests in you is not an arbitrary one and is to be employed only when you are satisfied that the lighter punishment should be imposed. If you find the defendant guilty of first degree murder and do not find extenuating facts or circumstances to lighten the punishment it is your duty to find a verdict of murder in the first degree and fix the penalty at death."

It thus appears that the jury was there instructed that it was their "duty" to "fix the penalty at death" if they did not find "extenuating facts or circumstances." The majority there held that the discretion conferred upon the jury by section 190 of the Penal Code was absolute. Under this construction of the section, the majority further held that the above instruction was erroneous as it had the effect of telling the jury that it *must* fix the penalty at death if it did not find extenuating facts or circumstances. No similar situation exists in the present case. Here both the prosecution and the defense properly proceeded upon the theory that the jury *could* consider the question of the existence or nonexistence of mitigating or extenuating facts or circumstances, if it so desired, in fixing the penalty. They therefore fully argued the question of whether such facts or circumstances existed, and the trial court read to the jury the dictionary definitions of "mitigate" and "mitigation" when the jury made its request.

The trial court here did not at any time tell or imply to the jury that it *must* fix the penalty at death unless it found such mitigating circumstances. The majority opinion concedes that the "formal instructions, commendably, are free" from any such suggestion. The fact is that, unlike the Green case, the jury here was told in the formal instructions that "in determining which punishment shall be inflicted, you are *entirely free* to act according to your own judgment." (Emphasis added.) Turning to the informal instruction given

along with the dictionary definitions, the trial court was careful to point out that "The only thing I can tell you is that it is entirely up to you folks." And again, "The only thing I can say to you, ladies and gentlemen, is that you heard the evidence; you are the sole judges as to what the penalty or punishment is to be in this case. That is up to you. I can't tell you what to do. I gave you all the instructions. You have the instructions with you and if you can find any mitigating circumstances in the case, why, *if that is what you are looking for,* why it is up to you to find them. I can't tell you anything about them." (Emphasis added.)

The argument of the prosecuting attorney was likewise proper. When discussing punishment and the claimed absence of mitigating circumstances, he said: "The Judge will tell you it is a matter within your discretion. It is something you may consider, look over and decide. You can come to your own conclusion." And again he said: "We feel from this evidence you should use your discretion, use it wisely, study the case, and feel when you come to the conclusion after you have thought it over that you will find this is a first degree case and that the imposition of the death penalty is justified."

The sole implication which may be drawn from all the instructions, formal and informal, and from the argument of counsel is that the jury *could* consider the existence or non-existence of mitigating circumstances, "if that [was] what [they were] looking for" in fixing the penalty. The last mentioned implication is entirely correct, and an express formal instruction to the effect that they could consider such matters, if they so desired, might well have been given even under the rule of the Green case, so long as it was made clear by the instructions, as it was here, that "In determining which punishment shall be inflicted, you are entirely free to act according to your own judgment"; that the question of punishment is "entirely up to you folks"; and that "you are the sole judges as to what the penalty or punishment is to be in this case. That is up to you." It therefore appears that the instructions given were equivalent to an instruction that the jury's discretion in fixing the punishment was "absolute."

In view of the record, as summarized here and in the majority opinion, I cannot agree with the majority that this case is controlled by People v. Green, supra; or that there was any error similar to that in the Green case which "involves the same untenable concept that under the law it is the duty of the jury" to impose the death penalty in the absence of evidence of mitigating circumstances. Permissive language was used at all times by court and counsel with respect to the fixing of the punishment, and no mandatory implications can properly be drawn therefrom. I therefore believe that the partial reversal by the majority rests upon an unwarranted and undesirable extension of the rule of the Green case to a situation in which it has no application.

In conclusion, I reiterate that I am of the opinion that it is entirely proper for counsel for the prosecution and counsel for the defense to argue concerning the claimed existence or non-existence of mitigating circumstances in a murder case. It is a matter of common knowledge that such arguments are ordinarily presented in practically every trial for murder. I am further of the opinion that the trial court may properly give, upon the jury's request, approved definitions of any words properly used by counsel in their arguments. I therefore conclude that counsel's arguments and the trial court's instructions here were wholly unobjectionable, and more particularly in the light of the trial court's explicit instructions, formal and informal, concerning the jury's absolute freedom to exercise its discretion in determining the punishment to be imposed.

I find no error in the record and would therefore affirm the judgment and order in their entirety.

47 Cal.2d 776

The PEOPLE of the State of California, Plaintiff and Respondent,

v.

Oscar Hugo BRUST, Defendant and Appellant.

Cr. 5780.

Supreme Court of California. In Bank.

Jan. 29, 1957.

Rehearing Denied Feb. 27, 1957.

Prosecution for first degree murders of defendant's estranged wife and his stepson. The Superior Court, Los Angeles County, H. Burton Noble, J., after return of jury verdicts which were silent as to punishment, entered judgment of conviction and imposed the death sentence and denied motion for new trial and defendant appealed. The Supreme Court, Schauer, J., held that evidence sustained convictions and instructions of court respecting assessment of punishment was sufficient to overcome any error created by voir dire examination of jury respecting necessity of finding mitigating circumstances before imposing punishment of life imprisonment.

Affirmed.

1. Homicide ⇐253(1)

Evidence sustained convictions of first degree murders.

2. Criminal Law ⇐356

Evidence of circumstances which would tend to excite defendant's anger against his victim may be admitted on defendant's behalf as tending to show provocation and passion and therefore excusability or a lesser degree or lower class of crime. West's Ann.Pen.Code, § 192, subd. 1; § 195, subd. 2.

3. Homicide ⇐181, 339

In prosecution of defendant for killing of estranged wife and stepson, statements of wife showing threats against defendant and hostility toward him were admissible not as proof of the contents but as circumstantial evidence of wife's hostile feeling toward defendant, but in view of other evidence of similar nature in case exclusion of such statements were not prejudicial.

4. Homicide ⇐354

The concept that a jury in finding a defendant guilty of first degree murder and imposing life imprisonment is extending a leniency which should only be done in case of a finding of mitigating circumstances, is erroneous and contrary to the law.

5. Homicide ⇐314

It is the function and responsibility of the jury which has found defendant guilty of first degree murder to select and designate in their verdict which of the two punishments prescribed by statute shall be imposed in any given case and it is not necessary that the choice of penalty be based on a finding of mitigating or of aggravating circumstances. West's Ann.Pen.Code, § 190.

6. Criminal Law ⇐1166½(6)

In prosecution for first degree murder resulting in jury verdict of guilty, instructions of court respecting assessment of punishment were sufficient to correct any error which might have been created on voir dire examination questions emphasizing need of finding mitigating circumstances in order to assess punishment at life imprisonment. West's Ann.Pen.Code, §§ 190, 1239(b).

7. Homicide ⇐311

In prosecution for first degree murders instruction of court respecting duty of jury in assessing punishment in case it found defendant guilty, was not erroneous on ground that it lead jury to believe they were not the sole arbitrators in selection of punishment. West's Ann.Pen.Code, § 190.

8. Homicide ⇐314

Use of the "silent verdict" by jury in first degree murder prosecution is undesirable as tending to make jury feel less than their full responsibility for selection of death penalty. West's Ann.Pen.Code, § 190.

Eugene V. McPherson, Los Angeles, for appellant.

Edmund G. Brown, Atty. Gen., and Norman H. Sokolow, Deputy Atty. Gen., for respondent.

SCHAUER, Justice.

Defendant has been found guilty of the first degree murders of his estranged wife and his step-son. The jury had been instructed that "if you should fix the penalty as death, you will not specify the death penalty in the verdict, and you will say nothing about punishment in the verdict"; so instructed, they returned verdicts silent as to penalty. Defendant was also convicted of assault upon his step-daughter with a deadly weapon with intent to commit murder. Jury trial on his plea of not guilty by reason of insanity was waived and the court found that defendant was sane at the time of the commission of the offenses. Defendant's motion for new trial was denied. This appeal from the judgment imposing the death sentence for each murder is taken by virtue of section 1239 (par. (b)) of the Penal Code.

Defendant's contentions relate only to the trial of the issues raised by his plea of not guilty. He argues that the evidence before the jury was insufficient to show that the murders were willful, deliberate, and premeditated (the only theory upon which they could have been found to be of the first degree). Defendant also complains of the trial judge's rejection of evidence of declarations by defendant's wife; this evidence, defendant claims, should have been admitted on the issue of the wife's provocation of defendant. We have concluded that defendant's contentions are without substantial merit. We have further concluded that the use of the so-called "silent verdict," in the circumstances of this case which are hereinafter delineated, is not shown to have misled the jury as to the unlimited scope of their discretion in choice of penalty for the murders or affected adversely to defendant their sense of responsibility for such choice of penalty.

At about 4 a. m. on October 30, 1954, defendant fatally shot his wife, Mildred Brust, and his step-son, Curtis Johnson, aged 16, and shot and wounded his step-daughter, Kay Marie Johnson, aged 14. The shootings were the culmination of long-continued domestic difficulties. Defendant and Mildred were married in 1947. Curtis and Kay Marie, the children of a previous marriage of Mrs. Brust, lived with the Brusts. Defendant and Mrs. Brust had one child, Bobby, who was five years old at the time of the killings. Mr. and Mrs. Brust argued frequently about the step-children's lack of respect for defendant, defendant's authority in the home, and finances. On July 12, 1954, Mrs. Brust began an action for divorce and defendant moved from the family home. According to defendant he was "illegally evicted"; in fact the complaint was accompanied by a request for an order that defendant be restrained from occupying the community home. Mr. and Mrs. Brust entered into a property settlement agreement which defendant performed, but Mrs. Brust repeatedly asked defendant for additional money. An interlocutory decree was entered on October 1, 1954. Mrs. Brust was awarded custody of Bobby with rights of visitation to defendant.

Defendant was employed by the federal government as a letter carrier. After the divorce proceeding was instituted, and at a time at least two weeks before the commission of the offenses of which defendant stands convicted, he surreptitiously took from the post office a key to the portion of the office where guns and ammunition were kept and had a locksmith make a duplicate of the key; he did this so that he would be able to obtain a gun. (Cf. People v. Green (1932), 217 Cal. 176, 179, 17 P.2d 730.)

At about 10 p. m. on October 29, 1954, defendant, at Mrs. Brust's request, telephoned her. She asked defendant to care for Bobby the next day, Saturday; defendant refused; and they argued. Defendant then went to the Brust house (defendant testified that Mrs. Brust asked him to come; Kay Marie testified that she did not). Defendant and Mrs. Brust quarreled, first about defendant taking Bobby, then about

other matters. Mrs. Brust said, "I am going to make trouble for you" with defendant's employer and the sheriff, and became very angry, "going into a tantrum." Defendant seized her arms and shook her and they fell to the floor. Kay Marie came toward them and defendant slapped her. Defendant said, "I want to get out of here," and Mrs. Brust said, "Call the police. * * * I have got him where I want him." Defendant attempted unsuccessfully to pull the telephone from the wall and left.

Defendant drove about "in a turmoil" and thought of committing suicide. He went for a time to the Elks Club. He drove to the post office, used his duplicate key, and took a revolver loaded with six cartridges. He returned to his room for a time.

After further driving about, defendant went to the Brust home at about 4 a. m. He broke open the front door, on which there was a chain lock. Mrs. Brust came from her bedroom and defendant shot her; the wound severed an artery. Kay Marie was screaming and running about her room; defendant fired two shots into the room and wounded her in the arm and shoulder. He went into Curtis' room, where the boy was attempting to shield himself beneath the covers, and shot him fatally in the back of the head. Meanwhile, Kay Marie had gone to the telephone and told the operator to send the police.

After defendant shot Curtis he telephoned his adult daughter and told her that he had "wiped out the family" and was going to kill himself and that he wanted her to come and get Bobby.

Deputy sheriffs arrived at the Brust residence at 4:50 a. m. Kay Marie met them at the door. When they entered the living room where defendant was, defendant put the revolver to his head and pulled the trigger repeatedly but the gun did not fire. A deputy seized defendant's arm and defendant, at the deputy's command dropped the gun.

The revolver contained four empty cartridges and two loaded cartridges with indentations on the primer caps which indicated that they had misfired.

Defendant, who appeared "very calm," answered the questions of the deputies. He said, among other things, "I shot my wife first, and then my stepdaughter twice, and then my stepson. I wish you guys hadn't stopped me. I wanted to save the State the money. * * * I planned this for two months. * * * I got the gun from the post office * * * I had a key made to get in with. It was part of the plan." Asked, "Aren't you sorry you have done this?" defendant replied, "No; I am glad. They have ruined my life, and it is too late to start over again. I am getting too old."

In subsequent voluntary statements made by defendant to officials on October 30 and November 1, defendant described his domestic difficulties and the shootings. He said, among other things, that he had the duplicate post office key made "For this definite reason. * * * What I have done" and that he took the gun "For the exact purpose that I used it for—to kill my wife and her two children and also myself"; that "I had planned somewhat to destroy the family, except my son, including myself," from the time defendant was "evicted from the home" on July 12; and that if his victims were alive he would do the same thing "Probably sooner."

[1] As the foregoing summary of the evidence shows, there is legally adequate proof of willful, deliberate, and premeditated murder. Defendant's argument that the evidence establishes no more than second degree murder[1] is based on a view of the evidence favorable to defendant rather than to the state. He urges that there was provocation "adequate to negative or raise a reasonable doubt as to the idea of premedita-

1. Murders of the first degree and of the second degree are defined and distinguished in People v. Bender (1945), 27 Cal.2d 164, 181 [16]–185 [21], 163 P.2d 8; see also People v. Thomas (1945), 25 Cal.2d 880, 903, 156 P.2d 7.

tion or deliberation, leaving * * * [each] homicide as murder of the second degree; i. e., an unlawful killing perpetrated with malice aforethought but without premeditation and deliberation" (People v. Thomas (1945), supra, 25 Cal.2d 880, 903, 156 P.2d 7). Defendant's argument is particularly directed to the killing of Mrs. Brust, but he also refers to provocatory conduct of the step-children during the time he lived with them (their disrespect for defendant, making faces at him, calling him a "bald-headed old goat," demanding toys which he could not afford). The jury (who were fairly instructed as to the differences between the degrees of murder) could have accepted, but were not compelled to favor, the view that conduct of the victims was so grossly provocatory as to negative or raise a reasonable doubt as to the formation of a truly deliberate intent to kill; the jury's determination in this respect is controlling on appeal.

Defendant argues that because he had the key to the post office and could have obtained the gun prior to his going to the Brust home on the night of October 29, but did not up to that time avail himself of his opportunities to kill his wife and step-children, it is apparent that he had abandoned any intent to kill which he may have had previously; that after he went to the Brust home on October 29 at about 10:15 p. m. he could not have formed a deliberate intent to kill because the circumstances of his quarrel with Mrs. Brust, "coupled with the indignities heaped upon him by his wife and step-children," precluded subsequent dispassionate deliberation. Defendant particularly relies upon his own testimony that during his quarrel with Mrs. Brust "She asked me for about $50.00. She said she could show me a good time"; that thereafter when they fell to the floor defendant dislocated his shoulder; and that during the approximately five hours after he left the Brust home on the night of October 29 and before he returned on the morning of October 30 he was planning suicide, not murder, but wished to see Bobby before he killed himself.

While the jury could have accepted any or all of the views of the evidence urged by defendant it is clear that they were not required so to do. In this connection it may be noted that there is testimony that defendant first complained of the shoulder injury in the county jail on November 1, and that he stated that it occurred when he rolled over on his bunk in the jail.

Defendant complains of the rejection of his offer of proof of statements of Mrs. Brust, made to persons other than defendant, which he says were relevant to the issue of provocation sufficient to establish that the killing of Mrs. Brust (and, impliedly, of Curtis) was no more than murder of the second degree. The rejected evidence was as follows: (1) Seven months before she was killed Mrs. Brust stated, "Some day he [defendant] is going to make me so mad that I will kill him." (2) Four months before she was killed, while the Brusts were in Montana, Mrs. Brust said that "she hated Mr. Brust and didn't know whether she was going back to California with him." (3) On the afternoon before she was killed she stated that she was going to "get in touch with Mr. Brust and get some more money out of him." This evidence, defendant says, was admissible because it tends to show that Mrs. Brust "was in fact a person who would provoke appellant."

[2, 3] An important theory of the defense is that a long-continued, provocatory course of conduct of Mrs. Brust culminated in bringing defendant to a point where his capacity for cool deliberation was substantially impaired. Declarations (1) and (2) quoted in the last paragraph are relevant to this theory for the following reasons: The victim's expressions of hostility to defendant tend to show the existence of hostility. The existence of hostility tends to show the probability of hostile conduct toward defendant. Evidence of circumstances which would tend to excite defendant's anger against his victim may be admitted on defendant's behalf as tending to show provocation and passion, and therefore excusability or a lesser degree or lower class of

crime. (See Pen.Code, §§ 195, par. 2, 192, par. 1; People v. Valentine (1946), 28 Cal.2d 121, 132 [4], 137, 143, 169 P.2d 1; II Wigmore, Evidence (3d ed., 1940), § 390, p. 338.) Declaration (3) quoted in the last paragraph is also relevant, for it is a declaration of the victim's intent to behave provocatively toward defendant. (See People v. Weatherford (1945), 27 Cal.2d 401, 421–423, 164 P.2d 753; People v. Alcalde (1944), 24 Cal.2d 177, 185–188, 148 P.2d 627.)

The declarations are not vulnerable to the hearsay objection. The defense sought to use declaration (1) not as proof of the truth of its contents (hearsay) but as circumstantial evidence of Mrs. Brust's hostile feeling toward defendant. (See People v. Radley (1945), 68 Cal.App.2d 607, 609, 157 P.2d 426.) Declaration (2) has a dual aspect: as hearsay evidence that Mrs. Brust, as she declared, "hated Mr. Brust," and as circumstantial evidence of her hostility. Declaration (3) is hearsay evidence of the existence of the declared intent.

Insofar as the evidence is hearsay, the following analysis (People v. Weatherford (1945), supra, 27 Cal.2d 401, 421, 164 P.2d 753) is pertinent: "it is admissible only if there appears to be a necessity for that type of evidence and a circumstantial probability of its trustworthiness (V Wigmore, p. 202, § 1420), and if it falls within an accepted exception to the hearsay rule. * * * The death of the declarant creates the necessity for resort to hearsay and the declarations, being those of a present existing state of mind, made in a natural manner and not under circumstances of suspicion, carry the probability of trustworthiness. (VI Wigmore, § 1725, p. 80.)" Even when it is not strictly *necessary,* because of death or unavailability of the declarant, to receive declarations of existing mental or emotional state, such declarations can be received "on the consideration that, though the person's testimony on the stand may still be both actually and conveniently practicable, yet the probability of there receiving from him testimony which shall be in value equal or superior to certain hearsay statements is small; thus, while there is hardly a necessity in the strict sense, there is at least a desirability of resorting also to the hearsay statements." (VI Wigmore, Evidence (3d ed., 1940), § 1714, p. 58.)

Although the above discussion presents theories under which the declarations might have been received in evidence, defendant has not shown that their exclusion was prejudicial. Defendant testified at great length to provocatory conduct of Mrs. Brust, including her attempts to "get * * * money out of him." Other witnesses testified that they had heard both Mr. and Mrs. Brust, together and separately, discuss and complain about their marital difficulties, and had observed them quarreling. In view of the large amount of evidence received as to hostile feelings and provocatory conduct of Mrs. Brust, it does not appear that the admission in evidence of the three specific declarations quoted above would have led the jury to give more effect than they did to defendant's contention that the murder was of the second degree.

The prosecuting attorney, on voir dire examination of the prospective jurors, made the following accurate and candid statement as to responsibility for choice of penalty in the event the jury should find defendant guilty of first degree murder: "Let's assume this situation * * * You have heard all of the evidence. * * * You heard the instructions and you retire and deliberate. You and your fellow jurors come to the conclusion that one or both of these murders alleged here are first degree murders. That is your conclusion beyond a reasonable doubt. Then it becomes your duty which you undertake, your responsibility—a responsibility that you can't shirk off on me and you can't shirk off on Mr. McPherson [defendant's counsel] and you can't shirk off on the judge—to decide what the penalty will be." That forthright statement of the prosecutor becomes of substantial significance in a record which otherwise might present a serious problem as to the fairness of the trial on the issue of penalty.

During the voir dire examination of prospective jurors, the prosecuting attorney made eight references materially similar to the following: "In your examination of the evidence for that factor [choice of penalty, assuming that the jury have concluded that the killing was murder of the first degree], *you find no reason* in your sound judgment, in your sound discretion *why you should extend to the defendant life imprisonment.* Under those circumstances, would you hesitate at all to return a verdict assessing the extreme penalty?" (Italics added.) And the prosecuting attorney made eleven references materially similar to the following: "You discuss the facts pro and con and re-examine them and in your judgment *you can't see any reason why you should extend to the defendant the leniency of life imprisonment.* Under those circumstances, would you hesitate at all to return a verdict * * * assessing the death penalty?" (Italics added.)

In argument concerning the selection of penalty the prosecuting attorney three times used the phrase "leniency of life imprisonment"; he said, "Is there one thing in the evidence that anyone of you can point your finger at and say that that serves in *mitigation* of the defendant's terrible deeds? It isn't there"; and he twice stated that there was nothing to "*mitigate* the murder" of Curtis. (Italics added.)

[4, 5] The statements of the prosecuting attorney summarized in the preceding two paragraphs, in the absence of other circumstances hereinafter delineated, might have suggested to the jury the erroneous concept that life imprisonment was a "leniency" to be extended only if the jury found "mitigation." Such a concept would be contrary to the law. As emphasized in People v. Green (1956), 47 Cal.2d 209, 302 P.2d 307, at page 314, "It is *not* a function of the jury either to *lighten* the punishment or to *increase* the punishment; they have no such power. The statute [Pen. Code, § 190, quoted infra, 306 P.2d 486, footnote 2] clearly and equally states two alternatives as punishment; it gives preference to neither. It is the function and responsibility of the jury to select, and to designate in their verdict, which of the two punishments prescribed by the statute shall be imposed in any given case," and it is not necessary that the choice of penalty be based on a finding of mitigating or of aggravating circumstances. As stated in People v. Friend (1957), 47 Cal.2d 749, 306 P.2d 463, "If the prosecutor is trying to persuade the jury to select the death penalty, it would seem more to the point and more consistent with the statute that he should place the greater emphasis of his argument on developing *aggravating* circumstances rather than the mere absence of *mitigating* factors."

[6] Upon consideration of all the pertinent circumstances of the case, however, it does not appear reasonably probable that the jury, when the case was submitted to them, could have possessed the above mentioned erroneous concept of their duty. The judge, the prosecutor, and defendant's counsel, during the voir dire examination of prospective jurors, repeatedly emphasized that the jury must follow the instructions of the judge rather than statements of counsel as to the law. The formal instructions of the judge began, "It becomes my duty as judge to instruct you concerning the law applicable to this case, and it is your duty as jurors to follow the law as I shall state it to you," and continued, "You are to be governed solely by the evidence introduced in this trial and the law as stated to you by me." Therefore, it is to be assumed that the jury followed the judge's instruction as to choice of penalty.

The sole instruction on that subject was as follows: "The law of this state provides that every person guilty of murder in the first degree shall suffer death or confinement in the state prison for life, at the discretion of the jury that finds him guilty. If you should find the defendant guilty of murder in the first degree, it will be your duty to determine which of the two penalties shall be inflicted, the death penalty or confinement in the state prison for life. If you should fix the penalty as confinement in the state prison for life, you will so

indicate in your verdict, using a form that will be handed to you when you retire to deliberate, but if you should fix the penalty as death, you will not specify the death penalty in the verdict, and you will say nothing about punishment in the verdict. In determining which penalty should be imposed, you should not act arbitrarily. Your decision should be based upon a sound discretion, after a thorough consideration of all the evidence in the case, and the law as given you by this Court as it may apply thereto. In determining which punishment shall be inflicted, you are entirely free to act according to your own judgment."

[7] The foregoing instruction, insofar as it relates to the jury's discretion as to choice of penalty, does not transgress the following requirement (People v. Friend (1957), supra, at page 766 of 47 Cal.2d, at page 473 of 306 P.2d): The jury "may be told that the state is responsible for the law which defines murder of the first degree and which prescribes that every person guilty of such offense 'shall suffer death, or confinement in the state prison for life,' but in that event they must further be told that by the very terms of the statute the responsibility of making the selection as between death or imprisonment for life is committed absolutely to the jury." The instruction in its first sentence states the pertinent substance of section 190 of the Penal Code.[2] Neither the remainder of the instruction nor any other portion of the record before us (when the whole of that record is considered) can reasonably be said to have led the jury to the erroneous belief that they were not the sole arbiters when they reached the question of selection of punishment or that their discretion in that regard was not absolute.[3] The jury were told, "you are *entirely free* to act according to *your own* judgment" (italics added). They were not expressly and erroneously told, as were the jury in People v. Green (1956), supra, at page 216 of 47 Cal.2d, at page 313 of 302 P.2d, that it was their duty to fix the penalty at death if they did not find extenuating facts or circumstances. They were not misled into the erroneous belief, as were the jury in People v. Friend (1957), supra, at page 754 of 47 Cal.2d, at page 466 of 306 P.2d that they must find mitigating circumstances in order to justify return of a verdict which specified the punishment of life imprisonment rather than a verdict which by silence as to penalty indicated the death penalty. Also, there was no intimation by the court in this case that the prosecuting attorney's forthright statement as to the jury's responsibility for the selection of punishment (hereinabove quoted) was not accurate. To the contrary, although the court's instructions were not as specific as was the prosecutor's statement of responsibility, the effect of the instructions was to support the quoted statement. Hence, the use of the silent verdict here could not have contributed to error in that respect.

The instruction that the jury in determining penalty "should not act arbitrarily" does not suggest that the law favors the death penalty or that the jury would act "arbitrarily" if they fixed the penalty as imprisonment for life in the absence of

2. Section 190 (as amended by Amendments to the Codes, 1873–1874, p. 457) provides, "Every person guilty of murder in the first degree shall suffer death, or confinement in the state prison for life, at the discretion of the jury trying the same * * *"

3. As we have pointed out in People v. Green (1956), supra, at page 216 of 47 Cal.2d, at pages 313, 320–322 of 302 P.2d and emphasized in People v. Friend (1957), supra, at page 764 of 47 Cal.2d, at page 472 of 306 P.2d, this court as early as 1895 announced (in People v. Leary, 105 Cal. 486, 496, 39 P. 24) that section 190 of the Penal Code (as amended by Amendments to the Codes, 1873–1874, p. 457) "confided the power to affix the punishment within these two alternatives [death or life imprisonment] to the absolute discretion of the jury"; and since this is the clear meaning of the statute it is obvious that the jury must not be misled into believing that any rule of law or state of facts restricts them in their selection of punishment, or that the law or the judge favors either penalty over the other.

mitigating circumstances; neither does it suggest that the law favors life imprisonment or that they would act "arbitrarily" if they fixed the penalty as death in the absence of aggravating circumstances.

The instruction that the jury's decision as to penalty "should be based upon a sound discretion, after a thorough consideration of all the evidence in the case, and the law as given you by this Court as it may apply thereto," is correct in the circumstances of this case, where determination of the effect of "the evidence" and "the law" on selection of penalty was left to the jury alone.[4] It should be noted, however, that such an instruction could gravely mislead a jury if "the law as given you by this Court" suggested that one penalty or the other should be preferred either as a general rule of law or on the facts of the case.

[8] Here, as has been mentioned above, the jury were told (as they were in People v. Friend (1957), supra) that "if you should fix the penalty as death, you will not specify the death penalty in the verdict, and you will say nothing about punishment in the verdict." The giving of the foregoing instruction, followed by the return of forms of verdict silent as to the penalty for the first degree murders, was not in itself error, and, as we have above shown, did not in the circumstances of this case contribute to misleading the jurors as to the character and extent of their responsibility in the selection of penalty. The use of the "silent verdict," however, is undesirable for the reasons stated in the Friend case (1957), supra, at page 768 of 47 Cal.2d, at page 475 of 306 P.2d. The practice grew out of grave error (in People v. Welch (1874), 49 Cal. 174, 185) expressly pointed out and denounced in the Green case (1956), supra, at page 223 of 47 Cal.2d, at pages 317–322 of 302 P.2d; it may tend to make the jury feel less than their full responsibility for selection of the death penalty; and it may, combined with error relating to selection of penalty, contribute to reversal and retrial on the question of punishment. The "silent verdicts" here, nevertheless, appear to have been returned by a jury who, as disclosed above, were not misled as to the nature and scope of their duty or power or responsibility in fixing the penalty. We conclude, therefore, that the use of such forms of verdict does not, either alone or in combination with the other circumstances of this record, furnish ground for retrial of the question which the verdicts impliedly determined.

The record reveals a tragic story of antagonisms flaming from the tinder of emotional immaturity. The inadequacy,

4. "The jurors should understand that it is their duty to conscientiously consider all the evidence in the case in arriving at their decision but that it is not essential to their choice of either penalty that they find palliating or mitigating circumstances on the one hand or evidence in aggravation of the offense on the other hand; that insofar as selecting the penalty is concerned (as between the two alternatives) the law does not itself prescribe, nor authorize the court to innovate, any rule circumscribing the exercise of their discretion, but, rather, commits the whole matter of its exercise to the judgment and the consciences of the jury; that in deciding the question whether the accused should be put to death or sentenced to imprisonment for life it is within their discretion alone to determine, each for himself, how far he will accord weight to the considerations of the several objectives of punishment, of the deterrence of crime, of the protection of society, of the desirability of stern retribution, or of sympathy or clemency, of age, sex, human passion, ignorance or weakness, or (if appropriate under the evidence, of illness or intoxication or provocation not sufficient to reduce the degree or class of the crime), of the presumptions concerning, or possible uncertainties attaching to, life imprisonment, or of the irrevocableness of an executed sentence of death, or an apprehension that explanatory facts may exist which have not been brought to light, or any other consideration whatever which in the light of the evidence, the duty they owe to the accused and to the state, and the law as explained to them by the judge, appears to them to be important." (People v. Friend (1957), supra, at page 767 of 47 Cal.2d, at page 474 of 306 P.2d.)

whatever its source, lamentably was never remedied. Apparently the defendant and his wife engaged in altercations to such an extent that the cumulated goading effect on defendant brought him to a point where he wanted to, and decided that he would, commit the crimes of which he has been convicted. Until that fateful night of crime defendant apparently had been a law-abiding [5] and industrious [6] member of society, well-regarded in the community where he worked and lived.[7]

In a case such as the present one, it is difficult to understand upon what theory the jury could have based its selection of the death penalty other than the view that defendant's crimes were so disproportionate to his reasons therefor that he should receive a penalty equal to the fate which he inflicted on his estranged wife and step-son.[8] The theory that others will be deterred from like crimes and that society will thus be protected seems to have little practical application to killings arising out of domestic difficulties of the sort depicted by the record here. When a person such as defendant (with inadequate spiritual resources) has determined that the law-provided method for solving his difficulties (the divorce proceeding) is inadequate for his purpose, it seems that he would usually be unconcerned with the effect of his killings upon society or particular other persons or himself. For example, defendant here exposed his own five-year old son to a scene of carnage without hesitation although he expressed concern and love for the boy. And it does not appear likely that the death penalty is necessary for future protection of society against the killer here, for the probability of recurrence to the individual of a set of circumstances such as those which caused defendant to kill appears extremely remote.

Not only do we mention the foregoing factors as reasonable explanation of the selection of the extreme penalty by the jury here; also we mention the various generally accepted purposes of punishment as matters of which the jury might appropriately be advised in connection with their selection of penalty for first degree murder.

While at least some of us may doubt that this defendant exemplifies the type of criminal who should be put to death for his crimes, we find in the record no legal basis for concluding that the proceedings in the trial court were invalid or that there was prejudicial error which caused a miscarriage of justice.

For the reasons above stated, the judgment and order denying a new trial are affirmed.

GIBSON, C. J., and CARTER, TRAYNOR and McCOMB, JJ., concur.

SPENCE, J., concurs in the judgment.

5. Defendant reported to the psychiatrists who examined him in connection with this proceeding that he had never been arrested before his arrest on the charges here involved; that he served in the United States Army for two years without disciplinary action against him and that his discharge was honorable.

6. Defendant reported to the psychiatrists that he was gainfully employed from the time of his graduation from high school in 1928 until the time of the crimes here involved. There is evidence that during defendant's marriage to Mrs. Brust he was employed not only in the postal service but also at "extra jobs"; he also worked on improvements of his home. He supported his step-children; their father did not comply with an order of court that he make payments for their support.

7. There is abundant, undisputed evidence that defendant's reputation for peace and quiet was good.

8. Stern retribution, although it is no longer the prime purpose of the criminal law, may be a relevant factor in selecting punishment. (People v. Friend (1957), supra, at page 762 of 47 Cal.2d, at page 471 of 306 P.2d).

148 Cal.App.2d 131

Parley Max SMITH, Stanley Quayle, Donald Quayle, and Jesse Quayle, doing business under the firm name and style of Garden Valley Trout Farm, a co-partnership; P. E. Thornton, Clifton Hildebrand, and S. W. Quayle, a joint enterprise, Plaintiffs and Respondents,

v.

AMERICAN SURETY COMPANY OF NEW YORK, a corporation, et al., Defendants, American Surety Company of New York, a corporation, Defendant and Appellant.

Civ. 8932.

District Court of Appeal,
Third District California.
Jan. 29, 1957.

Action by plaintiffs to establish and enforce an oral contract of truck liability insurance against insurer. The Superior Court, Yuba County, Ben V. Curler, J., entered judgment for plaintiffs and insurer appealed. The District Court of Appeal, Warne, J. pro tem., held that where in every instruction concerning the issue of oral contract trial court had been careful to leave the amount of coverage to jury, and jury was specifically instructed that it must determine from a preponderance of evidence the amount of insurance agreed on, instruction to the effect that it was presumed that the parties contemplated terms contained in policies usually issued to cover like risks did not misdirect jury did not authorize jury to determine the amount of insurance regardless of the oral contract alleged.

Judgment affirmed.

1. Appeal and Error ⇐989, 994(2)

Jury is the sole judge of the credibility of the witnesses and the weight of evidence and those matters are not within the province of an appellate court.

2. Insurance ⇐665(1)

In action to establish and enforce an oral contract of truck liability insurance against insurer, evidence was substantial to support verdict for plaintiffs.

3. Trial ⇐142

Where jury could draw but one conclusion from the evidence, it is not error to instruct jury upon the facts thus admitted.

4. Trial ⇐194(7)

Where there was no dispute that individual whom a plaintiff contacted in regard to insuring a truck was authorized local agent of insurer, although local agent had to obtain consent of insurer before entering into contract of insurance for commercial vehicles, insurer's letter to local agent quoting rates and stating that insurer would handle insurance compelled conclusion that local agent was vested with authority to write commercial vehicle policy on behalf of plaintiffs, and, therefore, fact of agency was undisputed and jury was properly so instructed.

5. Appeal and Error ⇐1064(1)

Where complaint to establish and enforce an oral contract of truck liability insurance alleged an agreement for $10,000 and $20,000 coverage, instruction authorizing jury to return a verdict for plaintiffs up to $10,000 was not prejudicial to insurer.

6. Trial ⇐194(11)

Where in every instruction concerning the issue of an oral contract to insure plaintiffs' truck trial court had been careful to leave amount of coverage to jury and jury had been specifically instructed that it must determine from a preponderance of evidence the amount of insurance agreed on, instruction to the effect that it is presumed that the parties contemplated terms contained in policies usually issued to cover like risks did not misdirect jury and did authorize jury to determine the amount of insurance regardless of oral contract alleged.

Barfield & Barfield by Charles V. Barfield, San Francisco, for appellant.

Hildebrand, Bills & McLeod by Charles C. McLeod, Oakland, and Robert W. Steel, Marysville, for respondent.

WARNE, Justice pro tem.

This action was brought to establish and enforce an oral contract of truck liability insurance. The case was tried before a jury and resulted in a verdict against the appellant. The appeal is from the judgment.

Plaintiffs Stanley and Jesse Quayle were engaged in the trout farming business under the name of Garden Valley Trout Farm, a co-partnership. An agreement was made between them and plaintiffs Hildebrand and Thornton to purchase a truck for the purpose of hauling live trout between Idaho and California, and it was so purchased in the early part of March, 1952. After the truck had been taken to Garden Valley, Stanley Quayle contacted defendant Cleveland for the purpose of procuring public liability insurance on it. On March 13, 1952, Mr. Cleveland wrote to the American Surety Company to inquire as to whether it would insure the truck and to determine what the rates would be for bodily injury insurance in the amounts of five- and ten-thousand-dollar limits. The appellant, by letter, replied to this request, quoted the rates and stated that it would handle the insurance. On March 18, 1952, Mr. Cleveland wrote to Stanley Quayle that he could procure the insurance. Stanley Quayle testified that on March 18th or 19th he called on Cleveland and requested that the policy be issued. He further testified that at this meeting it was agreed that a policy for ten and twenty thousand be written, and that Mr. Cleveland stated that they (the plaintiffs) were covered, and that they could begin using the truck.

On April 14, 1952, while the truck was being operated by plaintiff Parley Max Smith in the conduct of the business, it struck and injured Charles Howe, a minor. Pursuant to a stipulated judgment, the injured boy was awarded $5,000 against Hildebrand and Thornton and $10,000 against the truck driver and the Quayle brothers. After the accident Hildebrand communicated with the appellant insurance company and asked if it would investigate and defend the action. The appellant denied liability and refused to defend. It denied that an oral contract of insurance was ever made.

Stanley Quayle testified that on the day after the accident he went to Mr. Cleveland's office to notify him of the accident, and at that time Cleveland said that he had neglected to get the insurance placed, but that he would issue a policy now. A policy was issued by the appellant dated April 15, 1952, with a maximum liability of five and ten thousand dollars on plaintiffs' truck.

The appellant urges for grounds of reversal (1) that the evidence was and is insufficient as a matter of law to support the judgment for plaintiffs or any one or more of them, and (2) that the jury was misdirected to the prejudice of appellant.

Appellant does not contend that plaintiffs are not entitled to recover if an oral contract of insurance was in fact entered into.

[1, 2] Conceding that the evidence is most conflicting, nevertheless there is substantial evidence to support the verdict of the jury and the judgment. The jury was the sole judge of the credibility of the witnesses and the weight of the evidence. Those matters are not within the province of an appellate court. Crawford v. Southern Pacific Co., 3 Cal.2d 427, 429, 45 P.2d 183.

[3, 4] Turning next to the instructions, appellant complains that the court withdrew from the consideration of the jury the issue as to the authority of its local agent Cleveland to bind appellant to ten- and twenty-thousand-dollar coverage without its previous consent and approval. The instructions on the subject matter read as follows:

> (1) "Under the evidence produced, I instruct you that Acton Cleveland had authority to insure the truck involved immediately upon receipt by him of the written authorization dated March 17, 1952, from defendant American Surety Company."
>
> (2) "I hereby instruct you that at all times covering the transactions herein involved, defendant, Acton Cleveland, was acting as a represent-

ative of defendant, American Surety Company of New York, and was a local agent of said defendant in Camptonville, California."

(3) "I instruct you that under the law of this state, an agent is not personally liable upon a contract he makes in behalf of his principal, where he discloses the identity of the principal to the other contracting party. *Therefore*, if you find, from a preponderance of the evidence, that defendant Cleveland did make an oral contract of insurance with plaintiffs, then your verdict must be in favor of plaintiffs and against defendant American Surety Company of New York only, and in such amount as you find, from a preponderance of the evidence, to have been specified in such oral contract as the amount of insurance coverage, not exceeding, however, the sum of $10,000."

There is no dispute in the evidence that the defendant Cleveland was the authorized local agent of the American Surety Company of New York. He had represented the company for 29 years. Both Cleveland and Wells so testified. However, Cleveland had to obtain the consent of the company before entering into a contract of insurance for commercial vehicles. The letter of March 17, 1952, which stated that American Surety Company would handle the insurance compels a conclusion that in this case Cleveland was vested with such authority, and therefore the fact of agency was undisputed. Where the jury could draw but one conclusion from the evidence, it is not error to instruct the jury upon the facts thus admitted. Barker v. Southern Pacific Co., 118 Cal.App. 748, 5 P.2d 970, 6 P.2d 982; Smith v. Western Pacific R. Co., 36 Cal.App.2d 433, 440, 97 P.2d 863.

[5] It is also contended that instruction number 3 above was also prejudicially erroneous in that it authorized the jury to return a verdict for plaintiffs up to $10,000, whereas the complaint alleged an express oral agreement for ten- and twenty-thousand-dollar coverage. We fail to see where the limiting of the amount of recovery to $10,000 instead of $20,000 could be prejudicial to the appellant. This instruction was beneficial rather than prejudicial to appellant.

[6] Appellant also objects to an instruction given by the trial court which read: "I instruct you that in cases of oral contracts for original insurance where no terms are expressly agreed upon, it is presumed that the parties contemplated those contained in policies usually issued to cover like risks." Appellant contends that this instruction permitted the jury to determine the amount of the insurance regardless of the oral contract alleged, and that if no express amount was agreed upon the jury could determine it. When the instructions are read in their entirety no such construction could possibly have been placed upon this instruction. In every instruction concerning the issue of the oral contract of insurance the court was careful to leave the amount of the coverage to the jury. The jury was specifically instructed that in the event they found from a preponderance of the evidence that an agreement to insure the truck in question was entered into between Cleveland and plaintiff Stanley Quayle or Jesse Quayle, that they must then determine from a preponderance of the evidence, the amount of insurance agreed upon. Again in the defendant's instruction No. 2 the jury was told that before it would render a verdict against appellant it must appear by a preponderance of the evidence that the truck in question was insured by the American Surety Company in a definite amount.

After having examined the entire record in the case, including all of the evidence, we have concluded that the giving of the instructions complained of did not result in a miscarriage of justice.

The judgment is affirmed.

VAN DYKE, P. J., and SCHOTTKY, J., concur.

148 Cal.App.2d 109

Maxine SALTONSTALL, Plaintiff and Respondent,

v.

Philip Leverett SALTONSTALL, Defendant and Appellant.

Civ. 22142.

District Court of Appeal, Second District, Division 1, California.

Jan. 29, 1957.

Rehearing Denied Feb. 20, 1957.

Hearing Denied March 27, 1957.

Action by a wife for divorce. On defendant's petition for a writ of supersedeas to stay, pending appeal, an order of the Superior Court, Los Angeles County, modifying its order granting defendant custody of parties' minor daughter by requiring him to return child to plaintiff, who was awarded custody by divorce decree, the District Court of Appeal, Fourt, J., held that evidence being conflicting, trial judge exercised discretion in changing child's custody, and that he did not abuse his discretion in failing to grant stay of order appealed from until further hearing, for which whole matter was continued.

Writ denied.

White, P. J., dissented.

1. Divorce ⇐303(1)

Superior court's orders respecting divorced spouses' minor child's custody should not be constantly changed and modified.

2. Divorce ⇐312.4

One petitioning for writ of supersedeas to stay Superior Court's orders respecting custody of minor child of petitioner and his divorced wife pending his appeal therefrom has burden to establish necessity of writ.

3. Divorce ⇐312.4

On petition for writ of supersedeas to stay, pending appeal, Superior Court's order modifying order granting petitioner his minor daughter's custody by requiring return of child to her mother awarded custody by divorce decree, presumption is in favor of trial court's decision and District Court of Appeal cannot presume error therein.

4. Appeal and Error ⇐479(1)

Where petition for writ of supersedeas to stay order of trial court pending petitioner's appeal therefrom shows no probable error, appellate court will not issue writ.

5. Divorce ⇐303(3)

Where evidence before trial court on divorced wife's motion to modify court's order granting divorced husband parties' minor daughter's custody so as to require return of child to her mother, awarded custody by divorce decree, was not conclusive, but conflicting, trial court exercised discretion in changing child's custody.

6. Divorce ⇐312.4

On divorced husband's petition for writ of supersedeas to stay trial court's order respecting divorced spouses' minor daughter's custody pending his appeal therefrom matters going to merits of appeal in petition and supporting affidavit will not be considered, as District Court of Appeal is not concerned with what ultimate decision should be.

7. Divorce ⇐312.4

Trial judge's ruling, denying divorced husband's motion for stay pending appeal of order involving custody of parties' minor child should not be disturbed by District Court of Appeal, in absence of showing of abuse of trial judge's discretion. West's Ann.Code Civ.Proc., § 949a.

8. Divorce ⇐298(1)

In proceeding to determine custody of divorced spouses' minor child, basic fundamental matter before court is child's best interests, in determining which parents' morals or lack thereof, their financial condition, and child's age, temperament, and love for either or both of parents must be considered.

9. Divorce ⇐296, 312.6(5)

Proceedings to determine custody of divorced spouses' minor child are left to sound discretion of trial court, whose determination will not be set aside by District

Court of Appeal, in absence of clear showing of abuse of discretion.

10. Divorce ⇐312.4

Evidence was insufficient to show that Superior Court judge abused his discretion in failing to grant divorced husband a stay of order modifying order granting him custody of divorced spouses' minor daughter by requiring him to return child to her mother, awarded custody by divorce decree, until further hearing for which court continued whole matter.

11. Divorce ⇐305

Appellate courts have power to issue appropriate writs or orders for enforcement of trial court's orders respecting divorced spouses' minor children's custody, even in absence of express recognition of such power in statutes providing for enforcement of such orders by writs of habeas corpus. West's Ann.Code Civ.Proc., §§ 946, 949a.

Henry B. Ely, Los Angeles, Dean M. McCann, Upland, for appellant.

Sidney Dorfman, Beverly Hills, Arthur N. Greenberg, Los Angeles, for respondent.

FOURT, Justice.

The defendant and appellant herein petitioned for a writ of supersedeas to stay the orders of the trial court pending an appeal, and further that a temporary stay, pending the granting or denial of the writ issue.

An action in divorce was filed on or about February 16, 1946, in Los Angeles county by Maxine Saltonstall, hereinafter referred to as the mother, against Philip Leverett Saltonstall, hereinafter referred to as the father. A child, Lee Bliss Saltonstall, was born as the issue of the marriage on March 23, 1947. At the time of the divorce decree, on July 1, 1949, the custody of the child was awarded to the mother, with the right of reasonable visitations to the father, and the father was ordered to pay $250 per month to the mother for the support and maintenance of the child. The mother had the full custody of the child from the date of the divorce decree, and the father apparently never visited with or saw or wrote to the child, nor requested the privilege of visiting or seeing her, nor did he communicate with or attempt to communicate with the mother about the child at any time until the mother filed an order to show cause for an increase in the child's support and maintenance, on or about September 20, 1955. On October 12, 1955, the father filed an order to show cause why the custody of the child should not be changed from the mother to the father. After various continuances, the matter was heard by a commissioner on May 3, 1956, July 23, 1956, and October 17, 1956.

A résumé of the facts as developed by the hearing on May 3, 1956, is as follows: The father is about fifty-six years of age, retired, living near La Jolla, California, in his own home. He receives an income of about $15,000 a year from two trusts in which he is the beneficiary. The mother, for the past six years or more, has resided with the child in various places in Mexico, including Mexico City, Cuernevaca, Acapulco, and various resort communities, because, as she stated, she liked to live in such surroundings. The child was placed in various schools while in Mexico and once was in the American Institute. However, the mother removed the child from that school and placed her in another because she "couldn't afford to keep her any longer", although the cost was only $89 per month, and she was receiving $250 each month from the father for the child's support and maintenance. The mother did not admit to the earning of any monies of any consequence; she had no funds of her own and no source of income, and apparently lived entirely from the $250 which was paid to her for the support and maintenance of the child. The commissioner found that the mother was a fit and proper person to have the custody of the child; further, it was found that the father strenuously objected to the child being reared in Mexico, and it was determined that it would be to the best interests of the child that she be reared in the United States. The father

was remarried to Beatrice Saltonstall, who was found by the commissioner to be a suitable person to supervise and care for the child. It was further found that if the father had the custody of the child, she would be enrolled in a suitable private school and spend the balance of her time in the home of her father. The commissioner determined that it was necessary for the child to spend some time in the father's home to ascertain whether the father and stepmother would be acceptable to the child, and whether the child would be happy in the father's home. Also, it was determined that the mother should be given an opportunity to establish a suitable home in the United States. The commissioner further determined that the father should have the physical possession of the child from June 1, 1956, to July 15, 1956, and that the matter should then be continued to the middle of July for further hearing. The court ordered on May 3, 1956, pursuant to the recommendation of the commissioner, that the application of the mother for an increase in support and maintenance for the child be denied; that the application of the father for change of custody of the child to him be continued to July 23, 1956, for further hearing, and that the father have the physical possession of the child from June 1, to July 5, 1956.

On July 23, 1956, the further hearing was held, at which time the testimony developed that the mother, for some time at least since the previous hearing, had been living with the child in an apartment in Beverly Hills with a man not her husband. She admitted to sleeping in the same bedroom with the man, but denied that there was anything improper between them, and stated that she had no idea how many nights she had stayed in the apartment of her "very good friend" since July 5, 1956. There was further testimony that when the father went to pick up the child at the hotel where the mother and child were then living, on May 31, 1956, he was delayed and could not take the child's luggage until he paid a delinquent hotel bill for the child and the mother. During the period from June 1, 1956, to July 5, 1956, the father had the child in his home where the youngster was happy and the father grew to love the child a great deal and became quite anxious to have the permanent custody of his daughter. Arrangements were made to place the child in a good day school. The child demonstrated that she was not mentally advanced to her age level and the father had made arrangements for a special tutor to assist her. The commissioner talked with the little girl in his chambers, where the youngster stated that she loved both her father and her mother, that she liked being with her father and being in his home; however, she would like to be with her mother, and she guessed that they would have nice places in the United States as well as in Mexico.

The commissioner determined that the mother had not established a satisfactory home or place in the United States within which to care for the child and that she had been moving about from place to place with no fixed residence. It was then directed that the child be with the father while the mother returned to Mexico to settle up her affairs there, and then to return to the United States and establish a facility here where the child could be reared. The mother indicated that she thought it was somewhat of an imposition to have her leave Mexico, come to the United States and establish a home, and find gainful employment from which she was to support and maintain herself. The court, upon the basis of the commissioner's recommendations, ordered that the custody of the child be with the father, and the cause was continued to September 10, 1956.

On October 17, 1956, the matter came on again for further hearing. At that hearing it was developed that the mother had secured a two-bedroom flat under a lease for a one-year term at a rental of $150 per month, and that on that date she was delinquent in the rent to the amount of about $450; that she was then employed at $50 per week on a job which she had had for only three days. The mother had also engaged a nurse at $100

per month, plus food and lodging, to assist her in the maintenance and care of the child.

The court then ordered that the order of July, 1956, be modified to provide that the father return the child to the mother on or before October 27, 1956, and that the father have the right to reasonable visitations and to have the physical possession of the child on the second weekend of each month and one month during the summer vacation. The whole matter was then again continued to March 11, 1957, for further hearing. The commissioner had stated that "[i]t would appear that the court should review the situation of the plaintiff and the minor child in five or six months to determine whether or not the plaintiff will carry out her intentions of making this home a permanent one." It was further developed that the petitioner herein had placed the child in a private school in La Jolla and had secured special tutoring for her and that she was able to enter the third grade. It was stated by a teacher that the child should not change schools in the middle of the term. There was also testimony that while in Mexico the child had been moved about from one place to another about twenty-six times, and had changed schools about ten times, all of which had, undoubtedly, contributed to her backwardness. It was brought out further that if she were allowed to stay in the La Jolla school with her father it would be the first time in her life that she had ever completed a school term in one place.

The last above-mentioned order was entered on October 19, 1956, and on October 26, 1956, the father perfected an appeal. Until the early part of November, 1956, the attorneys for the mother were of the belief that the appeal automatically stayed the order of October, 1956. However, they ultimately learned of sections 949a, Code of Civil Procedure, which was added to the statutes in 1955, and 946, and on November 9, 1956, they secured a writ of habeas corpus returnable November 19, 1956, requiring the father to produce the child for delivery to the mother. The father and his attorneys, up to that time, were of the impression that the appeal automatically stayed the order of October, 1956. A petition was then made to this court for a writ of supersedeas.

[1] The father contends that the writ should issue because, among other things, the child is presently happily located with the father in a decent and respectable home of some stability and standing; that the child is now in school doing reasonably well; that she has made childhood friends and is presently happy and contented and healthy, and that she has the love and affection of her father and Mrs. Beatrice Saltonstall, whom the court found was well able to supervise and care for the child. Further, the father contends that the order of October 17, 1956, was detrimental to the child's welfare, her schooling, her mental, physical and moral well being, and that the court acted in an arbitrary and capricious manner; that furthermore, there are special circumstances in this case in that the court continually continues to keep changing the order, and then continuing the matter to a time months in the future thereby effectually preventing any successful appeal. We are in accord with the view that there should be an end to the constant changes and modifications of orders having to do with the custody of a child. Sorrels v. Sorrels, 105 Cal.App.2d 465, 469, 234 P.2d 103; Bemis v. Bemis, 89 Cal.App.2d 80, 90, 200 P.2d 84.

[2–4] It is true, however, that in matters of this character the burden is on the petitioner (father) to establish the necessity of the writ. Private Investers v. Homestake Min. Co., 11 Cal.App.2d 488, 492, 54 P.2d 535. The presumption is in favor of the trial court's decision, and we cannot presume error in determining the motion. Nuckolls v. Bank of California, Nat. Ass'n, 7 Cal.2d 574, 578, 61 P.2d 927. Where no probable error is shown in the petition, the appellate court will refuse to issue the writ. People v. Smith, 71 Cal.App.2d 211, 212, 162 P.2d 475.

[5–7] We are of the opinion that the evidence which was before the trial court

was not conclusive but that it was conflicting and the trial court exercised its discretion in changing the custody as it did. There is much in the petitioner's affidavit and petition which goes to the merits of the appeal, but, we are not concerned with what the ultimate decision should be in this proceeding. Food & Grocery Bureau of Southern California v. Garfield, 18 Cal.2d 174, 178, 114 P.2d 579. Furthermore, the petitioner in this instance requested the trial court for a stay of proceedings under the provisions of section 949a, Code of Civil Procedure, and upon a hearing being held the motion for the stay was denied. The ruling of the trial judge should not be disturbed unless it can be shown that there was an abuse of discretion.

[8, 9] As heretofore indicated, the basic fundamental matter before the court was what is the best for the child. The morals or lack of morals of either of the parents, their financial condition, the age of the child, her temperament and the love of either or both parents are all factors to be considered by the trial court in determining the best interests of the child. Necessarily, such proceedings are left to the sound discretion of the trial court and whatever it determines will not be set aside except it should clearly appear that there has been an abuse of discretion. Crater v. Crater, 135 Cal. 633, 635, 67 P. 1049.

[10] Although we might well have decided the case differently had we been acting in the capacity of the trial judge, we cannot say that the court abused his discretion.

It is to be hoped, however, that before long there will be some order which will have some degree of permanency to the end that the child will be reared in, and have the benefits of a home grounded upon decency, respectability, stability, sound character and love, to the end that she may grow into and become a decent and respectable woman.

[11] Counsel have devoted considerable time and effort in calling our attention to the effect of section 949a, Code of Civil Procedure, added to the statutes in 1955, and the amendment to section 946, Code of Civil Procedure, in 1955. No useful purpose could be served here by our discussing the sections mentioned, excepting to say that an explanation of the necessity of the history of such legislation can be found in 29 Southern California Law Review 113; 29 State Bar Journal 225 (1954), under the title "Proposals for Legislation", and the "Third Progress Report to the Legislature by the Senate Interim Judiciary Committee", March, 1955, page 34; Family Law for California Lawyers, page 778; 44 Cal.Law Rev. 141. Suffice it to say that the changes in the law in 1955 expressly recognized the appellate courts' power to issue an appropriate writ or order, and in any event the court would have the power, even in the absence of any express recognition.

The writ is denied.

DORAN, J., concurs.

WHITE, Presiding Justice.

I dissent.

From a reading of the factual background surrounding this litigation, as contained in the majority opinion and after a consideration of the evidentiary features reflected in the various hearings had in the trial court, I am persuaded that, having in mind the best interests and welfare of the child in question, the court below abused its discretion in not granting a stay pending determination of the correctness of its order. The discretion with which the trial court is clothed is not plenary nor is it an arbitrary one. It must be exercised along legal lines and, in a legal sense, discretion is abused whenever, in its exercise, a court exceeds the bounds of reason—all the circumstances before it being considered. In the early case of Lybecker v. Murray, 58 Cal. 186, the court said, at page 189:

"* * * Under no circumstances is the discretion of the Court to be exercised arbitrarily, but it is a discretion, governed by legal rules, to do justice according

to law or to the analogies of the law, as near as may be * * * It must be exercised within the limitations above stated to promote substantial justice in the case."

That the court below was not satisfied with the wisdom or justice of its order from which the appeal herein was taken is evidenced by the fact that the order in question provided that "the whole matter" was continued to March 11, 1957 for further hearing, the court commissioner having stated that "it would appear that the court should review the situation of the plaintiff and the minor child in five or six months to determine whether or not the plaintiff will carry out her intentions of making this home a permanent one."

It is my reasoned opinion that the further and continued judicial "bouncing around" like a rubber ball of the child here involved should cease.

I would issue the writ of supersedeas.



148 Cal.App.2d 307

Minnie SHURGER, Plaintiff and Respondent,

v.

John J. DEMMEL and Elizabeth M. Demmel, his wife, Defendants and Appellants.

Civ. 8923.

District Court of Appeal, Third District, California.

Feb. 5, 1957.

Action by mother to cancel deeds executed by her to her son and a deed from the son to himself and his wife. Judgment for plaintiff in the Superior Court, Sacramento County, Malcolm C. Glenn, J., and the defendants appealed. The District Court of Appeal, Peek, J., held that the evidence authorized the finding that the deed from the mother to the son was a forgery and that findings respecting limitations were immaterial.

Judgment affirmed.

1. Deeds ⇐45

The owner of property cannot be divested thereof by a forged instrument.

2. Deeds ⇐207

Evidence justified cancellation of deed from mother to son on the ground that the deed was a forgery.

3. Appeal and Error ⇐1071(5)

Where mother was entitled to cancellation of deed to her son on the ground that it was a forgery, findings respecting limitation and confidential relationship were immaterial and would not invalidate the judgment in favor of the mother irrespective of whether they were sustained by the evidence. West's Ann.Code Civ.Proc., § 338, subd. 4.

Wilke & Sapunor, Sacramento, for appellants.

Lewis, Lewis & Lewis, Sacramento, for respondent.

PEEK, Justice.

Defendants appeal from an adverse judgment in an action instituted by plaintiff to have two deeds cancelled; one, a deed purported to have been made by her to her son, John J. Demmel, and a second deed from John to himself and Elizabeth, his wife.

The complaint is in two counts. The first cause sets forth certain alleged fraudulent representations made by John to plaintiff to obtain the deed from her. The second cause alleges that at all times therein plaintiff was the owner of the real property in question; that defendants claim an interest in the property adverse to her; that the claim is false and fraudulent and based upon a forged deed dated July 31, 1943; that she did not make or acknowledge the deed. By reference plaintiff includes the allega-

tions of portions of the first cause that Elizabeth accepted delivery of the deed to John and herself with full knowledge of all of the facts surrounding the acquisition of title by John; that defendants concealed the nature of the transfer from her to John; that defendants advised her she was the owner; that when she discovered the true facts in February, 1953, she demanded the restoration of the premises by reconveyance, but that the defendants failed and refused to do so.

Defendants' answer denies generally all of the material allegations of the complaint and affirmatively alleges laches. By amendment thereto they allege that the cause is barred by section 338, subsection 4, of the Code of Civil Procedure.

The record shows that at the time of trial plaintiff, who was born in Hungary, was 82 years of age and John, her only living child, was 61. A daughter, who was also born of her first marriage, had died many years before. Her second husband died in 1942, leaving her a life estate in the home where she was then living. The property which is the subject of this action was improved by her with a dwelling house in 1921. Except for a period of approximately six years, from 1932 to 1938, John and Elizabeth have continually resided therein. For the first few years of their occupancy, defendants paid plaintiff $35 per month for rent which was thereafter reduced to $25, which sum the defendants continued to pay up to the time this action was filed. During all of this time plaintiff paid the property taxes, the fire insurance premiums and the water bills. She and John had always been on friendly terms and she had reposed faith and trust in him. For safekeeping, she gave him all of her personal papers which included her deed to the property, a trust agreement between herself and a bank and her will which was dated in 1936. In 1940, at John's suggestion, she consulted attorney H. N. Mitchell who thereafter represented her in certain legal matters involving the estate of a brother. According to her testimony, she never consulted Mitchell again and did not visit his office in 1943.

The instrument purporting to be the deed from plaintiff to John was executed on July 31, 1943, and acknowledged that same day before attorney Mitchell as notary public. At the trial it was stipulated that Mitchell was deceased and that this signature on the acknowledgment was genuine. Plaintiff, however, testified that she had never signed a deed knowing it to be a deed; that the signature on the deed in question "* * * looks like mine, but I never signed that paper." She further testified that two or three years prior to the trial she had a conversation with Elizabeth in which she asked for an increase of $5 a month in the rent; that Elizabeth told her she could not pay it and that the property was in John's name; that prior to this time she did not know the property was in his name; that when she paid the real property taxes she always took a prior statement with her and informed the clerk that she desired to pay the taxes on the property shown on such statement; that on this occasion when she went to the office to make payment, she found that she had forgotten to bring with her an earlier statement; and that when she asked for the current statement, she was told there was nothing assessed in her name. She thereafter had one of her roomers accompany her to the title company to verify this fact. The roomer, when called as a witness, testified that he did so accompany her to the title company. He further testified that this took place in February, 1953, approximately four months prior to the commencement of the action.

The findings of the trial court which are pertinent to the conclusion we have reached are that on July 31, 1943, John falsely and fraudulently secured from the plaintiff a false and forged deed purported to have been executed by her that day and purporting to convey the property to him; that plaintiff was unaware of the fact that she was signing a deed; that such fact was concealed from her by John; that thereafter the deed was recorded; and that on the same day John executed and delivered a

grant deed conveying the property to himself and wife as joint tenants, which deed was likewise recorded.

It is the defendants' first contention that the evidence does not support the finding that John falsely and fraudulently secured from plaintiff a false and forged deed purported to have been executed by her. Assuming in accordance with defendants' contention that the trial court could only base its judgment in favor of plaintiff upon the second cause of action, nevertheless in view of her testimony and the inferences which could reasonably be drawn therefrom, we would be compelled to affirm the judgment.

[1, 2] It is well established that the owner of property cannot be divested thereof by a forged instrument. Crittenden v. McCloud, 106 Cal.App.2d 42, 234 P.2d 642; Montgomery v. Bank of America, 85 Cal. App.2d 559, 564, 193 P.2d 475. From the evidence produced by plaintiff, a reasonable inference can be drawn that the purported deed from plaintiff to her son was a forgery. It was shown that shortly prior to the commencement of this action in 1953 she learned for the first time that the property was not in her name but was in the names of John and his wife. She had always paid the taxes on the property, the fire insurance premiums and the water bills. Although she testified that the signature to the deed looked like hers, she further testified that she had never knowingly signed a deed. Thus it may be inferred that her signature was obtained without her having knowledge that it was a deed. She further testified that she had no conversation with Mr. Mitchell, the notary public who acknowledged the deed, subsequent to the estate proceedings in 1940, and that she was not in his office in 1943.

[3] Defendants also contend that the further findings of the trial court that neither cause of action was barred by section 338(4), Code of Civil Procedure; that plaintiff did not discover the fact of the alleged false and forged deed until February, 1953; that a confidential relationship existed between plaintiff and her son; and that on the date the purported deed was executed, plaintiff was old and infirm and inexperienced in business matters and placed complete reliance upon her son, are not sustained. However, since we have concluded that even assuming the insufficiency of the evidence to support plaintiff's first cause of action which was predicated upon fraud, it necessarily follows that said section of the Code of Civil Procedure does not apply and the remaining challenged findings were wholly unnecessary to the conclusion of the court upon the second cause of action.

The judgment is affirmed.

SCHOTTKY, J., and WARNE, J. pro tem., concur.



Mary V. SPENCE, Plaintiff and Appellant,
v.
Squire DORAN, Defendant and Respondent.*
Civ. 22008.

District Court of Appeal, Second District, Division 2, California.

Feb. 6, 1957.
Rehearing Denied March 4, 1957.
Hearing Granted April 2, 1957.

Action for injuries sustained in head-on collision occurring after plaintiff's driver had swung to his left and into oncoming traffic lane in a vain attempt to avoid defendant's vehicle which had been approaching in plaintiff's driver's lane of two-lane road having sandy shoulders and six foot embankments on each side. The Superior Court, Los Angeles County, Ellsworth Meyer, J., entered judgment adverse to plaintiff, and she appealed. The District Court of Appeal, Moore, P. J., held that the evidence required finding as a matter of law that defendant had been

* Dismissed by stipulation of the parties April 18, 1957.

negligent and that plaintiff's driver had not been negligent.

Reversed.

Ashburn, J., dissented.

1. Automobiles ⇐172(8)

Overtaking vehicle must return to its own side of roadway before coming within 100 feet of any oncoming vehicle. West's Ann.Vehicle Code, § 530.

2. Automobiles ⇐244(10, 36)

In action for injuries sustained in head-on collision occurring after plaintiff's driver had swung to his left and into on-coming traffic lane in a vain attempt to avoid defendant's vehicle, which had been approaching in plaintiff's driver's lane of two-lane road having sandy shoulders and six foot embankments on each side, evidence established as a matter of law that defendant had been negligent and that such negligence had been at least a contributing factor in causing the collision.

3. Negligence ⇐136(9)

Contributory negligence is a question of fact for jury, except where court can hold as a matter of law that only one rational inference can be drawn from evidence.

4. Automobiles ⇐206

Motorist was not required to anticipate negligence on part of driver of oncoming vehicle.

5. Negligence ⇐72

Under the doctrine of "imminent" or "sudden" peril, one who, in a sudden emergency, acts according to his best judgment but because of lack of time to form an accurate judgment, omits to act in most judicious manner, is not chargeable with negligence, so long as he did exercise care of reasonably prudent person under like circumstances; and fact that injurious consequences might have been avoided by following another available course does not, by reason of injuries, render him blamable.

See publication Words and Phrases, for other judicial constructions and definitions of "Imminent Peril Doctrine" and "Sudden Peril Doctrine".

6. Negligence ⇐72

The imminent peril doctrine is available to every person who, without negligence on his part, is suddenly and unexpectedly confronted with peril, arising from either the actual presence or the appearance of imminent danger to himself or others.

7. Automobiles ⇐225

When a motorist faces imminent peril, he is released from rule of ordinary care which governs him in calmer and more deliberate moments, and is not chargeable with negligence merely because of failure to take course that careful consideration after fact shows he should have taken.

8. Automobiles ⇐225

It is duty of driver of vehicle who is suddenly confronted with danger arising from fault of another to seek to avoid collision, and whether he has taken proper course will be determined from all of circumstances of case.

9. Evidence ⇐595

An inference cannot be based upon mere possibilities, but only on probabilities.

10. Automobiles ⇐244(42)

In action for injuries sustained in head-on collision occurring after plaintiff's driver had swung to his left and into oncoming traffic lane in a vain attempt to avoid defendant's vehicle, which had been approaching in plaintiff's driver's lane of two-lane road having sandy shoulders and six foot embankments on each side, evidence required finding as a matter of law that plaintiff's driver had not been negligent. West's Ann.Vehicle Code, §§ 527, 530, 544.

George L. Hecker, Orlan S. Friedman, Beverly Hills, for appellant.

Spray, Gould & Bowers, Los Angeles, for respondent.

MOORE, Presiding Justice.

Appeal from judgment denying recovery of damages allegedly suffered in a collision of her automobile with that of respondent on a public highway.

Rollin Spence, seated by his wife, the plaintiff, was operating her automobile on Highway 138, near Pear Blossom. Their son Anthony, 16, occupied the rear seat. The road was of concrete divided by a white line into two lanes. Each lane was wide enough for one car. The road had "a sandy shale-like shoulder and an embankment on each side. From the paved roadway to the bottom of the embankment it was five or six feet."

Going east at a speed of 50 miles per hour, Spence collided with the vehicle of respondent going west at the same speed. Mrs. Spence was injured. She instituted this action to recover her damages. The verdict went against her. She demands a reversal on the ground that the evidence does not support the implied findings of the jury. It appears to be without conflict that the point of impact was in the west-bound lane and that immediately prior to the collision, Mr. Spence swung to his left and into the on-coming lane in an attempt to avoid respondent who was coming toward Spence in the east-bound lane. The only real conflict in the evidence is on the question as to whether or not respondent was in the east-bound lane for the purpose of passing two slow-moving vehicles. Respondent testified that he was. Spence and his son Anthony testified that they saw no vehicles to be passed by respondent. No other witness testified to the manner in which the accident happened, Mrs. Spence having suffered retrograde amnesia. But this conflict in the evidence is unimportant in view of the law involved and the conclusion derived.

[1] The behavior of a motorist in passing a slow-moving vehicle on his own side of the highway must be adjudged in the light of section 530 of the Vehicle Code. It is there provided that no vehicle shall be driven to the left side of the center line of a roadway in passing another vehicle going in the same direction "unless such left side is clearly visible and is free of oncoming traffic for a sufficient distance ahead to permit * * * passing to be completely made without interfering with the safe operation of any vehicle approaching from the opposite direction * * *." In any event, the overtaking vehicle must return to the right-hand side of the roadway before coming within one hundred feet of any vehicle approaching from the opposite direction. Whether respondent was free from negligence or appellant was contributorily negligent is a question of fact to be determined from the facts established by the evidence. The trial judge concluded that either one or both was true and denied a motion for an instructed verdict and when the motion for a new trial came on for hearing, it was again held that no question of law was raised and the court denied the motion.

Respondent Negligent

[2] Despite the doctrine that every reasonable inference must be indulged in favor of the judgment and every fair intendment must support it we are persuaded that the contention of appellant must be upheld. The evidence as to respondent's negligence and as to the proximate cause is conflicting. Palmer v. City of Long Beach, 33 Cal.2d 134, 199 P.2d 952; Miller v. Pacific Constructors, Inc., 68 Cal.App.2d 529, 157 P.2d 57. The testimony was clearly in conflict as to respondent's overtaking two vehicles. Respondent testified that he was driving west on the north lane of the highway; overtook two automobiles that were "mighty near stopped"; in order to pass them he pulled out into the east-bound lane, passed the vehicles on their left and as he "came back in" everything was blacked out; he did not know how far the Spence car was from him when he pulled out to go around the two cars; he saw the Spence car a short distance from him on the east-bound lane; immediately prior to the collision he was in the southerly or east-

bound lane although he was proceeding toward the west. His excuse for being there clearly inculpates him and lends corroboration to the evidence of appellant. It is highly significant that if there were two slow-moving vehicles so close to the scene that the occupants of the same were not called as witnesses by either party. It is highly improbable that such occupants would not have come up to the scene of the accident and given assistance, particularly in view of the fact that both plaintiff and the female companion of respondent were seriously injured. Mr. Spence's testimony that another car and the police arrived promptly after the accident is uncontradicted. If there were occupants of the two slow-moving vehicles, why were they not identified and brought to court as the only disinterested witnesses of the collision? Although Mr. Spence and his son insist that there were no vehicles in the west-bound lane approaching them, since the jury impliedly found the presence of such vehicles, we are obliged to assume that as an established fact. But even with such assumption, the actual situation defeats the contention of respondent.

From his testimony only it is established that he had drunk whiskey the night before and had been drinking on the way as he drove toward the scene of the accident. He did not know how many times he had drunk. While he maintains that two slow-moving vehicles suddenly loomed up in his own lane and forced him to swerve into the east-bound lane yet he admits the day was clear and sunny and that the highway was straight[1] whereby, if he had been observing the law and exercising a reasonable caution, he might readily have seen such vehicles far in advance of him. If he had been attentive to the road and had had respect for the safety of others making use of it and any thought for his own safety, he would have noticed not only the Spence car but also its rapid approach. The day was so clear that he had at least two miles of visibility. The only reasonable inference is that he did not look or if he did look, he had no respect for the rights of others using the highway. He testified that he returned promptly to the west-bound lane and did not see the Spence vehicle until the instant previous to the crash. From such proof from the lips of respondent, the processes of deduction lead unerringly to the conclusion that respondent was negligent as a matter of law and that such negligence was at least a contributing factor in causing the collision. Therefore, if the verdict was based upon respondent's freedom from negligence, it was conceived in error.

Appellant Not Contributorily Negligent

[3–10] The only other hypothesis whereby the verdict might be justified is that appellant was contributorily negligent. There is no substantial basis for such contention. If respondent was in the east-bound lane immediately before the crash, as he testified, then Mr. Spence driving at 50 miles per hour was suddenly confronted with an automobile approaching him head-on at about the same rate of speed. The cars were covering the gap between them at the aggregate rate of one hundred miles per hour or 147 feet per second. Respondent testified that in fact he was unaware of the presence or approach of appellant's vehicle. That situation required prompt and speedy exercise of judgment on the part of Spence. For the situation of both parties to remain a second or two, they faced immediate death from a head-on crash in the east-bound lane. If Spence had turned right, his family faced death at the foot of the embankment on the south side of the highway. In view of the crisis that faced him, can it be said that Spence was negligent in resorting to the least perilous course? By leaving his own lane for the purpose of avoiding respondent's car wildly plunging down upon him, he chose the route calculated to result in the minimum of detriment as it would have occurred to any reasonably cautious motorist. Therefore, the jury errone-

1. Exhibits 1 and 2, photographs of highway, demonstrate the truth of such admission.

ously reasoned that Mr. Spence was negligent in attempting to avoid a head-on collision in his own lane of travel.

Contributory negligence is a question of fact for the jury, except where the court can hold as a matter of law that only one rational inference can be drawn from the evidence. Bardin v. Case, 99 Cal.App.2d 137, 142, 221 P.2d 292; Anthony v. Hobbie, 25 Cal.2d 814, 818, 155 P.2d 826; Blank v. Coffin, 20 Cal.2d 457, 126 P.2d 868; Kosloskye v. Cis, 70 Cal.App.2d 174, 160 P.2d 565. Such is the situation in the instant cause.

Spence was not required to anticipate negligence on the part of respondent, Bardin v. Case, supra; Bingham v. Greenamyer, 25 Cal.App.2d 467, 77 P.2d 867, neither was he guilty of contributory negligence because in a moment of imminent peril he failed to take the course that careful consideration after the fact shows that he should have taken. Karr v. Parks, 40 Cal. 188, 193.

According to the widely accepted doctrine of "imminent peril," one who in a sudden emergency acts according to his best judgment, or because of lack of time to form an accurate judgment, omits to act in the most judicious manner, is not chargeable with negligence, so long as he did exercise the care of a reasonably prudent person under like circumstances. The fact that injurious consequences might have been avoided by following another available course does not, by reason of the injuries, render the actor blamable. 38 Am.Jur., Negligence (1934) § 296, p. 796; Prosser on Torts (1941) § 37, p. 242. The doctrine has been characterized by the courts of this state as the "sudden peril rule", De Ponce v. System Freight Service, 66 Cal.App.2d 295, 301, 152 P.2d 234, 237; Uhl v. Fertig, 56 Cal.App. 718, 724, 206 P. 467, and the "imminent peril doctrine", Stickel v. Durfee, 88 Cal.App.2d 402, 407, 199 P.2d 16; Yates v. Morotti, 120 Cal.App. 710, 716, 8 P.2d 519. It is available to every "person who, without negligence on his part, is suddenly and unexpectedly confronted with peril, arising from either the actual presence, or the appearance, of imminent danger to himself or others." When a motorist faces such peril, he is released from the rule of ordinary care which governs him in clamer and more deliberate moments. Leo v. Dunham, 41 Cal.2d 712, 714, 264 P.2d 1; and see Gamalia v. Badillo, 53 Cal.App.2d 375, 378, 128 P.2d 184; Graham v. Consolidated Motor Transport Co., 112 Cal.App. 648, 652, 297 P. 617; Hooper v. Bronson, 123 Cal. App.2d 243, 251, 266 P.2d 590.

It is the duty of the driver of a vehicle who is suddenly confronted with danger arising from the fault of another to seek to avoid a collision. Whether he has taken the proper course depends upon all the circumstances of the case. Hagenah v. Bidwell, 46 Cal.App. 556, 560, 189 P. 799; Hill v. Peres, 136 Cal.App. 144, 148, 28 P.2d 944, 946. In Hill v. Peres, supra, the plaintiff who turned to the left in his attempt to avoid the collision had a clearance to his right of nineteen feet bounded by a fourteen-inch curb, yet the court held that his choice of hazards confronting him was compatible with due care and "that he acted as a man of ordinary prudence and caution would have acted under the same circumstances cannot be said as a matter of law to be without support in the evidence." In the instant case, Spence had no such escape route. To his right was an embankment; in front of him was the on-rushing defendant. The only potentially safe place was to his left. He took the action that any quick-thinking and reasonably prudent man would have taken under the circumstances.

The trial court, at the request of plaintiff, instructed the jury in the language of sections 527, 530 and 544 of the Vehicle Code. Section 527 provides that drivers of vehicles proceeding in opposite directions shall pass each other to the right. Section 530 governs the overtaking and passing of motor vehicles and is the section which the defendant violated. Section 544 provides: "No person shall turn a vehicle from a direct course or move right or left upon a roadway unless and until such movement can be made with reasonable safety and then only after the

giving of an appropriate signal in the manner provided herein in the event any other vehicle may be affected by such movement." Immediately following these instructions, the court gave BAJI No. 149 to the effect that conduct in violation of any of such code sections constituted negligence per se.

It is obvious that in turning to the left in the manner he did, Spence violated the strict letter of both sections 527 and 544. The jury, therefore, under the instruction in BAJI No. 149 was required to find that there arose a legal presumption that Spence was contributorily negligent. It is true that No. 149 contains the modifying provision: "However, such presumption is not conclusive. It may be overcome by other evidence showing that under all the circumstances surrounding the event, the conduct in question was excusable, justifiable and such [as] might reasonably have been expected from a person of ordinary prudence." But this did not tell the jury that Spence, when "suddenly and unexpectedly confronted with peril, arising from either the actual presence, or the appearance, of imminent danger to himself or to others, is not expected nor required to use the same judgment and prudence that is required of him in the exercise of ordinary care in calmer and more deliberate moments." Leo v. Dunham, 41 Cal.2d 712, 264 P.2d 1, 2, supra. The jury was not told that "ordinary prudence" may be of a lesser degree at a time of imminent danger than under ordinary traffic conditions. No instruction was given or requested on the subject of imminent danger. Had one been read to the jury, the verdict might well have been for plaintiff. When the proper rule of law is applied to the evidence in this case, the only rational inference that can be drawn is that Spence was not guilty of contributory negligence as a matter of law.

Respondent urges that the jury might have deduced that Mr. Spence was traveling at an unsafe speed. But the only evidence of his speed is his own testimony that he proceeded at 50 miles per hour. Respondent offered no evidence that under the traffic and weather conditions at the time and place this speed constituted a violation of the basic speed law. Veh.Code, § 510. Nor did respondent offer any evidence that at the place of the accident the highway was posted to limit the lawful speed to less than 50 miles per hour. This contention is predicated upon Spence's testimony that he first saw respondent's car in the wrong lane when it was two hundred feet away and moved to apply his brakes; that Spence's skid marks began 39 feet from the point of collision; that by allowing reaction time of one second, Spence moved 161 feet in one second, or between 60 and 70 miles per hour. But this is pure speculation. Spence's estimate of two hundred feet was at best a pure guess, made at a time when imminent death was rushing at him and he was required to make a split-second decision as how best to save himself and his family. But this reasoning does not account for the movement of respondent's automobile. To justify such deduction it would be necessary to assume that Doran's car came to a dead stop at the point where it was first seen by Spence. There is no evidence to warrant such an assumption. It is not even a probability. No inference of negligence arises from the evidence of Spence's speed. An inference cannot be based upon mere possibilities, but only on probabilities. Sanders v. MacFarlane's Candies, 119 Cal. App.2d 497, 500, 259 P.2d 1010. But even if it be assumed that Spence was traveling at too great a speed, there is still no evidence that his speed was a contributing factor in the proximate cause of the collision.

Despite the fact that the cars collided in the west-bound lane, the freedom of Mr. Spence from negligence and the negligence of respondent are so emphatically established that the judgment must be set aside.

The judgment is reversed.

FOX, J., concurs.

ASHBURN, Justice.

I dissent. While inclined to agree with the conclusions reached by the majority I am not free to do so, for that requires a weighing of fact inferences in a manner not permissible in a reviewing court.



148 Cal.App.2d 272

The PEOPLE of the State of California, Plaintiff and Respondent,

v.

Lupe HUERTA, Defendant and Appellant.

Crim. 5711.

District Court of Appeal, Second District, Division 1, California.

Feb. 4, 1957.

Hearing Denied April 2, 1957.

Defendant was charged with sale of narcotics and was tried without jury. The Superior Court, Los Angeles County, John G. Barnes, J., rendered judgment against defendant, and defendant filed letter with clerk of court indicating that his purpose was to appeal because he had been unjustly convicted. The District Court of Appeal, Fourt, J., held that the record disclosed no error and that defendant had been fairly and properly convicted.

Affirmed.

1. Witnesses ⇐305(2)

Where defendant voluntarily elected to take witness stand to testify in own behalf, any privilege that he might have had not to take witness stand, in first instance, was waived.

2. Criminal Law ⇐633(1)

In criminal prosecution, where upon inquiry by court, defendant's counsel and defendant specifically waived jury trial, and trial judge was not made aware of disagreement, if any, between defendant and his attorney as to jury trial, defendant was not denied fair trial because trial was without jury.

3. Criminal Law ⇐1032(1)

Amendment of indictment by striking reference to marijuana and interlineation of reference to heroin without objection or request for continuance by defendant did not prejudice defendant and he could not object for first time on appeal. West's Ann.Health & Safety Code, § 11500; West's Ann.Pen.Code, § 1008.

4. Indictment and Information ⇐159(1)

Amendment of indictment is permitted if it does not change nature of offense or prejudice defendant's substantial rights. West's Ann.Pen.Code, § 1008.

5. Stipulations ⇐14(7)

Where pursuant to stipulation, made in open court between attorneys for respective parties, testimony of forensic chemist of sheriff's department that had been given before grand jury was read into evidence in trial in lieu of personal appearance of chemist, testimony was properly received.

6. Criminal Law ⇐418(1)

In prosecution for sale of narcotics, testimony of deputy sheriff as to conversation in presence of defendant between sheriff and two others concerning purchase of narcotic capsules was admissible.

7. Criminal Law ⇐1035(3)

Defendant who expressed no dissatisfaction with his counsel at time of criminal trial, and although he was present during all of proceedings in court and heard all of stipulations, made no objections to any of them, was bound on appeal by what was said and agreed upon in open court and could not, for the first time, claim that he had not been properly represented.

Lupe Huerta, in pro. per., for appellant.

Edmund G. Brown, Atty. Gen., William E. James, Deputy Atty. Gen., for respondent.

FOURT, Justice.

The defendant in this matter filed a letter with the clerk of the court indicating that his purpose was to appeal because he had been unjustly convicted. The document will be treated here as though it were an appeal from the judgment.

The appellant was charged in two counts with the sale of narcotics in violation of section 11500 of the Health and Safety Code. After a trial the appellant was found guilty of both counts and sentenced to the state prison, the sentences to run concurrently.

A résumé of the facts is as follows, as to count I: On or about February 13, 1956, Albert Natividad, a deputy sheriff of the county of Los Angeles, attached to the Narcotic Detail, saw the appellant in front of a cafe on Seventh Street in Los Angeles about 7:15 o'clock p. m. Natividad, a confidential informant, and a third person (whose name does not appear) in the presence of the appellant talked of making a purchase of some narcotic capsules at $3 each. While the bargaining was taking place the appellant interrupted the conversation and stated that three capsules for $8 was a very cheap price; that the narcotics they had was very good stuff and that he would be able to get three caps for $9. The conversation between the unknown person, the deputy sheriff and the confidential informant continued, and during such conversation, the appellant left for about two minutes and returned with a package which appellant stated contained three capsules. The deputy sheriff instructed the informant to give $5 to the appellant, which the informant did, and the deputy sheriff gave the appellant $3, whereupon the delivery of the package was made to the informant by the appellant.

As to count II, the facts were that on February 20, 1956, at about 8 o'clock p. m., Natividad approached the appellant as he was talking to a group of boys on Seventh Street. Natividad stated that he wanted to buy some narcotics and they then went to the officer's car on Stanford Street. The appellant went into an apartment house nearby and returned to the automobile in a few minutes and thereupon handed to Natividad two capsules. Natividad paid to the appellant $5 for the capsules.

It was stipulated by all concerned that the cause was to be tried by the court sitting without a jury. It was also stipulated at the trial that the testimony of a forensic chemist of the sheriff's department given before the grand jury in this cause would be read into evidence in lieu of a personal appearance by the chemist. The substance of the capsules, in each instance, was identified by the chemist as being heroin.

The appellant contends that he was denied a fair trial, that the court erred in receiving into evidence the testimony of the chemist and the testimony of Natividad concerning the conversation with the confidential informant in appellant's presence, and that he was denied the effective aid of counsel.

[1, 2] A thorough and complete examination of the record indicates that the appellant was not denied a fair trial. The appellant suggests that he was required to testify against himself. In truth, he was neither required to testify against himself, nor did he testify against himself. He elected to voluntarily take the witness stand and to testify in his own behalf, and any privilege that he might have had not to take the witness stand, in the first instance, was waived. (14 Cal.Jur.2d, Criminal Law, § 119, pp. 340–341.) The appellant also insists that he was denied a fair trial because his attorney ignored his requests and demands for a jury trial. The record recites clearly, upon inquiry by the court, that the appellant's counsel, the appellant himself and the representative of the district attorney's office all specifically waived a jury trial, and stated in essence that it was their desire to have the trial by the court and without a jury. The trial judge was not made aware of any disagreement between the appellant and his attorney, if any there was, and no irregularity appears. People v. Puter, 85 Cal.App.2d 348, 350, 193 P.2d 23.

The appellant further contends that he was deprived of the "presumption of in-

nocence". However, he does not, in any wise, or in any manner support his claim by any reference to the record, and our reading of the same discloses that he was afforded a fair trial in every respect.

[3] The indictment was amended on its face during the course of the trial and, in our opinion, properly so. The transcript discloses the following:

"Mr. Galliano (Deputy District Attorney): Now, if your Honor pleases, the Indictment inadvertently was written up to show a violation of the same section, 11500 of the Health and Safety Code, but the narcotic described there was marijuana, and it should have been a preparation of heroin as to each count. At this time we ask leave to file by interlineation, striking the words 'flowering tops and leaves, Indian hemp, Cannabis Sativa,' and substitute therein the words 'a preparation of heroin.'

"The Court: Very well. It will be so amended.

"Mr. Galliano: That is as to each count.

"The Court: As to each count."

[4] Where the amendment does not change the nature of the offense charged or prejudice the appellant's substantial rights, it is permitted. People v. Nasworthy, 94 Cal.App. 2d 85, 91, 210 P.2d 83; Pen.Code, § 1008. No objection was made by the appellant and no request for a continuance was made. So far as we are able to determine, the appellant suffered no prejudice and he cannot now object for the first time on appeal. People v. Beck, 71 Cal.App.2d 637, 641, 163 P.2d 41.

[5] The testimony of the chemist was received pursuant to a stipulation made in open court between the attorneys for the respective parties, and we can conceive of no reason why it was not properly received.

[6, 7] As to the conversation which took place between Natividad, the informant and the unknown person in the presence of the appellant, it was obviously admissible, and furthermore, no objection was made to it at the time of the trial. The appellant expressed no dissatisfaction with his counsel at the time of the trial and, although he was present during all of the proceedings in court, and heard all of the stipulations, he made no objections to any of the same. The appellant is now bound by what was said and agreed upon in open court and he cannot now, for the first time, say that he was not properly represented. Quite the contrary, as a matter of fact, appears from the record—namely, that the appellant was represented by competent, capable and alert counsel.

The record discloses no error and the appellant was, in our opinion, fairly and properly convicted of selling heroin on two separate, distinct, different occasions, and he was indeed fortunate to have the judge order that the terms run concurrently and not consecutively.

The judgment is affirmed.

WHITE, P. J., and DORAN, J., concur.



148 Cal.App.2d 220

The PEOPLE of the State of California, Plaintiff and Appellant,

v.

ONE 1949 PLYMOUTH SEDAN, License No. 8 N 60932, Engine No. P151029529, Defendant,

John Harold Wagner, Registered Owner and Respondent.

Civ. 21889.

District Court of Appeal, Second District, Division 3, California.

Feb. 1, 1957.

Proceeding brought for forfeiture of an automobile. The Superior Court of Los Angeles County, Parks Stillwell, J., ren-

dered judgment adverse to the People, and an appeal was taken. The District Court of Appeal, Shinn, P. J., held that police officer, who had been informed by two different users of narcotics that defendant was selling narcotics in vicinity of a drive-in restaurant during late night and early morning hours, and who had observed defendant at such location on many occasions contacting a great many people in their automobiles and throughout area, had lawfully arrested defendant there, and held that the incidental search, which had disclosed narcotics, had not been illegal.

Reversed with directions.

1. Criminal Law ⇐304(2)

It is generally known to be common practice of young people who are inclined to sociability to gather around drive-in restaurants during late hours of the night and early morning hours.

2. Arrest ⇐63(4), 71

Police officer who had been informed by two different users of narcotics that defendant was selling narcotics in vicinity of a drive-in restaurant during late night and early morning hours, and who had observed defendant at such location, on many occasions, contacting a great many people in their automobiles and throughout area, lawfully arrested defendant there and incidental search, which disclosed narcotics, was not illegal.

Edmund G. Brown, Atty. Gen., Joan D. Gross, Deputy Atty. Gen., for appellant.

John H. Marshall, Harold J. Ackerman, Los Angeles, for respondent.

SHINN, Presiding Justice.

The proceeding is one for the forfeiture of an automobile pursuant to the provisions of section 11610 of the Health and Safety Code, the ground of the claimed forfeiture being that the vehicle was one in which a narcotic was unlawfully possessed by an occupant thereof or which was used to facilitate the unlawful possession of a narcotic by an occupant thereof. The proceeding was against John Harold Wagner, the owner of the car. Wagner was arrested while seated in the car and was taken to the police station where he was found to have some 32 marijuana cigarettes and a bindle of heroin. The only witness was Vernon C. Dossey, a police officer for the City of Los Angeles. Upon conclusion of the receipt of evidence defendant moved that the testimony of Dossey be excluded upon the ground that the evidence of the possession of narcotics had geen illegally obtained as the result of an unlawful arrest and an illegal search. The motion was granted, judgment was entered for the restoration of the car to Wagner and the People appeal.

[1, 2] The only question presented to the trial court for decision was whether the fact that Wagner possessed narcotics was ascertained in an illegal manner, namely, whether his arrest was unlawful and the subsequent search illegal. That is the only question for our consideration. We are of the opinion that there was no illegality involved and that the court was in error in granting the motion of the defendant.

There was evidence of the following facts: Officer Dossey, three or four months prior to the date of the arrest, was informed by a man he knew to be a user of narcotics that Wagner was selling narcotics in the vicinity of the Red Hut Drive-In; that he possessed a car such as he was using on the night of the arrest; that he usually would be found in the vicinity of the Drive-In between 11 o'clock p. m. and 4 or 5 o'clock a. m., where he was selling marijuana. About two months, and again about four days prior to the arrest, Dossey received information from another informant, also a narcotic user, and further information from the first informant that Wagner was still selling marijuana in the same location; that he kept the marijuana in his undershorts and was using heroin. Following the receipt of the first information Dossey and his partner made a practice of watching the de-

fendant in the location of the Drive-In. They had been informed that the most likely time for them to find Wagner in the possession of narcotics would be on Friday nights when there were many people gathered at the location. Between the time they had received the first information and the night of the arrest they had observed Wagner at the location approximately 40 or 50 times. During this period Dossey had become acquainted with the defendant and with the fact that he was unemployed. Wagner would come to the location about 11 o'clock p. m. and was under observation by the officers on the nights when they did watch him until about 3 o'clock a. m. Wagner never entered the Drive-In for food or drink. He "hung around" on the lot and contacted a great many people in their automobiles and throughout the Drive-In area. He did not appear to be transacting any business, unless it was a traffic in narcotics. It was developed on cross-examination that the first informer mentioned had furnished the officer information upon the strength of which he had made narcotic arrests of other persons. When pressed for names the officer named a girl he had arrested upon information received from the first named informer and she "was held on addiction." The officer was on friendly terms with this informer and had received information from him at various times. Although he did not testify that he considered the information reliable it was inferable that he so considered it, inasmuch as he acted upon it, and in the one particular instance which he related in his testimony the information had proved to be accurate. The officer did not testify whether he had ever seen defendant pass anything to any of the people he contacted around the Drive-In or that he ever saw defendant receive any money from anyone.

On the night of the arrest defendant was seated in his car parked at the curb directly adjacent to the driveway leading into the Drive-In. Defendant was seated behind the wheel doing nothing. The officers parked behind him and Dossey proceeded to defendant's car, opened the door and arrested defendant. He was ordered to drive to police headquarters where he was searched and produced the narcotics which were taken from underneath the elastic band of his shorts. It is our opinion that any police officer actively engaged in apprehending purveyors of narcotics who received the information that Officer Dossey had received from two different users of narcotics, and who had on 40 or 50 occasions observed the conduct of an accused as described by the witness, would have reasonable grounds for believing that the person under surveillance was engaged in the sale of narcotics. We agree with the trial judge that the gathering of young people around a drive-in restaurant during late hours of the night and the early morning hours in itself is suggestive of no wrong-doing. It is generally known to be a common practice of young people who are inclined to sociability and find such locations convenient for social gatherings. This is merely one of the phenomena of the automobile age. But the facts of defendant's case are far different. His conduct was sinister. The very fact that for months he had made a practice of contacting many people who congregated at the Drive-In was enough to place him under suspicion. He was obviously engaged in some sort of business transactions carried on secretly. But this was not the sole reason for his arrest. There was the additional fact that the officer had received information that defendant was selling narcotics. This, plus defendant's activities, which had the appearance of lawbreaking, amply justified an honest and strong suspicion that defendant was making a business of the sale of narcotics. See People v. Moore, 141 Cal.App.2d 87, 296 P.2d 91.

The order is reversed with instructions to enter a judgment of forfeiture of the automobile.

PARKER WOOD and VALLÉE, JJ., concur.

148 Cal.App.2d 331

The PEOPLE of the State of California, Plaintiff and Respondent,

v.

Porfirio G. CUEVAS, Defendant and Appellant.

Cr. 5704.

District Court of Appeal, Second District, Division 3, California.

Feb. 6, 1957.

Defendant was convicted of narcotics violation, having admitted prior felony conviction. The Superior Court of Los Angeles County, Charles W. Fricke, J., entered judgment and denied defendant's motion for new trial. Defendant appealed from judgment and order. The District Court of Appeal, Shinn, P. J., held that provision of Fifth Amendment to United States Constitution against compulsory self-incrimination does not preclude prosecution in California State Court criminal case from commenting on failure of accused to deny truth of charges against him, where such comment is expressly sanctioned by California Constitution and Penal Code.

Judgment and order affirmed.

1. Courts ⇐97(5)

It would not be for California District Court of Appeal to disagree or to anticipate that Supreme Court of United States would change its views on constitutional question. U.S.C.A.Const. Amends. 5, 14; West's Ann.Const. art. 1, § 13; West's Ann.Pen.Code, § 1323.

2. Criminal Law ⇐393(1)

Provision of Fifth Amendment to United States Constitution against compulsory self-incrimination does not preclude prosecution in California state court criminal case from commenting on failure of accused to deny truth of charges against him, where such comment is expressly sanctioned by California Constitution and Penal Code. U.S.C.A.Const. Amends. 5, 14; West's Ann.Const. art. 1, § 13; West's Ann.Pen.Code, § 1323; West's Ann.Health & Safety Code, § 11500.

3. Criminal Law ⇐316

Failure of defendant in criminal case to deny incriminating testimony is not an admission of its truth; it is merely circumstance that may be considered by jury as tending to indicate truth of such evidence, and as indicating that among inferences that may reasonably be drawn therefrom, those unfavorable to defendant are the more probable.

4. Criminal Law ⇐721(3), 1037(1, 2)

Though argument of prosecutor in criminal case to effect that failure of defendant to deny incriminating facts or testimony constituted an admission of their truth was improper, where defendant's attorney made no assignment of misconduct and no request for admonition to jury to disregard argument, claimed misconduct could not properly be urged on appeal as ground for reversal of judgment.

David C. Marcus, Los Angeles, for appellant.

Edmund G. Brown, Atty. Gen., Lynn Henry Johnson, Raymond M. Momboisse, Deputy Atty. Gen., for respondent.

SHINN, Presiding Justice.

Porfirio G. Cuevas was accused by information of a violation of section 11500 of the Health and Safety Code in that he wilfully, unlawfully and feloniously sold, furnished and gave away flowering tops and leaves of Indian Hemp (cannabis sativa), commonly known as marijuana. He was also charged with a previous felony conviction, likewise for a violation of section 11500 of the Health and Safety Code. Defendant pleaded not guilty and admitted the prior. Trial was to a jury. Defendant was convicted and his motion for a new trial was denied. Probation was likewise denied and Cuevas was sentenced to the state prison for the term prescribed by law. He appeals from the judgment and the order denying him a new trial.

Raymond Camacho, an undercover police officer assigned to the vice squad, was the chief witness for the People. The following is the substance of his testimony. At about 9:30 p. m. on September 14, 1955, he went to Chuey's Bar, which was located at 1001 South Boyle in Los Angeles. He was dressed in civilian clothes and did not carry a gun or any police identification. He had seen defendant at Chuey's on two previous occasions and knew him only as "Junior." Officer Camacho sat at the bar and ordered a small bottle of beer from defendant who was the bartender. After paying for the beer he asked the defendant "if he could fix me up with two." Defendant told Officer Camacho to give him a dollar and to wait a minute. Camacho gave defendant an unmarked one-dollar bill and saw Cuevas go out the back door of the bar and talk to two men who were seated in a light-colored car which was parked at the rear of the premises. Defendant returned shortly and handed Officer Camacho two cigarettes wrapped in brown paper. Camacho then left the bar and went to the police station, where he marked each cigarette with his initials, his serial number and the date. He sealed them in an envelope and deposited the envelope with Central Property. The cigarettes, bearing the markings made by Officer Camacho, were received in evidence and were proved to contain marijuana.

Defendant took the stand in his own behalf. He was asked to give his name, which he did. Defendant's counsel then stated that he had no further questions. On cross-examination the district attorney asked Cuevas whether he worked at Chuey's Bar, whether he saw Camacho at the bar on September 14th, and whether he sold two cigarettes to Camacho, not knowing that he was an officer. Objections to these questions were sustained on the ground that they were beyond the scope of the direct examination. The district attorney then asked defendant whether he went by the name "Junior," which Cuevas denied. There was no redirect examination and no other witness was called by defendant.

During his argument to the jury the district attorney repeatedly commented upon defendant's failure to explain or deny the testimony of Officer Camacho. The sole questions presented upon this appeal concern the propriety of the district attorney's remarks and his right to comment on defendant's failure to testify more fully.

Defendant's first contention is that the provisions of the Due Process Clause of the Fifth Amendment to the United States Constitution should be applied to the states by reason of the Fourteenth Amendment and that a prosecutor may not comment to the jury upon the failure of the accused to deny by his testimony the truth of the charges brought against him. Such comment is expressly sanctioned by Article I, Section 13 of the California Constitution and Section 1323 of the Penal Code.[1]

Defendant concedes that the identical question was argued before the Supreme Court of the United States in the case of Adamson v. People of State of California, 332 U.S. 46, 67 S.Ct. 1672, 91 L.Ed. 1903, and that in a 5 to 4 decision the Supreme Court held that the above-quoted portions of Article I, Section 13 and Penal Code Section 1323 did not deny due process to the accused. Defendant argues, however, that the effect of the decision in Rochin v. People of California, 342 U.S. 165, 72 S.Ct. 205, 96 L.Ed. 183, is to open the question for reexamination. The argument is, apparently, that were the Supreme Court of the United States to reconsider the matter, it would hold that the guarantee against com-

1. Article I, Section 13. "* * * No person * * * [shall] be deprived of life, liberty, or property without due process of law; but in any criminal case, whether the defendant testifies or not, his failure to explain or to deny by his testimony any evidence or facts in the case against him may be commented upon by the court and by counsel, and may be considered by the court or the jury."

Penal Code Section 1323. "* * * The failure of the defendant to explain or to deny by his testimony any evidence or facts in the case against him may be commmented upon by counsel."

pulsory self-incrimination contained in the Fifth Amendment is applicable to prosecutions in the courts of the states by virtue of the Due Process Clause of the Fourteenth Amendment and that comment by the district attorney upon the failure of the accused to testify is in contravention of due process. We are of the view that this contention cannot be maintained. In the Rochin case, a conviction for possession of narcotics was reversed upon the grounds that evidence of the contraband was obtained by means which were in violation of due process, namely, by forcibly pumping out the contents of Rochin's stomach without his consent. There is nothing in the opinion of the Supreme Court in that case to indicate that a majority of that court would be disposed to question the soundness of the ruling in Adamson v. People of State of California.

[1, 2] Defendant also suggests that the case of People v. Cahan, 44 Cal.2d 434, 282 P.2d 905, is indicative of a similar disposition on the part of our own Supreme Court to reexamine the constitutional issue raised by the present appeal. But the Cahan decision did no more than establish, solely as a rule of evidence, that evidence obtained in derogation of constiutional rights may not be received against an accused. As of the present, the Adamson decision speaks the views of the Supreme Court of the United States. It is not for us to disagree or to anticipate that the court will change its views.

[3, 4] The second contention to be considered is that the district attorney was guilty of prejudicial misconduct in his argument to the jury. That argument comprises sixteen pages of the transcript and is too lengthy to be set out in full. However, it is fair to state that it consists almost entirely of arguments based upon Cuevas' failure to testify as to anything more than his name. The entire tenor of it was to the effect that the failure of the defendant to deny the testimony and facts against him was an admission of their truth, and that the jury should so regard it. The statements of the deputy could have been understood by the jury as declaring the legal effect of the failure of the defendant to testify. Of course, it is not the law that the failure to deny incriminating testimony is an admission of its truth. It is merely a circumstance that may be considered by the jury as tending to indicate the truth of such evidence, and as indicating that among the inferences that may reasonably be drawn therefrom, those unfavorable to the defendant are the more probable. People v. Adamson, 27 Cal.2d 478, 489, 165 P.2d 3. It would be grievous error for the court to instruct to the effect that the failure of a defendant to deny incriminating facts or testimony constituted an admission of their truth. The argument of the prosecutor to the same effect was improper. However, defendant's attorney made no assignment of misconduct and no request for an admonition to the jury to disregard the argument now assigned as misconduct. An admonition that they should be disregarded would have removed the harmful effect of the statements and in the absence of any objection the claimed misconduct cannot properly be urged as a ground for reversal of the judgment. People v. West, 215 Cal. 87, 8 P.2d 463; see, also, People v. Codina, 30 Cal.2d 356, 362, 181 P.2d 881.

The judgment and order are affirmed.

PARKER WOOD and VALLÉE, JJ., concur.

148 Cal.App.2d 38

Frank W. BABCOCK, Plaintiff and Appellant,

v.

COMMUNITY REDEVELOPMENT AGENCY OF THE CITY OF LOS ANGELES, a public corporation, City of Los Angeles, a municipal corporation, and the Members of the Los Angeles City Council, to-wit, Everett G. Burkhalter, Earl E. Baker, Robert M. Wilkinson, Harold A. Henry, Rosalind Wyman, L. E. Timberlake, Don A. Allen, Gordon A. Hahn, Edward R. Roybal, Charles Navarro, Harold Harby, Harriet Davenport, Ernest E. Debs, John C. Holland and John S. Gibson, Jr., Defendants and Respondents.

Civ. 21586.

District Court of Appeal, Second District, Division 3, California.

Jan. 28, 1957.

Hearing Denied March 27, 1957.

Action by property owner against Community Redevelopment Agency, city council, and others for injunctive and declaratory relief against proposed action of agency under Community Redevelopment Law. The Superior Court of Los Angeles County, A. Curtis Smith, J., dismissed action, and plaintiff appealed. The District Court of Appeal, Parker Wood, J., held that owner of property in area which Community Redevelopment Agency had declared to be blighted, and which agency proposed to redevelop, under Community Redevelopment Law, could not obtain injunctive or declaratory relief against action of agency, though his own property may not have been substandard, in absence of allegation of fraud, collusion, bad faith, or abuse of discretion by agency in designating the redevelopment area.

Orders and judgments affirmed.

1. Pleading ⇐214(5)

Allegations which were conclusions were not admitted by demurring.

2. Declaratory Judgment ⇐325

Allegation, in suit for injunctive and declaratory relief against proposed exercise by municipal redevelopment agency of eminent domain authority to redevelop blighted area, that defendants lacked power to acquire property in area, by eminent domain, for redevelopment purposes, was conclusion, not admitted by demurring. West's Ann.Health & Safety Code, § 33000 et seq.

3. Health ⇐32

Even if condition of plaintiff's own property was not characteristic of condition of property in blighted area, within statutes relating to redevelopment of areas denominated blighted, that fact would not be determinative that area as a unit was not a blighted area. West's Ann.Health & Safety Code, § 33000 et seq., 33004.

4. Municipal Corporations ⇐267

Under Community Redevelopment Law, community redevelopment agency and city council had authority to designate redevelopment areas, and court was not empowered to substitute its determination for determination of agency or council in absence of abuse of discretion, fraud, collusion, or bad faith on part of agency or city council. West's Ann.Health & Safety Code, § 33000 et seq.

5. Declaratory Judgment ⇐319
Injunction ⇐118(3)

Owner of property in area which community redevelopment agency had declared to be blighted, and which agency proposed to redevelop, under Community Redevelopment Law, could not obtain injunctive or declaratory relief against action of agency, though his own property may not have been substandard, in absence of allegation of fraud, collusion, bad faith, or abuse of discretion by agency in designating the redevelopment area, under Community Redevelopment Law. West's Ann.Health & Safety Code, §§ 33000 et seq., 33003, 33004, 33040, 33041–33044, 33047(c), 33048, 33267, 33480, 33481; Housing Act of 1949, §§ 100 et seq., 102(d) as amended in 1954, 42 U.S. C.A. §§ 1450 et seq., 1452(d).

Austin Clapp, Redwood City, and Charles E. McClung, Los Angeles, for appellant.

Charles F. Reiche, Los Angeles, for respondent Community Redevelopment Agency of the City of Los Angeles.

Roger Arnebergh, City Atty., Bourke Jones, Asst. City Atty., and Spencer L. Halverson, Deputy City Attorney, Los Angeles, for respondent City of Los Angeles.

PARKER WOOD, Justice.

Action for injunction and declaratory relief. Plaintiff sought an injunction restraining defendants from entering into any contract with the United States Government or any agency thereof, or from otherwise expending public funds, for the redevelopment of the Bunker Hill area of the city of Los Angeles. In another cause of action, plaintiff sought a declaration that the jurisdictional prerequisites for the redevelopment of said area do not exist.

Defendants are Community Redevelopment Agency of the City of Los Angeles (referred to as the agency), the city of Los Angeles (referred to as the city), and the individual members of the Los Angeles City Council.

The agency and the city demurred to the amended complaint generally and specifically. The demurrers were sustained, and plaintiff was granted permission to amend within 10 days. Plaintiff declined to amend and the court dismissed the action as to the agency and the city. Plaintiff appeals from the orders and judgments dismissing the action.

The allegations of the cause of action for an injunction were in substance, as follows: Plaintiff is a citizen of California, a resident of the city of Los Angeles, the owner of real property in said city, and is subject to taxation and, within one year prior to the commencement of the action, has paid taxes to the city. The agency is a public corporation existing pursuant to the Community Redevelopment Law of California, Health & Safety Code, § 33000 et seq. The city is a charter city. The individual defendants are and at all times mentioned in the complaint were members of the council of the city and had and have powers and duties under the Community Redevelopment Law of California and the actions of said defendants thereinafter more particularly set forth, with the exception of the actions thereinafter alleged regarding the appropriation of funds on June 28, 1954 by the city council, are the actions of an agency of California pursuant to the provisions of said Community Redevelopment Law. Plaintiff is the owner of real property in the city, which property is particularly described in the complaint and referred to thereinafter as the Dome Apartment-Hotel. Said hotel building is of wood and stucco construction on concrete and brick foundations, and consists of four stories and a basement, and contains, among other things: 29 apartments with kitchen and bath; 33 one-room apartments with kitchen; 9 bachelor rooms without bath; lobby; closets; public toilets; stairways; an automatic elevator; and 5 fire escapes. Said building has been inspected from time to time by the Building and Safety Department and Health Department of the city "and the conditions and facilities therein found by said Departments to meet with the requirements of the applicable ordinances" of the city governing the maintenance and operation of the building as an apartment-hotel. Said Dome Apartment-Hotel is fit and safe to occupy for the living purposes for which it was designed and for which it is presently used. Said premises are not conducive to ill health, transmission of disease, infant mortality, juvenile delinquency, or crime. Said real property and building are within the area in the city referred to as Bunker Hill. Bunker Hill is an area bounded on the north by First Street, on the south in part by an irregular line running between Fourth and Fifth Streets, on the east by Hill Street, and on the west by Fremont Street. The area is more particularly shown on Exhibit A attached to the complaint.

It was alleged further that Bunker Hill was developed in the early days of the city. There are many buildings and structures in said area used and intended to be used for

living, commercial, industrial and other purposes, and for a combination of said purposes. A predominant number of said buildings are fit and safe to occupy for such purposes and are not conducive to ill health, transmission of disease, juvenile delinquency, infant mortality or crime. There is no disuse of land or buildings in the area. There is some vacant land, but plaintiff alleges on information and belief that where said vacant land exists each owner thereof has definite plans for its use and development within a reasonable period of time from the filing of the complaint. Some of the land is owned by public agencies, and plaintiff alleges on information and belief that said public agencies have definite plans for the use and occupancy of said land within a reasonable time from the filing of the complaint. Plaintiff alleges on information and belief that defendant city intends to acquire for public use by the exercise of eminent domain certain property in the Bunker Hill area, to wit, an area bounded by First, Hill, Second, and Olive Streets. Bunker Hill area was developed primarily for residential use and is presently so used, although over the years there has been a change from single-family to multi-family use with a corresponding inincrease in commercial uses to meet the needs of an expanding population. For a long time prior to the enactment of ordinance No. 90500 (March, 1946), and since such enactment, the area has been zoned for multi-family use. There is no economic dislocation in the area, in that, the primary use contemplated for the area, by the present owners of property therein and by defendants, is residential with necessary commercial accessories, and the area has developed substantially in accordance with the plans of the appropriate city authorities. The lots within the area are predominately regular in size and shape and are predominately greater in size than 5,000 square feet, and such lots are of adequate size for proper usefulness and development. The lots are laid out with due regard for the contours and other physical characteristics of the ground and surrounding conditions. The streets are adequate and are keyed to the surrounding freeway development, "use of which might be substantially impaired by their relocation." Utilities are in and are adequate and "expense" of large sums would be necessitated in case of relocation of said utilities. Property in the area owned by the city is available for parks and other open spaces. The present use of the land in the area is neither stagnant nor unproductive, but fills existing economic needs in the community. There have been a substantial number of transfers of property in the area within five years prior to the filing of the complaint. The values of real property in the city have at least doubled between 1940 and 1955, and the prices at which properties in the area have been transferred since January 1, 1950, have been at least twice the value of the properties in 1940. Due to the construction of the freeway network, which surrounds and cuts through the area, the value of property is increasing and within a reasonable time will be of such value as to make it economically and financially practicable for the present owners to develop and redevelop their properties. Plaintiff alleges on information and belief that said owners will develop and redevelop their properties within a reasonable time. Public intervention and assistance is not necessary for the development and redevelopment. There is practically no tax delinquency in the area, and the amount presently paid in taxes per capita is approximately equal to the amount paid by the city to cover the cost per capita of rendering public service. The population of the area has remained substantially the same for the last 25 years except as affected by the purchase of land by public bodies for public improvements.

It was alleged further that existence of the buildings in the area and their present use "is not a menace, injurious or inimical" to the public health, safety or welfare of the people of the city, and any difficulties which might exist in the area could have been

remedied "by the exercise of existing statutes and ordinances, including but not limited to" Ordinances Nos. 77000, 90500, 100676, 100677, 100678, 100757 of the city. Those ordinances authorize the Building and Safety Department and the Health Department of the city to require the repair or demolition of buildings which are unfit or unsafe to occupy for living, commercial, industrial or other purposes and authorize said departments to require the repair or reconstruction of buildings which are deteriorated or substandard, as defined in said ordinances, so as to make them comply with the standards set forth in said ordinances for the protection of life, health, property, safety and welfare of the public and of the occupants of said buildings. Said ordinances authorize said departments to order the repair, reconstruction or demolition of buildings which are in such condition as to be conducive to ill health, transmission of disease, or infant mortality, or which are overcrowded or in which there exists inadequate provisions for ventilation, light or sanitation. There is no greater degree of juvenile delinquency and crime in the area than in other comparable areas of the city. The development and redevelopment of the area can be accomplished by private enterprise without public participation or assistance and therefore it is not in the public interest nor are the defendants authorized by law to exercise the power of eminent domain to acquire any of the lands in the area for such purpose.

It was alleged further that defendants, other than the city, have declared the area to be a blighted area, subject to redevelopment and to the terms of the Community Redevelopment Law, and the defendants, other than the city, propose and intend to acquire all the real property in said area, "except such as may be acquired by the City of Los Angeles as hereinabove alleged, including that owned by plaintiff more particularly described hereinabove." Said defendants intend to make this acquisition, if necessary, by exercise of eminent domain, and intend and propose to completely remove all existing edifices and to clear the land in order to replace the existing conditions with a completely planned community. In this regard on November 2, 1954, the agency adopted Resolution No. 48, by the terms of which the agency authorized an application to the Federal Government for financial assistance, pursuant to the provisions of the Federal Housing Act of 1954 as amended, Title 42, § 1450 et seq., U. S. Code [42 U.S.C.A. § 1450 et seq.]. Said resolution was approved by a majority of the City Council of the city on November 15, 1954. Plaintiff alleges on information and belief that pursuant to said resolution the agency submitted an application to the House and Home Finance Agency of the Federal Government, requesting a preliminary loan of approximately $600,000, pursuant to section 1452, subdivision (d), Title 42 of the United States Code [42 U.S.C.A. § 1452(d)]. Plaintiff alleges on information and belief that these funds, if granted, are to be used by the agency to prepare preliminary plans and surveys "looking" to the ultimate completion of the agency's "aforesaid declared purpose of acquiring said real property in the Bunker Hill area for redevelopment." The agency refused plaintiff's request that plaintiff be allowed to inspect said application. Plaintiff alleges on information and belief that if the application referred to above is approved by the House and Home Finance Agency, the defendant agency will execute a contract with the Federal Government for the funds sought in said application. Under the provisions of section 1452, subdivision (d), Title 42 of the United States Code [42 U.S.C.A. § 1452 (d)], said funds will have to be repaid with interest. For the foregoing reasons, the area is not a redevelopment area or a blighted area within the meaning of the provisions of the Community Redevelopment Law, and defendant agency lacks the power to proceed with its express intention of acquiring the real property in the area by eminent domain for purposes of redevelopment.

It was alleged further that about June 28, 1954, the individual defendants, acting as the city council of the city, appropriated $107,000 to and for the benefit of the agency, for use by the agency for its administrative and overhead expenses for the fiscal year 1954–1955. Said money was appropriated from money of the city, said money having been derived from taxes collected by the city. Between July 1, 1954, and the date of filing the complaint, a substantial part of the $107,000 has been spent, and between the date of filing the complaint and July 1, 1955, an additional substantial amount thereof will be spent by the agency and by the city to promote the agency's plan to redevelop the area. By reason of the foregoing, any expenditures or the incurring of financial obligations by defendants with respect to the area will be a waste of public funds. Defendant city has aided, and cooperated with, the other defendants in doing the acts alleged to have been done by them, and the city threatens to, and will, unless restrained by the court, continue to aid and cooperate with the other defendants in doing the acts which it is alleged the other defendants threaten to do.

In the cause of action for declaratory relief plaintiff incorporated by reference all the allegations of his cause of action for an injunction, except: (1) the allegations that plaintiff is a citizen of California, a resident of Los Angeles, the owner of real property in the city, and is subject to taxation by the city, and within one year prior to commencement of the action paid taxes to the city; (2) the allegations regarding the appropriation of $107,000 to and for the benefit of the agency, and the expenditure and proposed expenditure of substantial parts of said amount.

Further allegations in the cause of action for declaratory relief were in substance, as follows: Plaintiff is the owner of real property in the Bunker Hill area of the city. There are approximately 400 separate parcels of real property within the area which are owned by approximately 300 different owners. The issues and the questions to be determined in the action are of common and general interest to all property owners in the area similarly situated, and the issues and questions affect all such owners in the same manner as plaintiff is affected. Such owners are so numerous that it is impracticable to bring all of them before the court, and therefore plaintiff sues for himself and on behalf of all owners similarly affected. By reason of the acts and conduct of defendants, other than the city, thereinabove set forth, "the quality of plaintiff's land and building has been disparaged and its marketability has been and will be further impaired." Defendants, other than the city, threaten and intend to continue such conduct, "including statements" that said defendants intend to dispossess plaintiff's tenants. Plaintiff alleges on information and belief that the present tenants will seek residence elsewhere and plaintiff will be unable to rent accommodations in his building. Plaintiff has no adequate remedy at law. By reason of the foregoing, an actual controversy exists between plaintiff and defendants with regard to the legal status of the Bunker Hill area and more particularly the real property therein owned by plaintiff. Defendants contend: (1) that under the Community Redevelopment Law of California, the agency has the right and power to acquire the plaintiff's said property by eminent domain, pursuant to sections 33048 and 33267 of the Health and Safety Code; (2) that the area is a blighted area within the meaning of sections 33040 through 33044 of the Health and Safety Code; and (3) that the area is a redevelopment area within the meaning of sections 33003 and 33004 of the Health and Safety Code. Plaintiff denies these contentions. Plaintiff contends that defendants have no power to incur any financial obligations or to expend any funds toward the redevelopment of the area. Defendants deny this contention.

The prayer of the complaint is that the respective rights of plaintiff and defendants with relation to plaintiff's property and the Bunker Hill area be adjudicated; and that an injunction be issued restraining defendants from entering into any contract with the United States Government or any agency thereof or otherwise expending public funds for the purpose of redeveloping the area.

As a summary of the first cause of action, it may be stated generally that it alleges: The qualifications of plaintiff to bring the action. The legal capacities of the defendants. A detailed description of plaintiff's property, which was to the effect that the property was not substandard. A general description of the Bunker Hill area, including general statements to the effect that a predominate number of the buildings are fit to occupy and are not substandard, and that the area is not a blighted area but fills existing economic needs. The owners of property in the area have plans for its redevelopment, and public assistance is not necessary for the redevelopment. A general statement to the effect that any substandard conditions in the area could be remedied under provisions of existing ordinances of the city. The defendants, other than the city, have declared the area to be a blighted area, subject to redevelopment under the Community Redevelopment Law, and they propose and intend to acquire all the real property in the area, except such as may be acquired by the city. Said defendants intend to make the acquisition, "if any," by eminent domain, and they intend to remove all edifices in order to replace "the existing conditions" with a planned community. The agency, pursuant to a resolution adopted by it, submitted an application to the Federal Government for a loan of approximately $600,000. Said resolution was approved by the city council. Said funds, if granted, are to be used by the agency to prepare preliminary plans and surveys for the furtherance of redevelopment of the area. The area is not a redevelopment or blighted area and the agency lacks the power "to proceed" to acquire the real property in the area by eminent domain for redevelopment. The city council appropriated $107,000 to the agency for the agency's expenses, and a substantial part of the money has been spent. Any expenditures by defendants with respect to the area will be a waste of public funds.

As a summary of the second cause of action, it may be stated generally that it alleges: An actual controversy exists between plaintiff and defendants as to the legal status of the area. Defendants contend that the agency has the power to acquire plaintiff's property by eminent domain, that the area is a blighted and redevelopment area. Plaintiff denies these contentions. Plaintiff contends that defendants have no power to expend any funds toward the redevelopment. Defendants deny this contention.

Section 33040 of the Health and Safety Code states: "It is found and declared that there exist in many communities blighted areas which constitute either social or economic liabilities, or both, requiring redevelopment in the interest of the health, safety, and general welfare of the people of such communities and of the State. These blighted areas are characterized by one or more of the conditions set forth in Sections 33041 to 33044, inclusive."

Section 33041 of the Health and Safety Code provides: "A blighted area is characterized by the existence of buildings and structures, used or intended to be used for living, commercial, industrial, or other purposes, or any combination of such uses, which are unfit or unsafe to occupy for such purposes and are conducive to ill health, transmission of disease, infant mortality, juvenile delinquency, and crime because of any one or a combination of the following factors: (a) Defective design and character of physical construction. (b) Faulty interior arrangement and exterior spacing. (c) High density of population and overcrowding. (d) Inadequate provision for ventilation, light, sanitation, open

spaces, and recreation facilities. (e) Age, obsolescense, deterioration, dilapidation, mixed character, or shifting of uses."

The characteristics of blighted areas, as set forth in section 33042, pertain to conditions resulting from faulty planning and subdividing (such as irregular form of lots and inadequate streets and utilities). The characteristics set forth in section 33043 pertain to conditions resulting in reduction of taxes to the extent that taxes are inadequate for cost of public services. The characteristics set forth in section 33044 pertain to conditions resulting from lack of use of land and from loss of population.

Section 33047, subdivision (c), of the Health and Safety Code declares that redevelopment of blighted areas is a public purpose for which public money may be expended and private property acquired, and is a governmental function of state concern in the interest of health, safety, and welfare of the people.

Section 33003 of the Health and Safety Code provides: "'Redevelopment area' means an area of a community which is a blighted area, the redevelopment of which is necessary to effectuate the public purposes declared in this part."

Section 33480 of the Health and Safety Code provides: "Redevelopment areas may be designated by resolution of the legislative body, or the legislative body may by resolution authorize the designation of redevelopment areas by resolution of the planning commission or by resolution of the members of the agency."

Section 33481 of the Health and Safety Code provides: "The resolution designating a redevelopment area or areas shall contain the following: (a) A finding that the area designated is a blighted area, the redevelopment of which is necessary to effectuate the public purposes declared in this act; (b) A finding that the area requires study to determine if a redevelopment project or projects within said area are feasible; (c) A description of the boundaries of the area designated."

Section 33004 of the Health and Safety Code provides: "A redevelopment area need not be restricted to buildings, improvements, or lands which are detrimental or inimical to the public health, safety, or welfare, but may consist of an area in which such conditions predominate and injuriously affect the entire area. A redevelopment area may include lands, buildings, or improvements which are not detrimental to the public health, safety or welfare, but whose inclusion is found necessary for the effective redevelopment of the area of which they are a part."

[1] Appellant argues that the demurrers admit the allegations to the effect that characteristics of blighted areas, as set forth in said sections 33041 to 33044 inclusive, do not exist in the Bunker Hill area; and that the demurrers admit the allegations to the effect that the redevelopment of the area is not necessary under the provisions of the community redevelopment laws. The allegations regarding the nonexistence of the characteristics of blighted areas were allegations negativing the various conditions specified in said sections as characteristics of blighted areas. Some of such allegations were that a predominate number of the buildings are fit and safe to occupy for living, commercial, and other purposes, and those buildings are not conducive to ill health, transmission of disease, juvenile delinquency, infant mortality or crime; and the existence of the buildings in the area is not a menace to public health, safety or welfare of the people. Many of such allegations are conclusions and, of course, are not admitted by demurring.

[2] The allegation that the defendants lack power to acquire the property in the area, by eminent domain, for redevelopment purposes is a conclusion.

[3] As above shown, plaintiff gave a detailed description of his own property, but he gave only a general description of the other property in the area. Even if the condition of his own property is not characteristic of the condition of property in a

blighted area, that fact is not determinative that the area as a unit is not a blighted area. Health and Saf.Code, § 33004,—stating that the area may include property not detrimental to public health, etc; Stockus v. Boston Housing Authority, 304 Mass. 507, 24 N.E.2d 333. In the Stockus case, just cited, it was said 304 Mass. at page 510, 24 N.E.2d at page 337: "The fact that the dwellings of the plaintiffs have such facilities [adequate facilities] is immaterial, for the test is the area as a unit and not two dwellings located in the area." In Berman v. Parker, 348 U.S. 26, at page 35, 75 S.Ct. 98, at page 104, 99 L.Ed. 27, which pertained to the District of Columbia Redevelopment Act, D.C.Code 1951, § 5–701 et seq., it was said: "Property may of course be taken for this redevelopment which, standing by itself, is innocuous and unoffending. But we have said enough to indicate that it is the need of the area as a whole which Congress and its agencies are evaluating."

[4] The amended complaint alleged that the defendants, other than the city, had declared the area to be a blighted area, subject to redevelopment under the Community Redevelopment Law, and that the agency intends to acquire by eminent domain all the property in the area, except such as may be acquired by the city. The defendants, other than the city, were the agency and the members of the city council. It was alleged that the actions of such members were the actions of an agency of the state pursuant to the Community Redevelopment Law. It therefore appears from the complaint that the agency and the members of the city council have declared or designated the area to be a blighted area. As above shown, section 33480 of the Health and Safety Code provides that redevelopment areas may be designated by the legislative body (city council), or that body may authorize the designation of such areas by the agency (Redevelopment Agency). Also as above shown, section 33481 of said code provides that the resolution designating a redevelopment area shall contain a finding that the area "is a blighted area, the redevelopment of which is necessary to effectuate the public purposes declared in this act." It has been held that the Community Redevelopment Law does not violate constitutional provisions relating to equal protection of the law, due process of law, delegating legislative power, and granting special privileges. Redevelopment Agency of City and County of San Francisco v. Hayes, 122 Cal.App.2d 777, 805–808, 266 P.2d 105. The agency and the legislative body (city council) have authority to designate redevelopment areas, and a court is not empowered to substitute its determination for the determination of the agency or the legislative body in the absence of abuse of discretion, fraud, collusion, or bad faith on the part of the agency or the legislative body. See Ransom v. Los Angeles City High School Dist., 129 Cal. App.2d 500, 505, 277 P.2d 455, 458. In the case just cited it was stated, in quoting from another case: "* * * the courts 'cannot enter the board room * * * nor interfere at all with its action unless the the board [administrative agency] is exceeding its legislative powers, or its judgment or discretion is being fraudulently or corruptly exercised.' [Citation.]" In the present case, there is no allegation of fraud, collusion, bad faith, or abuse of discretion. In Nickerson v. San Bernardino County, 179 Cal. 518, at page 522, 177 P. 465, at page 467, it was said: "When the Legislature has committed to a municipal body the power to legislate on given subjects or has committed to it judgment or discretion as to matters upon which it is authorized to act, courts of equity have no power to interfere with such a body in the exercise of its legislative or discretionary functions."

In Kaskel v. Impellitteri, 306 N.Y. 73, 115 N.E.2d 659, the city planning commission and the board of estimate determined that a certain area was substandard and insanitary and was subject to slum clearance. Plaintiff sought a determination that the area was not substandard and insanitary. The lower court dismissed the complaint. The New York Court of Ap-

peals, in affirming the judgment, said 306 N.Y. at page 80, 115 N.E.2d at page 662: "[T]he situation here actually displayed is one of those as to which the Legislature has authorized the city officials, including elected officials, to make a determination, and so the making thereof is simply an act of government, that is, an exercise of governmental power, legislative in fundamental character, which, whether wise or unwise, cannot be overhauled by the courts."

In Schenck v. City of Pittsburgh, 364 Pa. 31, 70 A.2d 612, the city planning commission certified that an area was a blighted area within the meaning of the Pennsylvania Redevelopment Law and approved a proposal by the Urban Redevelopment Authority of Pittsburg for redevelopment of the area. The proposal, with a contract with a redeveloper for redevelopment of the area, was submitted to the city council for approval. Plaintiff, who was part owner of property within the area, sought to enjoin the city council from approving the proposal and the contract, to enjoin the city from appropriating any money to carry out the proposal, to enjoin the authority from executing the contract and taking any steps to acquire land in the area by eminent domain. The Supreme Court of Pennsylvania, in the exercise of original jurisdiction, dismissed the bill. The court said 364 Pa. at pages 35 and 36, 70 A.2d at page 614: "Plaintiff asserts that the mere fact that the City Planning Commission has certified the tract as a blighted area does not conclusively establish that the redevelopment of this particular land is in fact for a public purpose. The answer to this contention is that, in the absence of any indication that the Commission did not act in good faith or was wholly arbitrary in certifying the area designated by it as blighted, its certification to that effect is not subject to judicial review. * * * It has been held in many cases that where the right of eminent domain is vested in a municipality, an administrative body, or even a private corporation, the question as to whether the circumstances justify the exercise of the power in a given instance is not a judicial one, at least in the absence of fraud or palpable bad faith."

In Stockus v. Boston Housing Authority, supra, 304 Mass. 507, 24 N.E.2d 333, the defendant had determined that a tract of land which included parcels owned by plaintiffs constituted a substandard area as defined by the Massachusetts housing authority law and adopted an order taking the tract. Plaintiffs sought to enjoin the defendant from enforcing its order taking plaintiffs' property. The appeal was from a decree sustaining a demurrer. The Supreme Court of Massachusetts, in affirming the decree, said 304 Mass. at pages 509 and 510, 24 N.E.2d at page 336: "The allegations concerning the characteristics of the area as enumerated in the bill seek to avoid the classification of the locus as a substandard area by negativing verbatim the various elements included in section 26J in defining a sub-standard area. While it is true that the specific characteristics enumerated in the bill, some being alleged to be absent and others to be present in the area in question, are in the main physical objects whose presence or absence is a matter of fact, yet it is equally true that the extent that these various elements enter into and form the predominating and distinctive traits of a neighborhood is frequently and largely a matter of opinion and whether such characteristics or some of them, considered all together or in any combination, present a housing situation that in its final analysis may reasonably and fairly be said to be injurious to the public safety, health or morals, is to a great degree a matter of practical judgment, common sense and sound discretion. There are, undoubtedly, instances where men of training and experience in special subjects related to construction, sanitation, fire prevention, zoning, public health, social service and other subjects might honestly differ in determining whether a certain district was a slum area. It the question is a debatable one, we have no right to substitute our judgment for that of the defendants acting as the local housing authority, upon whom the Legislature conferred the power 'To

determine what areas within its jurisdiction constitute sub-standard areas.' [Citations.] The specific negation of the presence of each of the elements included within the statutory definition of a sub-standard area, section 26J adds nothing to the bill. [Citations.]"

[5] The court did not err in sustaining the demurrers. The amended complaint does not state a cause of action for an injunction. The court was not required to make a declaration regarding the alleged controversy. "Declaratory relief * * * may be refused in the discretion of the trial court if it appears that the determination is not necessary or proper at the time and under all the circumstances. Code of Civ.Proc. § 1061. Where facts appear from the face of the complaint which would justify a trial court in concluding that its determination is not necessary or proper, it has been held that the court may sustain a general demurrer to the complaint for declaratory relief. [Citations.]" Moss v. Moss, 20 Cal.2d 640, 642, 128 P.2d 526, 528, 141 A.L.R. 1422.

The orders and judgments, dismissing the action, are affirmed.

SHINN, P. J., concurs.

VALLÉE, Justice.

I concur in the judgment. I am not in accord with the statement in the opinion that "a court is not empowered to substitute its determination for the determination of the agency or the legislative body in the absence of abuse of discretion, fraud, collusion, or bad faith on the part of the agency or the legislative body." Section 1094.5 of the Code of Civil Procedure makes it clear that the validity of any final administrative order or decision may be inquired into in a proceeding for a writ of mandate. See Redevelopment Agency of City and County of San Francisco v. Hayes, 122 Cal.App.2d 777, 812, 266 P.2d 105. And section 1094.5 provides that:

"The inquiry in such a case shall extend to the questions whether the respondent has proceeded without, or in excess of jurisdiction; whether there was a fair trial; and whether there was any prejudicial abuse of discretion. Abuse of discretion is established if the respondent has not proceeded in the manner required by law, the order or decision is not supported by the findings, or the findings are not supported by the evidence."

The agency says it is a "State Agency." If that be true, in a mandamus proceeding to review its final order the court is authorized to exercise its independent judgment on the evidence. Moran v. State Board of Medical Examiners, 32 Cal.2d 301, 308, 196 P.2d 20; Cooper v. State Board of Medical Examiners, 35 Cal.2d 242, 246, 217 P.2d 630, 18 A.L.R.2d 593; Thomas v. California Emp. Stab. Comm., 39 Cal.2d 501, 504, 247 P.2d 561.

I concur in the judgment solely on the ground stated in the agency's brief, which reads:

"Also, a court should not undertake to adjudicate any of appellant's alleged rights until such rights first have been determined and established in accordance with the procedure set up for that purpose in the Community Redevelopment Law, as hereinbefore referred to.

"Attention is called to Section 33481 (b) of the Community Redevelopment Law which requires a finding that the area designated as a blighted area 'requires study to determine if a redevelopment project or projects within said area are feasible.' It is for the purpose of making this study and investigation that this respondent has applied to the Federal Government for a preliminary loan, pursuant to the provisions of the Housing Act of 1949 as amended. Appellant admits this situation by the allegations in his amended complaint in paragraph XV, lines 2 to 20 on page 9.

"In other words, it is the contention of this respondent that appellant's ac-

tion is premature; that there are no alleged legal rights of appellant or duties of respondent to be determined at this stage of the proceedings under the Community Redevelopment Law, and, therefore, there is no justiciable controversy between appellant and respondent to be adjudicated."

Hearing denied; SCHAUER, J., dissenting.



148 Cal.App.2d 364

The PEOPLE of the State of California, Plaintiff and Respondent,

v.

Mack Earl ROACH, Defendant and Appellant.

Cr. 3286.

District Court of Appeal, First District, Division 1, California.

Feb. 8, 1957.

Prosecution for second-degree burglary. The Superior Court, County of Alameda, Donald K. Quayle, J., entered judgment of conviction and defendant appealed. The District Court of Appeal, Bray, J., held that evidence, including corroboration of testimony of an accomplice, was sufficient to sustain conviction.

Judgment affirmed.

1. Conspiracy ⇐47

A conspiracy may be proved by indirect evidence and inferences justified by the circumstances.

2. Burglary ⇐36

In prosecution for burglary, testimony of a witness that while chasing a person who had stolen some articles from store in which witness was employed, defendant followed the chase in his automobile, was admissible, in view of defendant's connection with person being chased, and in view of use of defendant's automobile in a prior attempted theft.

3. Criminal Law ⇐369(2), 372(10)

In prosecution for burglary, evidence concerning defendant's connection with an attempted theft of cigarettes from another store on a prior occasion was admissible, in view of connection shown between such other crime and crime charged, and in view of fact it showed a common plan or scheme.

4. Witnesses ⇐323

In prosecution for burglary, where a witness called by the state gave allegedly surprise testimony favorable to defendant as to defendant's connection with taking merchandise from various stores in the area, impeaching evidence was admissible to neutralize such favorable evidence.

5. Witnesses ⇐389

When a witness, in a criminal proceeding, testifies that he does not remember his previous statements, it is competent to prove them for the purpose of impeachment.

6. Criminal Law ⇐511(2)

In a criminal proceeding, corroborating evidence is sufficient to sustain a conviction if it tends to connect the defendant with commission of crime charged in such a way as may reasonably satisfy jury that witness who must be corroborated is telling the truth. West's Ann.Pen.Code, § 1111.

7. Burglary ⇐41(1)

In prosecution for burglary evidence, including corroboration of testimony of an accomplice, was sufficient to sustain conviction.

Claude O. Allen, Oakland, for appellant.

Edmund G. Brown, Atty. Gen., Clarence A. Linn, Asst. Atty. Gen., John S. McInerny, Deputy Atty. Gen., for respondent.

BRAY, Justice.

Defendant was convicted by a jury of second degree burglary. He appeals from the judgment of conviction.

Questions Presented.

1. Alleged error of the trial court in admission of certain evidence including evi-

dence of other crimes and evidence for purposes of impeachment.

2. Was the testimony of the accomplice Winn corroborated?

Evidence.

On March 22, 1956, defendant and one Winn entered the Pic-N-Pac Market in El Cerrito. The two came up to the check stand. Defendant went on through. Winn placed some articles on the stand. Winn apparently noticed that Smith, the assistant manager of the market, was looking at him while phoning. Winn told the checker he had forgotten something, left the check stand, walked to the mayonnaise section, pausing there, and then left the store without going back to the check stand. Smith could only see his head as he walked along. There was no one else around. Smith immediately went to the mayonnaise section and found there four cartons of cigarettes which were not there two minutes before. Suspecting that defendant and Winn were attempting to steal cigarettes, Smith had the police called and instructed clerk Sanders to follow Winn and get the license number of his car. Sanders testified that the two men were together in various parts of the store. It was when Smith went to the phone that Winn said he had forgotten something and went to the mayonnaise section. Sanders followed Winn and took the license number of the car that Winn got in. Defendant was then in the driver's seat.

March 31, 1956, Winn entered another Pic-N-Pac Market (this time in Berkeley). Defendant waited for him in his car. It bore the license number taken by Sanders. The store employees had been alerted to the attempted theft at the other store and had been given the license number of the car involved. Finding the license number to be the same, the store manager called the police. Assistant Manager Barton saw Winn putting cigarettes in the lining of his jacket. As Winn was leaving the store Barton followed him. Outside the store Barton hollered to Winn, who then started running. Barton ran after him and saw him throw down three or four cartons of cigarettes. During the chase Barton saw defendant in his car following as near as possible Winn's line of flight and honking his horn. Winn cut across lots and was eventually caught by Barton. Winn still had some cartons of cigarettes bearing the store stamp in his jacket.

Winn testified at the trial as a prosecution witness. He admitted that he and defendant had stolen from other stores and that on March 31st they had gone to the Berkeley Pic-N-Pac Market in defendant's car to steal something so they could finance a trip to San Francisco. Winn obtained the jacket from defendant. It had slits in it. (Apparently these made it easier to insert the stolen cigarettes.) Defendant waited in his car for Winn.

1. Admission of Evidence. (a) Defendant following chase.

[1, 2] Barton, after describing his chase of Winn, was asked if he noticed anything unusual while doing so. He then testified to seeing defendant following in his car honking his horn. Defendant's contention that this evidence was inadmissible is without merit. In the first place, he made no objection to it. Secondly, it tended to show defendant's connection with the crime and to corroborate Winn's testimony that defendant was waiting for him to return to the car with the spoils. As said in People v. Bennett, 132 Cal.App. 2d 569, 576, 282 P.2d 590, a conspiracy may be proved by indirect evidence and inferences justified by the circumstances. The circumstances here were entirely different from those in People v. Stevens, 68 Cal. 113, 8 P. 712, where the court held inadmissible evidence that one Harrigan and two others, none of whom were in anywise connected with the defendant in the case, were looking in the window of a store where the defendant was endeavoring to sell boots similar to those which had been stolen, and ran away when they saw the witness coming. Here defendant's connection with Winn and the use of the car in a prior attempted theft as well as this one were well established.

(b) The incident of March 22nd.

[3] Defendant contends that the evidence before related concerning the attempted theft of cigarettes is not sufficient to establish the commission of a crime and therefore inadmissible at the trial of this separate offense. Defendant relies upon the language of People v. Albertson, 23 Cal.2d 550, 145 P.2d 7, where the court, after pointing out that evidence of other crimes may be admitted when it helps to disclose motive, intent, premeditation, guilty knowledge, malice or a common plan or scheme, stated that such proof, however, should be received with extreme caution and must show some connection between the other crime and the crime charged, and it must be shown with reasonable certainty that the accused committed the other crime. The test as given in that case is that the proof must afford " 'substantial evidence' ", 23 Cal.2d at page 579, 145 P.2d at page 22, that the prior offense was in fact committed by the defendant. The evidence that Winn and defendant were attempting on March 22nd to steal cigarettes and were only deterred by the fact that Winn assumed that the store manager whom he saw telephoning and watching him, was calling the police, is substantial and meets that test. Comparing the modus operandi between the attempted crime and that charged we find it to be the same. In both the same two persons were involved in a common plan, the same criminal intent appeared, Pic-N-Pac markets were involved, the same car, which belonged to defendant, used, and even the same brand of cigarettes chosen. See People v. Grimes, 113 Cal. App.2d 365, 248 P.2d 130, which discusses the effect of similar modus operandi and also points out that the question of whether the other offense shows a general pattern, scheme, or plan and are sufficiently similar and possess a sufficiently high degree of common features with the act charged to warrant the inference that if the defendant committed the other acts he committed the act charged, is a primary question for the trial court to determine and to instruct the jury as to the limited purpose for which the evidence is admitted. This the court did in our case.

(c) Impeachment.

[4] Plaintiff called as its witness defendant's brother-in-law Watts, confined in the Alameda County Prison Farm for "Vag addict and petty theft." Plaintiff asked without objection "Have you been involved in taking merchandise from various stores in this area with your brother-in-law?" The witness said "No." Thereupon, claiming surprise and damage, plaintiff asked, again without objection and in some detail, if the witness had not told the examiner and Inspector McDonough that he had, and that he, the defendant and Winn had done so. The witness first said he did not remember. Then he made various answers, in one of which he admitted stating that he had been in stores with defendant on two occasions for the purpose of "boosting" (stealing), but it is not clear whether he admitted stating that defendant was a party to the intended "boosting" or not, or whether he alone was engaged in the "boosting." Again he denied making any statement involving defendant, and once more said he did not remember doing so. Watts admitted stating that defendant waited for him in the car while he went in to "boost" the Pic-N-Pac store and that defendant knew Watts went in for that purpose. He also denied saying so, and then stated he could not remember saying so. He definitely denied that defendant knew about the "boosting" although defendant brought him to the store on March 22nd [1] and waited for him. Finally, when asked concerning a conversation with Inspector Bishop, which had been referred to in the conversation with the district attorney and

1. It is not clear whether Watts was with defendant and Winn at the store on March 22nd when the license number of defendant's car was taken or whether this was a second attempt to "boost" the store on the same day. As there apparently was only one incident in which the store employees took defendant's car license number and Watts said it was taken while he was there, probably there was only one incident that day.

Inspector McDonough, Watts practically admitted making similar statements to those above mentioned and said he might have said them to get "some weight off my shoulders" and then that he could have been lying.

The only objection to this line of questioning made by defendant was after plaintiff had asked several impeaching questions, defendant said "Counsel claims surprise but it appears that there shouldn't be any surprise." The court permitted further questioning. Thereafter plaintiff called Inspector McDonough who, after objection by defendant that Watts had said nothing to be impeached about, testified to Watts' statements to the effect that he and defendant had stolen from two Pic-N-Pac markets. The court instructed that this evidence was admitted solely for impeachment purposes.

Defendant states in his closing brief "No question is raised on this appeal as to *surprise or materiality of the evidence,* the sole problem to be determined is whether Watts' testimony prejudiced the people's case and warranted his impeachment." (Emphasis added.) In support of his contention that Watts' testimony was not damaging, defendant quotes from People v. Spinosa, 115 Cal. App.2d 659, 667, 252 P.2d 409, a quotation taken from People v. LeBeau, 39 Cal.2d 146, 245 P.2d 302, to the effect that to determine whether a negative answer has actually damaged the party calling the witness the facts of the case must be considered. Here Watts was called by plaintiff to prove that defendant, Winn and Watts were engaged in a pattern of stealing from Pic-N-Pac markets. Unexpectedly he denied when asked concerning defendant and himself that they were so engaged. No objection was raised to questioning him concerning contradictory statements claimed to have been made by him. During the course of such questioning he denied, admitted and then could not remember making such statements. Moreover, he flatly denied that defendant had knowingly participated. To have left the matter there would have been exceedingly damaging to the prosecution. They had called a witness who, although he backed and filled on the question of what statements he had made, positively stated that defendant was not implicated in a similar crime. Thus, unless impeached, Watts' testimony was favorable to the defendant on a subject which defendant concedes was material. Thus the impeaching evidence was admissible to neutralize that favorable evidence. As we said in People v. Spinosa, supra, 115 Cal.App.2d at page 666, 252 P.2d at page 413, "There are many cases holding that negative testimony can be damaging within the meaning of the impeachment rule." This is that type of case. Impeachment by contradictory statements, of course, does not prove the existence of the facts mentioned in the statement to be contradicted, but may be considered for the purpose only of neutralizing the effect of the witness' statement upon the trial, People v. Newson, 37 Cal.2d 34, 45–46, 230 P.2d 618, and the court here so instructed the jury. "The evidence should have been admitted. To permit impeachment of one's own witness in this state, three elements must exist: (1) damage to the party calling the witness; (2) materiality of the evidence; and (3) surprise at his present testimony." People v. Spinosa, supra, 115 Cal.App.2d at page 665, 252 P.2d at page 413, see also People v. LeBeau, supra, 39 Cal.2d 146, 148, 245 P.2d 302. Those elements appear here.

[5] The fact that Watts stated among other answers that he did not remember making the statement would not prevent plaintiff from showing that he did make it. "When a witness testifies that he does not remember his previous statements, it is competent to prove them for the purpose of impeachment." People v. Bjornsen, 79 Cal.App.2d 519, 535, 180 P.2d 443, 453

2. Corroboration.

[6, 7] The testimony of an accomplice must be "corroborated by such other evidence as shall tend to connect the defendant with the commission of the offense * * *." Penal Code, § 1111. Other than the testimony of Winn, there was evidence

tending to prove the conspiracy. Defendant and Winn were together in a Pic-N-Pac market in El Cerrito attempting to steal cigarettes. They drove away from the market in the same car, belonging to defendant, in which defendant drove Winn to the Berkeley market and in which defendant followed the escaping Winn, honking at him. "The corroborative evidence may be slight and entitled to little consideration when standing alone * * *." It "'* * * need not be direct nor extend to every fact and detail. It may be circumstantial and is sufficient, even though slight, if it tend to connect the defendant with the commission of the crime.'" People v. Wayne, 41 Cal.2d 814, 822, 264 P.2d 547, 550. Another way of stating the rule is: "The corroborating evidence is sufficient if it tends to connect the defendant with the commission of the crime in such a way as may reasonably satisfy the jury that the witness who must be corroborated is telling the truth." People v. MacEwing, 45 Cal.2d 218, 224, 288 P.2d 257, 260. The corroboration was sufficient.

Judgment affirmed.

PETERS, P. J., and FRED B. WOOD, J., concur.



148 Cal.App.2d 117

R. W. AGNEW, Plaintiff and Appellant,

v.

John A. CRONIN, Oliver C. Hardy, C. N. Young, Mike Palumbo, M. Leora Rowe, E. W. Biscailuz, as Sheriff of Los Angeles County, State of California, Defendants and Respondents.

Civ. 22007.

District Court of Appeal, Second District, Division 2, California.

Jan. 29, 1957.

Action by judgment debtor against judgment creditor, her attorney, judgment debtor's debtors, one of whom was also a garnishee, such debtors' attorney, and the sheriff to recover for conspiracy to enable judgment creditor to obtain from the other debtors, through garnishment proceeding, money due judgment debtor but subject to exemption, to recover for actionable fraud, and to obtain declaratory relief. The Superior Court, Los Angeles County, Aubrey N. Irwin, J., entered judgments of dismissals in favor of all defendants after sustaining demurrers without leave to amend, and judgment debtor appealed. The District Court of Appeal, Fox, J., held that sheriff did not have duty to give judgment debtor notice of the garnishment but that the complaint was sufficient to state cause of action against the other defendants.

Judgment for sheriff affirmed, and other judgments reversed.

1. Garnishment ⇐99

Sheriff did not have duty to give judgment debtor notice that sheriff was running a garnishment in aid of execution upon money owed judgment debtor and in possession of judgment debtor, even though the money levied on was subject to exemption upon exercise of the privilege by the judgment debtor. West's Ann.Code Civ.Proc., §§ 537–561, 681, 690, 690.11, 690.26; West's Ann.Gov.Code, § 26608.

2. Garnishment ⇐230

Primary responsibility for protecting interests of the judgment debtor in a proper case lies with the garnishee. West's Ann. Code Civ.Proc., §§ 537–561, 681–713; West's Ann.Gov.Code, § 26608.

3. Constitutional Law ⇐309(1)

Failure to require levying officer to give notice to judgment debtor of garnishment proceedings does not make a garnishment statute abridge due process of law.

4. Sheriffs and Constables ⇐112

Mere fact that judgment debtor had on file a complaint against his debtors for recovery of money owed him for personal services could not, on theory of constructive notice of "public records", impute vicarious

knowledge of the contents of such complaint to sheriff for purpose of charging sheriff with liability for levying on debt owed judgment debtor when sheriff failed to give judgment debtor notice that he was running a garnishment in aid of execution upon money in possession of debtor of judgment debtor. West's Ann.Code Civ.Proc., §§ 537–561, 681–713; West's Ann.Gov.Code, § 26608.

5. Lis Pendens ⇐22(1)

Mere pendency of an action, without more, does not impart constructive notice to all the world of the fact of such litigation.

6. Garnishment ⇐230

Garnishee, who knows that the property levied on is subject to a claim of exemption by his creditor and that his creditor is ignorant of the garnishment, has the duty, whenever practicable, to notify his creditor of the garnishment so that creditor may have the opportunity, if he desires, of exercising his claim of exemption. West's Ann. Code Civ.Proc., § 690.18.

7. Garnishment ⇐230

Garnishee, who has knowledge that fund in his possession is subject to exemption and that owner of such fund has no knowledge of the garnishment, must not needlessly imperil the fund or unnecessarily or arbitrarily subject it to the garnishment but must act with reasonable caution in recognition of the owner's known rights, and, if garnishee departs from his ordinary status as a neutral or disinterested stakeholder and gives an improper advantage to one side or the other, he will be held liable to the party prejudiced. West's Ann.Code Civ.Proc., §§ 537–561, 681–713; West's Ann.Gov.Code, § 26608.

8. Garnishment ⇐228, 230

Garnishee is regarded in light of a trustee and is bound to protect, by legal and appropriate steps, the rights of all parties to the goods or credits attached in garnishee's hands. West's Ann.Code Civ. Proc., §§ 537–561, 681–713; West's Ann. Gov.Code, § 26608.

9. Conspiracy ⇐18

Complaint, which alleged, in substance, that garnishee, as judgment debtor's debtor, possessed money subject to exemption as current wages for personal services required by judgment debtor for the necessities of life, that judgment creditor obtained writ of garnishment directing seizure of the money, and that garnishee, pursuant to conspiracy with judgment creditor, another debtor, and their attorneys, answered the garnishment without disclosing the exemption and turned over the money without notification to judgment debtor despite garnishee's knowledge that judgment debtor was ignorant of the garnishment, was sufficient to state cause of action against alleged conspirators. West's Ann.Code Civ.Proc., § 690.18.

10. Fraud ⇐17
Garnishment ⇐230

Where garnishee's creditor asked garnishee why money due on the debt was not paid, and garnishee deliberately concealed from creditor, by silence and by equivocal responses, that, under garnishment proceedings then taking place, the money had been levied on, garnishee had duty to make full and fair disclosure, regardless of any confidential relationship, and his failure to do so constituted fraud.

11. Pleading ⇐198

Where complaint was good against one of the joint demurrants, the demurrer would have to be overruled as to all.

12. Judgment ⇐196

Where plea in abatement because of a prior action is presented by demurrer, entry of final judgment with respect to such issue at time the demurrer is heard constitutes error.

R. W. Agnew appearing in pro. per.

Harold W. Kennedy, County Counsel, and Robert C. Lynch, Deputy County Counsel, Los Angeles, for respondent Biscailuz.

Everett H. Smith, Los Angeles, for respondents Hardy and Rowe.

No appearance for respondents Cronin, Young and Palumbo.

FOX, Justice.

Plaintiff appeals from judgments of dismissal in favor of all defendants after their demurrers to his second amended complaint were sustained without leave to amend.

Plaintiff's second amended complaint is stated in three counts: The first cause of action is for damages for civil conspiracy. The second, which realleges only the same facts recited in the first cause of action, purports to proceed on the theory of actionable fraud. The third cause of action is for declaratory relief. The defendants are the Sheriff of Los Angeles County; Mrs. Rowe, a judgment creditor of plaintiff, and her attorney, Oliver C. Hardy; and C. N. Young and Mike Palumbo, who are allegedly indebted to plaintiff, and their attorney, John A. Cronin.

The complaint[1] is lengthy and may be epitomized as follows: Defendant Rowe obtained a judgment against plaintiff for $434.92 in 1953. On December 14, 1954, defendants Young and Palumbo became jointly indebted to plaintiff in the sum of $725.77 for personal services. On that day, Young gave plaintiff his check for $325 in part payment, but caused payment thereon to be stopped the following day. On December 15, 1954, plaintiff informed Young, Palumbo and their attorney Cronin that he was destitute and without funds to procure the common necessities of life and would sue unless paid forthwith the entire amount due. His demand for payment was refused.

On about December 15, 1954, defendants Young, Palumbo and Cronin formed a conspiracy, which defendants Rowe and Hardy joined and participated in about a week later, whose object was to defraud plaintiff out of the aforesaid money due him. The agreement reached by these conspirators and the actions taken pursuant thereto to accomplish its objectives were as follows: (1) to withhold all payments either of the sum of $325.00 or the sum of $725.77 from plaintiff and defraud him thereof; (2) Young to stop payment of the check given plaintiff;[2] (3) when plaintiff filed suit for the amount due, Young and Palumbo to deny that plaintiff ever performed personal services, that any debt was owed, or that a check had been given and payment thereon stopped; (4) defendants Rowe and Hardy to obtain a writ of execution upon Rowe's judgment and direct defendant sheriff to make a levy thereunder by garnishing C. N. Young, for money in latter's possession belonging to plaintiff, and to conceal and suppress this proceeding from plaintiff by denying him, and causing to be denied him, any notice thereof and any opportunity to protect his interest in the property levied on by claiming its exemption; (5) to refrain from disclosing to the sheriff that the money levied on in Young's possession represented plaintiff's earnings for personal services rendered and payable on December 14, 1954; (6) to deny plaintiff the rights and protection afforded him as a judgment debtor under sections 690, 690.11, and 690.26 of the Code of Civil Procedure,[3] viz., the privilege of applying for exemption.

It is alleged that pursuant to the above conspiracy, Young stopped payment on the

1. It should be emphasized that this court is confronted with questions of law only, and must accept the allegations of the complaint as true for purposes of this appeal.

2. This phase of the conspiracy antedates the participation therein of Rowe and Hardy.

3. Code of Civil Procedure, section 690, provides: "The property mentioned in Sections 690.1 to 690.25, inclusive, this code, is exempt from execution or attachment, except as therein otherwise specially provided, when claim for exemption is made to the same by the judgment debtor or defendant as hereinafter in Section 690.26 provided.

Section 690.11 provides: "One-half of the earnings of the defendant or judgment debtor received for his personal services rendered at any time within 30

check for $325.00 issued to plaintiff and that on December 29, 1954, Rowe and Hardy procured a writ of execution in favor of Rowe and against plaintiff as a judgment debtor. The writ was directed to the sheriff with instruction to make levy on money or debts belonging to plaintiff in Young's possession without informing the sheriff that such moneys were plaintiff's earnings for personal services rendered Young within 30 days next preceding the "alleged levy, garnishment and attachment." On December 29, 1954, the sheriff served Young with a garnishment, ordering Young not to pay over to anyone except himself the items garnished. In his "Answer to Garnishment," Young reported he was indebted to plaintiff in the sum of $325.00, which he had in his possession; however, with intent to defraud plaintiff and pursuant to the conspiracy, he failed to disclose to the sheriff the exempt character of the debt. It is then alleged that the defendants other than the sheriff breached their duty to notify plaintiff of the garnishment in order that he might have an opportunity to claim his privileges under Code of Civil Procedure sections 690.11 and 690.26 and that such defendants, at all times here material, knew plaintiff was a destitute person and that the money levied upon was exempt from execution under sections 690 and 690.11, Code of Civil Procedure.

It is further alleged that plaintiff filed his complaint (No. 639033, Superior Court) against Young and Palumbo for the amount due him for his personal services on January 19, 1955, and caused them to be served with complaint and summons on the following day; and that Young and Palumbo answered said complaint with denials as described in the alleged conspiratorial agreement and that the defendants knew the falsity of such answer.

On February 21, 1955, pursuant to the conspiracy, and with intent to defraud plaintiff, Young paid the aforementioned $325.00 to the sheriff. On February 25, 1955, the sheriff paid this amount, less the sum of $7.35 as fees, commissions and expenses, to defendant Rowe in partial satisfaction of her judgment. On various occasions between December 15, 1954, and June 27, 1955, plaintiff inquired of Young, Palumbo and Cronin why the sum of $325.00 was not paid him, and on such occasions they refused to disclose, and deliberately concealed from him, the fact that the sheriff had served the above writ on December 29, 1954. Plaintiff did not learn of the issuance of the writ and the payment to the sheriff pursuant thereto until June 27, 1955.

Concerning the sheriff, plaintiff alleges that it has been the sheriff's continuing practice when garnishing personal property belonging to a judgment debtor to deliberately refrain from giving notice of the service of garnishment to the judgment debtor and to deprive the latter of an opportunity to protect his property; that from January 19, 1955, to February 25, 1955, the sheriff knew of the pendency of plaintiff's complaint for the money levied on because of its nature as a "public record," and that the money so levied on was exempt from execution under Code of Civil Procedure sections 690 and 690.11, and that the sheriff was required, according to the spirit and purpose of said statutes and under the constitutional requirements of due process of

days next preceding the levy of attachment or execution where such one-half is necessary for the use of the debtor, or his family supported in whole or in part by such debtor.

"All of such earnings, if necessary for the use of the debtor's family, residing in this State, and supported in whole or in part by such debtor unless the debts are: (a) Incurred by such debtor, his wife or family, for the common necessaries of life; or, (b) incurred for personal services rendered by any employee, or former employee, of such debtor."

Section 690.26 reads in part: "If the property mentioned in Sections 690.1 to 690.25, inclusive, shall be levied upon under writ of attachment or execution, the defendant or judgment debtor * * in order to avail himself of his exemption rights as to such property, shall deliver to the levying officer an affidavit of himself or his agent, together with a copy thereof, alleging that the property levied upon, identifying it, is exempt * * *."

law to give him notice of the levy; that the sheriff's seizure of said property and his delivery thereof to Rowe and Hardy divested him of property rights in violation of law; that the property seized was exempt as plaintiff's earnings for personal service rendered within 30 days next preceding the levy and was necessary for plaintiff's use and the use of his family, who reside in California and are supported in part by him.

It is further alleged that plaintiff suffered emotional shock and suffered hunger and want by reason of the acts of defendants, and that the conduct of the defendants other than the sheriff was actuated by malice.

In his third cause of action, all of the above allegations are reiterated. Plaintiff then asserts that the defendants, other than the sheriff, threaten that if he should recover judgment in his action No. 639033 for the sum of $725.77, that any amount recovered would not be paid to him but that Hardy and Rowe threaten to instruct the sheriff to levy thereon in further satisfaction of the Rowe judgment without notification thereof to plaintiff; and that the sheriff threatens that if instructed to levy on money belonging to plaintiff in the possession of Young or Palumbo, he will levy on and garnishee the same without notice to plaintiff. Plaintiff alleges that a controversy exists (1) respecting the validity of such threatened levy without notice to plaintiff; (2) as to whether the prior levy was conformable to law; (3) as to who is entitled to possession of the $325.00 taken upon execution; (4) whether he is entitled to notice when the sheriff levies upon his property in the possession of another in order that he might decide whether to waive or claim the privilege of exemption; and (5) whether exempt property retains such status until plaintiff receives knowledge of the levy and elects to waive or claim the privilege. Plaintiff alleges in respect to this controversy that a levy upon his exempt property in the control of a third person without notice to him violates the law, while it is defendants' contention that notice is not required nor do they have any duty to give notice; that unless he have a declaration of rights he will be irreparably damaged.

The prayer is for general and punitive damages against the defendants other than the sheriff, and an injunction prohibiting them from seizing additional property belonging to plaintiff in the hands of Young and Palumbo without notice; declaratory relief; for an order compelling the sheriff to seize the $325 for delivery to plaintiff and an order compelling Rowe to pay said sum over, and for other relief.

The sheriff, Rowe, and Hardy interposed general demurrers. Cronin, Young and Palumbo interposed a joint general demurrer and demurred specially "that there is another action pending between the same parties." All the demurrers were sustained without leave to amend.

[1] Turning first to the question of the sheriff's liability, it is to be observed at the outset that the property in dispute was not absolutely exempt from execution but was merely subject to exemption upon exercise of the privilege by the debtor. Code Civ.Proc., sec. 690.26. It is significant that there is neither an allegation that the sheriff is involved or participated in any conspiracy with the other defendants to deprive plaintiff of his exemption privilege, nor that he had actual knowledge that the money in the hands of the garnishee was subject to a claim of exemption. Plaintiff's attempt to impose liability on the sheriff is predicated essentially on the contention that he was not afforded an opportunity to claim his exemption because the sheriff failed to give him notice that he was running a garnishment in aid of execution upon money owed plaintiff in Young's possession. This contention is without substance or warrant, for it professes to impose on the sheriff an obligation neither inherent in his office nor specified by law as one of his official duties.

[2,3] There is no provision in the pertinent sections of the Code of Civil Procedure which requires the levying officer to notify a judgment debtor that money belonging to him and held by a third party is

being levied on, nor have we been referred to any case imposing such obligation in the absence of statutory mandate. Had the Legislature intended to impose such a duty on the sheriff in its elaborately detailed development of a statutory scheme of attachment and garnishment procedures and the granting of exemptions from execution, Code of Civil Procedure, secs. 537–561, 681–713, it is not to be doubted that it would have ascribed that responsibility to the sheriff; but it has pointedly refrained from so doing. It is patent that this omission was deliberate, for, as will subsequently appear, the primary responsibility for protecting the interests of the judgment debtor in a proper case lies with the garnishee. Clearly, the Legislature did not deem it incumbent on the sheriff, as a stranger to the proceedings and as a ministerial officer charged with the function of executing orders not manifestly irregular or void on their face, Gov't Code, sec. 26608; First National Bank v. McCoy, 112 Cal.App. 665, 297 P. 571, to be saddled with the burden of searching for and notifying the judgment debtor in every case where he is directed to serve a writ of garnishment upon the ground, perchance, that the property levied on may be susceptible to a claim of exemption. The reason for this omission is not difficult to ascertain. All that the sheriff knows about the transaction derives from the writ commanding him to make the levy. He is not expected to know, nor is he advised of, the place of abode or residence of the vast number of judgment debtors whose assets he is directed to garnish, and it would be a virtually insuperable, if not impossible, undertaking for him to attempt to seek out such persons, who may be scattered in various parts of the state, to apprise them of a garnishment. Contrary to plaintiff's assertion, a statute does not abridge due process of law by failing to provide notice of garnishment proceedings by a levying officer and it has been held upon the highest authority that a statute authorizing the issuance of a garnishment in aid of execution without notice to the judgment debtor is constitutional. Endicott-Johnson Corp. v. Encyclopedia Press, 266 U.S. 285, 288, 45 S.Ct. 61, 69 L.Ed. 288; High v. Bank of Commerce, 95 Cal. 386, 387, 30 P. 556; Coffee v. Haynes, 124 Cal. 561, 565, 57 P. 482; Foster v. Young, 172 Cal. 317, 322, 156 P. 476; Smith v. Dickson, 58 Iowa 444, 445, 10 N.W. 850; Ketcham v. Kent, 115 Mich. 60, 63, 72 N.W. 1110; Hexter v. Clifford, 5 Col. 168, 173. In Endicott-Johnson Corp. v. Encyclopedia Press, supra [266 U.S. 285, 45 S.Ct. 62], the Supreme Court of the United States addressed itself to the question in these terms: "However, the established rules of our system of jurisprudence do not require that a defendant who has been granted an opportunity to be heard and has had his day in court, should, after a judgment has been rendered against him, have a further notice and hearing before supplemental proceedings are taken to reach his property in satisfaction of the judgment. Thus, in the absence of a statutory requirement, it is not essential that he be given notice before the issuance of an execution against his tangible property; * * *. No established rule of our system of jurisprudence requires that such notice be given. On the contrary, it has been frequently held in the state courts that in the absence of a statutory requirement, it is not essential that the judgment debtor be given notice and an opportunity to be heard before the issuance of such garnishment. [Citations.]"

[4, 5] In the light of these principles and considerations, it is clear that plaintiff has stated no cause of action against the sheriff. It is not claimed that he was confederated in the conspiracy to defraud plaintiff of property subject to exemption; on the contrary, it is alleged that the other defendants concealed from the sheriff the character of the property levied on. The mere fact that in January, 1955, plaintiff had on file a complaint against Young and Palumbo for recovery of moneys owed him for personal services cannot, on any theory of constructive notice of "public records," impute vicarious knowledge of the contents of that complaint to the sheriff. It is well settled in this state that the mere pendency

of an action, without more, does not impart constructive notice to all the world of the fact of such litigation. MacDermot v. Hayes, 175 Cal. 95, 110, 170 P. 616; Bernhard v. Wall, 184 Cal. 612, 630, 194 P. 1040; Orekar v. Lager, 122 Cal.App. 370, 372, 10 P.2d 178. And, as has been pointed out, the sheriff has violated no duty to plaintiff enjoined on him by law nor is it made to appear that any valid or justiciable controversy exists between plaintiff and the sheriff. For the foregoing reasons, the judgment in favor of the sheriff was proper.

[6–8] An entirely different congeries of legal principles comes into play in considering the complaint against the remaining defendants.[4] Here we are confronted with the obligation of good faith and fair dealing imposed by law upon a garnishee and the positive duty devolving upon him not to wantonly sacrifice or wrongfully dispose of the property in his possession upon which levy has been made. Thus, it is the prevailing law that the garnishee, who knows that the property levied on is subject to a claim of exemption by his creditor and that his creditor is ignorant of the garnishment, has the duty, whenever practicable, to notify his creditor of the garnishment so that the latter may have the opportunity, if he desires, of exercising his claim of exemption. Hing v. Lee, 37 Cal. App. 313, 317–318, 174 P. 356; Harris v. Balk, 198 U.S. 215, 227, 25 S.Ct. 625, 49 L.Ed. 1023; Southern Ry. Co. v. Fulford, 125 Ga. 103; Missouri P. R. Co. v. Whipsker, 77 Tex. 14, 13 S.W. 639, 8 L.R.A. 231; Pierce v. Chicago & N. W. R. Co., 36 Wis. 283; Stewart v. Northern Assurance Co., 45 W.Va. 734, 32 S.E. 218, 44 L.R.A. 101; Czesna v. Lietuva Loan & Sav. Ass'n, 252 Ill.App. 612. These cases rely on the salutary principle that fair dealing requires such notification where possible in order that the right to claim the exemption be not prejudiced. A garnishee with knowledge that a fund in his possession is subject to exemption and that its owner has no knowledge of the garnishment is in complete control of the situation and must not needlessly imperil the fund in his hands or unnecessarily or arbitrarily subject it to the garnishment. He must act with reasonable caution in recognition of the owner's known rights and if he departs from his ordinary status as a neutral or disinterested stakeholder to give an improper advantage to one side or the other, he will be held liable to the party prejudiced. As stated in Hardy v. Hunt, 11 Cal. 343, 350, " 'The garnishee is regarded by the law somewhat in the light of a trustee, and is bound to protect, by legal and appropriate steps, the rights of all parties to the goods or credits attached in his hands. * * *' "

These principles are well exemplified in Hing v. Lee, supra, where the court propounds the controlling law in the following language, 37 Cal.App. at page 318, 174 P. at page 359: "Though exemption is a personal privilege, which the judgment debtor may waive if he choose, yet the privilege exists until he himself, or some one authorized to do so for him, waived it * * * and a garnishee, whether trustee *or mere debtor,* cannot waive it for him, *or deprive him of the opportunity to claim it without being liable to him in damages.*" (Italics added.) In the cited case, defendant bank held the proceeds of an insurance policy for plaintiff. The sum was subject to exemption from execution under Code of Civil Procedure, section 690.18. Plaintiff's judgment creditor caused a garnishment in aid of execution to issue on this sum held by the bank. The bank paid the sum to the sheriff. Plaintiff did not know of the garnishment and had no opportunity to claim his exemption. The court declared that the bank held the fund in trust and that it was a breach of duty to plaintiff to hand over the fund to the sheriff without offering plaintiff an opportunity to make his claim of exemption. The court also discussed defendant's contention that no trust existed and that the deposit merely created a debtor creditor relationship. In this connection, the court stated: "Considering it thus a

4. Hereafter reference to defendants applies to defendants other than the sheriff.

deposit, we feel satisfied that, in view of the ignorance of plaintiff of the levy of the execution, *it was the duty of the bank to notify him before paying over the money to the sheriff*. If it had been other personal property belonging to plaintiff, in the possession of defendant, a sale would be required, and it would have made no particular difference whether the bank gave notice or not, since the sheriff would have been required to give notice to plaintiff before the sale. But, it being money, the conduct of the bank made it impossible for plaintiff to claim this privilege of exemption, and hence appellant should be held responsible for the amount lost.

"In Freeman on Executions, third edition, section 416, it is said: 'Although as a general rule the exemption of property from execution can only be claimed by its owners, yet the rule does not apply to proceedings by garnishment. If the garnishee has in his possession any property or credit of the defendant not subject to execution he certainly may and he probably must, assert the fact of such exemption and thereby prevent the property from being taken and applied under the execution * * * When, however, the person summoned knows of a defense as that the debt or property sought to be reached is exempt from execution, we believe that it is his duty to assert such defense, or, at least, to inform his creditor of the proceeding and give him an opportunity to act for himself, and if the duty is not performed, that no judgment or order against the person summoned can protect him from liability to his creditor.'

"In the case at bar the garnishee knew, or, at least, had reason to know, that the property was exempt from execution and that the judgment debtor had no knowledge of the garnishment, and hence the payment of money to the sheriff does not protect appellant from liability to the judgment debtor." This states the rule here applicable.

[9] Applying these principles to the case at bar, it is obvious that plaintiff has stated a cause of action against the defendants. It is charged, in substance, that defendant Young had in his possession money subject to exemption as current wages for personal services required by plaintiff for the necessities of life and that these defendants conspired to defeat his ownership of that fund by a course of conduct calculated to deprive him of the opportunity to assert the exemption. To that end, Rowe obtained a writ of garnishment directing the seizure of the money in accordance with a prearranged plan that would enable Rowe to obtain the money in derogation of plaintiff's rights. Pursuant to that plan, Young answered the garnishment without disclosing that the money was subject to exemption and turned over the money to the sheriff for delivery to Rowe without any notification to plaintiff despite his knowledge that plaintiff was ignorant of the garnishment. It is thus clear that plaintiff has stated the formation of, and acts done pursuant to, a wrongful conspiracy to deprive him of a statutory privilege which resulted in economic detriment to him, and each participant is responsible as a joint tort-feasor for the ensuing damage regardless of whether he was a direct actor or the degree of his activity. Mox Incorporated v. Woods, 202 Cal. 675, 262 P. 302; California Auto Court Ass'n v. Cohn, 98 Cal.App.2d 145, 149, 219 P.2d 511. Plaintiff's complaint does not charge ordinary negligence on the part of a garnishee to notify him of the garnishment so that he might preserve his exemption rights, as in Hing v. Lee, supra. Here we are presented with the aggravated situation of a conspiracy in which the garnishee procured the execution and colluded to conceal the facts in order to frustrate plaintiff's right to promptly claim an exemption. A similar matter was considered in Smith v. Dickson, 58 Iowa 444, 10 N.W. 850, where defendant collusively procured a judgment to be rendered against him in a prior garnishment proceeding. He sought to resist plaintiff's present action to recover the sum due by interposing his payment

under garnishment as a defense. In repelling the argument the court remarked, 10 N.W. at page 851: "The defendant, knowing the money in his hands was exempt from execution, procured himself to be summoned as garnishee, failed to plead the exemption, or notify the plaintiff, so that he might do so.

This was in the nature of a fraud upon the plaintiff. The judgment against the defendant was rendered by collusion or procurement on his part, and he should not, we think, be permitted to set it up as a shield or defense in this action. Even if it be conceded the rule is that a garnishee defends only for himself, the defense must be in good faith. But here no defense was interposed, and in bad faith, in fraud of the rights of the plaintiff, the defendant procured a judgment against himself." Likewise, in the instant case, the defendants were so concerned with having the judgment creditor satisfied even out of exempt funds, that they conspired to foreclose him of his exemption rights by a violation of the garnishee's obligation to notify him of the occasion for the exercise of his privilege.

[10] Furthermore, the complaint also alleges that plaintiff inquired as to why the money was not paid while the garnishment proceedings were taking place. Young deliberately concealed from him, both by silence and by equivocal responses and statements, that the money had been levied on, in accordance with the common design. Plaintiff having requested information from Young on a matter peculiarly within his knowledge, it was Young's duty not to conceal any facts but to make a full and fair disclosure. This rule applies independently of any confidential relationship between the parties. Rogers v. Warden, 20 Cal.2d 286, 289, 125 P.2d 7; Bank of America v. Greenbach, 98 Cal. App.2d 220, 224, 219 P.2d 814. In Gillespie v. Ormsby, 126 Cal.App.2d 513, 527, 272 P.2d 949, 958, this court stated: "Deceit may be negative as well as affirmative; it may consist in suppression of that which it is one's duty to declare, as well as in the declaration of that which is false. * * * [O]ne who speaks is not only obligated to tell the truth but he is equally bound not to suppress or conceal any facts within his knowledge which materially qualify those stated [citations]." Having superior and exclusive knowledge of all the facts, and having been questioned by plaintiff as to why the money was not being paid him, and having a duty as garnishee to apprise plaintiff that his exempt property was at the time of the inquiry under garnishment, Young was bound to make a complete disclosure of the facts to enable plaintiff to fully understand the situation. His failure to do so under the circumstances constituted fraud.

In the light of the facts alleged and the controlling law, plaintiff has stated causes of action against the defendants and it was error to sustain the general demurrer.

[11, 12] There was also a special demurrer jointly made by defendants Young, Palumbo and Cronin that "there is another action pending between the same parties for the same cause." The only action pending alleged in the complaint was one between plaintiff and Young and Palumbo and would in nowise, from the face of the complaint, appear to encompass any of plaintiff's rights against Cronin. This ground of special demurrer was not available to Cronin. Where a complaint is good against one of the joint demurrants, the demurrer must be overruled as to all. Greenwood v. Mooradian, 137 Cal. App.2d 532, 546, 290 P.2d 955. Furthermore, where the plea in abatement because of a prior action pending is presented by demurrer, it is error to enter a final judgment with respect to that issue at the time the demurrer is heard. Lord v. Garland, 27 Cal.2d 840, 851, 168 P.2d 5.

The judgment in favor of the sheriff is affirmed. The judgments in favor of all other defendants are reversed.

MOORE, P. J., and ASHBURN, J., concur.

148 Cal.App.2d 257

Irwin R. WRIGHT, Plaintiff, Cross-Defendant and Appellant,

v.

Margaret WRIGHT and Scott Roberts, Defendants,

Margaret Wright, Cross-Complainant and Respondent.

Civ. 21860.

District Court of Appeal, Second District, Division 1, California.

Feb. 4, 1957.

Rehearing Denied Feb. 20, 1957.

Hearing Denied April 5, 1957.

Divorce action. Husband appeals from certain parts of judgment entered by the Superior Court of Los Angeles County, Parks Stillwell, J., pertaining to property settlement agreement and which awarded wife permanent alimony and attorney's fees to her counsel. The District Court of Appeal, Fourt, J., held that where agreement for division of property and payment of cash in lieu of husband's liability for future support of wife had been executed by parties prior to discovery of condition in wife rendering her probably incapable of self-support, there was no abuse of discretion in disregarding portion of settlement agreement and awarding her permanent alimony as well as additional attorney's fees.

Affirmed.

1. Husband and Wife ⇐30

Law favors the making of settlement agreements between husband and wife if it can be accomplished fairly and equitably, untainted by fraud, collusion, undue influence or the like. West's Ann.Civ.Code, §§ 158, 159.

2. Divorce ⇐236

Property settlement agreement entered into between husband and wife subsequent to commencement of divorce action and providing for substantially even division of community and joint tenancy property and payment of cash to wife in lump sum and limited monthly payments in lieu of husband's obligation for future support, was not an "integrated bargain" within doctrine providing that where agreement is integrated bargain, court cannot disapprove parts of agreement without setting aside entire agreement.

3. Divorce ⇐249(3)

In divorce proceeding, court has no jurisdiction to award to either party real property owned in joint tenancy by the parties.

4. Divorce ⇐236

In divorce action where agreement for property settlement and payment of cash in lieu of husband's liability for future support of wife had been executed prior to discovery of condition in wife rendering her probably incapable of self-support, there was no abuse of discretion by trial court in awarding wife property division under agreement which provided for an almost even division of community and joint tenancy property and in addition awarding her permanent alimony on reasonable basis as well as additional attorney's fees.

5. Divorce ⇐286

On review of divorce judgment respecting division of property and providing for support and maintenance of wife, court must take facts most favorably and strongly in favor of the respondent, including all reasonable inferences therefrom.

6. Divorce ⇐235, 286

Award of support and maintenance to the wife is a matter of discretion of the trial court which must be upheld unless there is a clear abuse thereof.

7. Divorce ⇐238

In determining matter of awarding support and maintenance to wife, court was not required to consider that wife could sell her home and thereby secure funds to live on.

8. Divorce ⇐238

When a wife is owner of nonincome-producing property she is not required to have recourse to such property for her support before seeking support from her husband.

9. Husband and Wife ⇐279(2)

In divorce action where an agreement for division of property and payment of cash in lieu of husband's liability for future support of wife had been executed prior to discovery of illness of wife who notified husband that she was rescinding agreement and endorsed each check from husband as being received as part payment under court order and not under agreement, conduct of wife did not waive her right to insist upon rescission.

10. Appeal and Error ⇐1010(1)

Only when a judgment rests upon some particular finding for its validity and support, will lack of sufficient evidence to support such finding necessitate a reversal.

11. Divorce ⇐286

In divorce action involving issue of whether wife could rescind executed settlement agreement on ground that it was executed before discovery of illness rendering her incapable of self-support, where finding respecting wife's physical condition was in the main substantially supported by evidence, fact that a portion of such finding was not literally and entirely supported by evidence, would not necessitate reversal.

Jerome Weber, David Hoffman, Los Angeles, for appellant.

Glenn S. Roberts, Los Angeles, for respondent.

FOURT, Justice.

This is an appeal from certain parts of a judgment entered on December 9, 1955, which pertains to a property settlement agreement, and which awards the defendant and cross-complainant permanent alimony and awards attorney's fees to her counsel.

The plaintiff, cross-defendant and appellant will hereinafter be referred to as the husband, and the defendant, cross-complainant and respondent will hereinafter be referred to as the wife.

A resume of the facts is as follows: The husband and wife were married on or about September 14, 1937, and separated about April 1, 1954. No children were born as the issue of the marriage. The husband brought an action in divorce July 15, 1954. The wife filed an affidavit for an order to show cause in re alimony pendente lite, attorney's fees and costs on August 3, 1954, wherein she set forth, among other things, that she had no money; that she was employed at a hat check stand two or three nights per week at 75 cents per hour plus tips; that she expected to work in the future if physically able; that there were two parcels of real property and two automobiles belonging to the parties. The husband filed an answering affidavit in which he set forth, among other things, that the wife made about $80 per month; that his monthly income from all sources was about $360; that his wife formerly had tuberculosis, but was cured six years ago; that she was physically fit and able to support herself and that $75 per month was reasonably necessary for the wife's support and was within his ability to pay.

The order to show cause was heard on August 12, 1954. At that time there was introduced into evidence an affidavit of Dr. Reginald H. Smart, M.D., who specialized in diseases of the chest. The affidavit of the doctor set forth that Mrs. Wright first became ill at the age of sixteen years when she had tuberculosis of the right kidney, which kidney was removed surgically; further, that in January, 1941, she was found to have tuberculosis in both lungs, and in March, 1942, was admitted to a sanatorium where she remained as a patient. Further, that in July, 1942, her right lung was collapsed by means of air refills, and in February, 1943, it was necessary to collapse the left lung by the same method. That she was continued on bilateral pneumothorax treatments in the sanatorium, and after discharge, the refills were administered in the office of the affiant, until June, 1948, when the treatments were discontinued. She had periodic checkups ever since that time. The affiant doctor diagnosed her ailment as tuberculosis of the bladder and kidney, arrested and far advanced, bilateral pul-

monary tuberculosis arrested; further that he had allowed her to work part-time as a hat check girl, but that he felt that she would never be able to work full-time or engage in any occupation which entails any degree of physical, emotional or mental strain. Also, that she had had intensive treatment for ten years before the disease was brought under control, and that any time she was subjected to undue stress or strain the disease might easily become reactivated and a relapse ensue; that it was imperative that she continue to live a sheltered life and not be expected to become self-supporting.

On August 16, 1954, the court commissioner filed his findings and recommended order. The substance of the findings are that the wife suffers from tuberculosis; that the husband struck the wife on numerous occasions and the wife was in fear; that the wife needed about $100 per month in addition to her earnings for her support and maintenance and payments on the family home. The court ordered the husband to pay $100 per month to the wife for her support and maintenance, and in addition thereto, to make the monthly payment of $56.96 on the house, plus stated attorney's fees and costs.

On August 26, 1954, the husband filed a first amended complaint wherein he alleged extreme cruelty on the wife's part and that there was community property belonging to the parties consisting of a single-family residence located in North Hollywood, and an income-producing property which consisted of a four-apartment building located in Van Nuys, and two automobiles and some furniture and furnishings. The husband requested judgment for a divorce and all of the community property.

On December 10, 1954, the wife filed an answer to the first amended complaint, wherein she set forth that the community property consisted of the two automobiles mentioned by the husband, some securities and some other items, and then set forth that the two parcels of real property were not community property, but were at all times owned in joint tenancy by the parties. She denied any acts of cruelty or other wrongdoing. On the same date she filed a cross-complaint wherein she alleged that the real property was owned as above set forth in the answer to the first amended complaint, and requested that all of the community property be awarded to her. She further alleged that for many years she had been treated for tuberculosis, that she was unable to work full time and to support herself and is constantly under the care of doctors; that she had no funds for support and maintenance and for costs and attorney's fees. She further claimed that the husband had physically assaulted her and that the court in this action had compelled him to remove from the residence place on or about August 21, 1954, and restrained him from harassing her.

The husband filed an answer to the cross-complaint on December 20, 1954, wherein he admitted the allegations with reference to the community property holdings, and that the real property was owned by them as joint tenants. With reference to the allegations of her health, he denied the same excepting that he admitted that at one time she had been treated for tuberculosis, but alleged that the condition was arrested many years ago, that she only saw a doctor for check ups not more than once a year, and further that she participated in athletics and had been employed for several years.

On February 4, 1955, an order to show cause filed by the husband for a modification of the support and maintenance allowance theretofore ordered came on to be heard. The court ordered that the order of August 12, 1954, be modified to provide that the husband pay to the wife $85 per month for her support and maintenance, and in all other respects the previous order was to remain in full force and effect.

On May 25, 1955, after considerable negotiations between the parties and their respective attorneys, a property settlement agreement was entered into. Under the agreement it was set forth that it was the

desire of the parties that their community and joint property be divided and "provision made for partial support of the wife". The husband was to pay to the wife $50 per month for six months, commencing July 1, 1955, and $25 per month for six months commencing January 1, 1956, such "payments to be the only payments made by husband to wife as and for the support and maintenance" of the wife. The wife was to receive the family residence in North Hollywood, the furniture and furnishings located therein, a 1951 Pontiac automobile, one-half of the Blair Holding Company stock in the possession of the husband and one poodle dog, and in addition thereto, $2,500 in cash. The husband was to receive the income property located in Van Nuys, a 1949 Pontiac automobile, all of the furniture then in his possession and one airedale dog. Each released the other from any claims arising out of the marital relation, and each released the other from any right to support and maintenance or otherwise, and each was to pay his or her own debts, and the husband was to pay to the wife's attorney a fee of $255 in addition to the fees previously allowed.

On June 29, 1955, the wife caused a letter to be directed to the husband through his attorney, wherein it was set forth that the wife had recently been to the doctor and that he, the doctor, had informed her, that a spot appeared on her lung and that she might be incapacitated. It was further set forth in the letter that the doctor advised that under the circumstances, the wife would be unable to support herself, and further that he urged that she not enter into any agreement whereby her husband, under such circumstances, would be released of all responsibility and she become a public charge. The letter also set forth that such was not anticipated at the time of the negotiations for the settlement agreement—that the wife was satisfied with the agreement excepting as to those portions which would discharge the husband from the obligation for the support and maintenance of the wife in the event she should become physically unable to provide for herself. There then followed the statement that by reason thereof, the wife would not be bound by the agreement and did rescind the same and offered to return all things of value which she had received by virtue of the agreement. Attention was called to the fact that the case was set for trial the following month and that it would be desirable to negotiate a new agreement, taking into consideration the present circumstances as related, and that if no such new agreement could be negotiated then the matter could be submitted to the court for adjudication.

At the time of the sending of the letter above mentioned all executory provisions of the agreement had been performed except the monthly payments to be made for her support and maintenance, and as of that date the wife was able to restore everything of value received by her under the agreement.

On July 6, 1955, the husband, through his attorney, by letter, rejected the rescission and elected to stand on the agreement. In this letter it was stated that "the basis of settlement was the valuation of the equity in the real properties as approximately equal"; it was further set forth that the wife had been gainfully employed and that there were no children and that the agreement "was eminently fair"; that it would not "be fair under the circumstances to surcharge Mr. Wright with her care".

The husband did then, on November 15, 1955, file an amendment to his first amended complaint wherein he alleged and set forth that since the filing of the first amended complaint the husband and wife had entered into a full and complete property settlement agreement which provided for a division of the community property and a cash settlement and other payments in lieu of support, maintenance and alimony, *that the agreement was fair and equitable,* and *requested that the agreement be approved* and made a part of the decree, and that the parties be ordered to comply with its terms.

The wife answered the amendment by admitting that an agreement was executed

and alleged that it had been rescinded. She then set forth that her physician had made a report on her health in an affidavit form, dated August 6, 1954, which was on file; that the doctor had examined her after the execution of the agreement and that her health had degenerated; that a spot was forming on her lung and she might become permanently disabled; that such condition was not known at the time she executed the agreement, and that she had rescinded and requested the court to make an order directing the husband to pay to the wife a reasonable sum as permanent alimony, together with attorney's fees and costs and that the court approve the division of the community property as provided in the agreement, or in the alternative, the court make such disposition of the same as might be just and equitable.

At the trial no evidence was presented by the husband on his amended complaint, excepting in connection with the validity of the agreement, the circumstances under which it was drafted, the earnings and expenses of the husband, the extent and nature of the community property and the joint tenancy property, and the condition of the wife's health and her knowledge thereof. The wife testified that she had, for about a month previous to the trial, been engaged in a market, wrapping meat, and had quit because of exhaustion, suffering and a breaking down of her health; that she had been examined by the doctor a few days after the agreement was signed and the doctor said he saw a spot on one lung and that he was concerned about it, that it was a new development; that she then called the husband and told him about it, and stated that from what the doctor had told her, she wanted "the alimony set aside so that the Court could help me decide what should be done so that I could be taken care of." She also related how the husband had slapped, knocked her down and choked her, and stated that he wanted a divorce, and further that when he consumed too much liquor he became foul and vulgar and hit her.

Dr. Reginald H. Smart testified that he specialized in diseases of the chest, and testified as to the matters which were set forth in his affidavit in the order to show cause proceeding on August 12, 1954; further, that she came to him from Northern California, where she had been a patient in a sanatorium for about two and a half years. He stated that after the kidney was removed the tubercular condition developed in both lungs; that both lungs had been partially collapsed by means of air refills and that when she first came to him, at regular intervals he would introduce air into both chest cavities to continue the collapse. He further stated that she had been under his care and treatment at periodic intervals since he first saw her. That the last examination was on November 4, 1955, and based upon the examinations he had made of her, it was his opinion that she was not able to take a full-time job without running a grave risk of reactivating her tuberculosis, which, as he stated, involved not only both lungs but involved the genitourinary system. He further said that he could not see how her condition could improve and it could get worse. He related that the damage to the lungs was permanent and as a result, among other things, their normal function of getting oxygen into the blood and carbon dioxide out of the blood had been damaged, which in turn placed a strain upon her heart. He stated that upon the last examination he found evidence of some dilatation of the right ventricle or the pumping part of the heart, which he indicated confirmed his judgment because she had been regularly employed at a market for about a month prior to the trial. As the doctor put it, "I feel that her recent experience with working full time is evidence that is confirmatory evidence that she should not be required to work full time in a job that involves any physical exertion of any degree." The doctor further stated that he recalled the husband calling him some months previously when the doctor and the husband had

some discussion about the physical condition of the wife, and it was the doctor's impression that the husband felt she was able to do more than the doctor thought she was able to do. The husband produced, as his witness, a Dr. Elliott A. Rouff, who also confined his practice to the diseases of the chest. Dr. Rouff stated that in his opinion she "could do a sedentary type of work, something not requiring any physical exertion to any extent," and not even that type of work on a full-time basis at the start. He further stated in substance that his opinion as to her ability to work did not differ materially from the expressed opinion of Dr. Smart.

The court found that the community property consisted of household furniture and furnishings, a 1949 Pontiac automobile and a 1951 Pontiac automobile, certain Blair Holding Company stock and two dogs, and that this property had been fairly and equitably divided by the agreement. Also, it was found that the real property was owned by the parties as joint tenants, and that there was no community property interest in any such real property, and no order was made as to its disposition. It was then found that the parties had entered into an agreement dated May 25 1955, under which the husband was to pay the amounts heretofore set forth, and that the husband had paid to the wife all sums provided for in the agreement which accrued to the date of the trial. As to the health of the wife, the court found that she had the ailments and diseases described by the doctors and that she was unable to engage in any occupation which entailed any degree of physical, emotional or mental strain. Further, that she has no separate income and no property other than that received under the agreement. Also, that shortly after the agreement was signed, and on or about June 24, 1955, that the wife was examined by her doctor at which time she was advised that her physical condition had deteriorated and that she might be developing a heart condition; that following the examination the wife gave a notice of rescission; that the husband refused to rescind; that thereafter the husband paid the amounts specified in the agreement to the wife; that she by endorsement on each check set forth that the payments were received to apply on the court order for support and maintenance which had theretofore been made, and had not been modified, which order provided for $85 per month for the wife. The court also found that the portion of the agreement providing for the payments of $50 per month for six months, and $25 per month for a further six months and the waiver of attorney's fees was and is inequitable and unfair to the wife, and that the court should not approve such portions of the agreement; that $100 per month was found to be reasonably necessary for the support and maintenance of the wife, and that the husband had the ability to pay such an amount; that credit should be given for the sum of $2,500 paid by the husband to the wife, as well as the monthly payments made after the date of the agreement; that such credit should first apply on the obligations of the husband under the provisions of the temporary order for support and maintenance in effect at the time of trial, and the balance applied on future alimony. The court then ordered that the husband pay to the wife as alimony $50 on the first day of each month for thirty-nine months, and commencing March 1, 1959, and the first of each month thereafter, pay the sum of $100 per month, the payments to continue until death or remarriage, or until the further order of the court. The wife's attorney was allowed an additional $150 on account of attorney's fees.

The husband contends that the court does not have the right to set aside the agreement if fairly entered into; that the court cannot disapprove parts of the agreement without setting aside all of the agreement, where it is an integrated bargain type; that the court cannot add a provision for alimony without changing basically the agreement; that there was insufficient evidence to support the rescission; that several

of the findings of fact are not supported by the evidence and that Mrs. Wright is estopped by her conduct after sending the notice of rescission.

[1] It is clear that the law favors the making of agreements between husband and wife if it is accomplished fairly and equitably, untainted by fraud, collusion, undue influence or the like. Civ.Code, §§ 158, 159; Hogarty v. Hogarty, 188 Cal. 625, 206 P. 79; Murray v. Murray, 28 Cal. App. 533, 153 P. 248; Anthony v. Anthony, 94 Cal.App.2d 507, 512, 211 P.2d 331. As said in Adams v. Adams, 29 Cal.2d 621, at page 624, 177 P.2d 265, at page 267: "A property settlement agreement, therefore, that is not tainted by fraud or compulsion or is not in violation of the confidential relationship of the parties is valid and binding on the court." In the same case it was said, 29 Cal.2d at pages 624–625, 177 P.2d at pages 267–268: "The parties, upon separation, may agree to provide for support and maintenance in a variety of ways, which generally fall into three categories. The first includes contracts in which the support and maintenance provisions are in the nature of alimony, whether in lump sum or monthly payments, and are separable from the provisions that divide the property. The contract may even provide solely for support and maintenance without reference to a division of property. These contracts, if equitable, are enforceable even though not presented to the court in a divorce action. Sanborn v. Sanborn, 3 Cal. App.2d 437, 442, 39 P.2d 830. If presented to a court in an action for divorce the court has the power to modify the provisions for alimony before or, if the provisions are incorporated in the decree, after judgment in accord with its power over alimony generally. Hough v. Hough, 26 Cal.2d 605, 613, 160 P.2d 15.

"The second category includes, among others, contracts in which the 'support and maintenance' provisions are not in the nature of alimony but are part of the division of property. This category also includes contracts that provide solely for the payment of monthly or lump sums 'in lieu of community property.' Such contracts must be treated like other property settlement agreements dealing solely with divisions of property. Ettlinger v. Ettlinger, 3 Cal.2d 172, 177–178, 44 P.2d 540. If the contract was not fraudulent when made, and there was no violation of the confidential relationship, it will be binding on the court and there can be no modification of the payments after the decree without the consent of the parties. Puckett v. Puckett, 21 Cal.2d 833, 840, 136 P.2d 1. The court in the divorce action may grant alimony to the wife and approve the agreement as well, since these agreements purport to deal only with the division of the property of the parties. Civ.Code, § 139; see Puckett v. Puckett, supra, 21 Cal.2d at page 841, 136 P.2d 1. It is often difficult to determine, in a contract containing provisions for division of property and payments of 'support and maintenance,' whether the payments are part of the division of property or are in the nature of alimony. 'It would be better practice to have that determination clearly and concisely made by the trial court when it renders the decree of divorce. Considerable confusion and uncertainty could be avoided in that fashion. The court could examine the agreement, the circumstances under which it was made, and the nature and value of the property as related to its division and the amount of the periodic payments giving consideration to the statutory rules on the subject.' Hough v. Hough, supra, at page 615 of 26 Cal.2d, at page 20 of 160 P.2d; Puckett v. Puckett, supra, 21 Cal.2d at page 841, 136 P.2d 1.

"The third category includes contracts in which the wife waives all support and maintenance, or all support and maintenance except as provided in the agreement, in consideration of receiving a more favorable division of the community property. The court cannot add a provision for alimony to such contracts without changing basically the agreement of the parties as to the division of their property."

[2] It appears to us that in the instant case there can be no doubt that the community property was divided in a substantially even manner. The court had nothing to do with dividing the real property owned and held by the parties as joint tenants. It further appears to us that the provision for support and maintenance, as it is set forth and provided in the agreement in question, is separable from the provisions having to do with the property division—in short, that the agreement in the instant case is not what is referred to as an "integrated bargain".

In the case of Moog v. Moog, 203 Cal. 406, 264 P. 490, the husband-appellant agreed to pay the wife-respondent, in July, 1921, $50 per month as and for her support and maintenance. The husband, on occasions, paid in advance for a year at a time. The amount of alimony allowed by the court was the same as mentioned in the agreement between the parties, but the dispute arose because the judgment was entered in January, 1926, and the plaintiff had received all payments due her under the contract until March, 1927. The court found that the contract was not induced by fraud or undue influence. The husband contended that the wife had accepted the benefits of the contract for six years and she should be bound by the same, and the court could not nullify the agreement without requiring her to return the money she had received in advance payments. The court further found that the wife had, since the agreement was entered into, become totally blind and had become afflicted with tuberculosis and that she was without means. The court said in deciding the case, 203 Cal. at page 408, 264 P. at page 491:

"With reference to ordinary contracts, the position of appellant is sound, undoubtedly; but in actions for divorce there is a very large discretion vested in the trial court in the allowance of permanent support for the wife, where she is granted a divorce, even in the face of contracts of settlement between the parties. Such contracts must be subjected to the examination of a court in the divorce action and derive their sanction from a decree made by the court with knowledge of all the facts. [Citing cases.] The rule stated in Corpus Juris, vol. 19, p. 218, is to the effect that where provision has been made by the husband for the wife, by separation agreement, the wife is not entitled to temporary alimony, unless she offers to return what she has received or shows that the amount provided for in the agreement is not sufficient for her needs. The latter condition existed in the instant case."

The court then concluded the case by saying, 203 Cal. at page 409, 264 P. at page 491: "It was this unfortunate condition, doubtless, which influenced the court in making the award of alimony in addition to what had already been received by plaintiff. Under the circumstances, we see no reason to interfere with the exercise of discretion vested in the trial court."

In the instant case the husband brought the agreement before the court in his amendment to his first amended complaint, and asked that it be approved. The wife set forth her reasons why it should not be approved and as a consequence, the matter became a part of the issues to be litigated. In other words, the parties asked the court to adjudicate the fairness of the agreement under the circumstances. Had the husband so desired, he could have rested on the contract, but he elected to submit it to the court. Hough v. Hough, 26 Cal.2d 605, 160 P.2d 15.

[3] The matter of the disposition of the community property was no particular problem in the case before us because each took one dog, one automobile, the furniture or furnishings in his or her possession, and an equal part of the securities. There was little, if any problem about the real properties, in that each of them admitted that the properties were held and owned by them as joint tenants. The court, in any event, had no jurisdiction to award the real property to either party. Fox v. Fox, 18 Cal.2d 645, 117 P.2d 325. Each of the

real properties was encumbered. The Van Nuys property produced sufficient income to pay the installments on the debt against it, and for many months at a time, produced monies over and above such indebtedness. The North Hollywood place produced no income. In the affidavit of the wife on the order to show cause in the first instance she set forth that the gross value of the Van Nuys apartments was $28,000, with a debt of $15,460 against it, or a net value of $12,540; that the North Hollywood residence had a gross value of $16,000 with a debt of $6,500 against it, or a net value of $9,500. The husband set forth in his answering affidavit that his net financial worth was $24,000 (community property) and made no statement concerning the real property belonging to the husband and wife. Presumably, he was satisfied with what the wife had set forth in her affidavit as to the values. In any event, he did nothing and said nothing about her statement of values.

In an affidavit for an order to show cause in re attorney's fees in March, 1956, the wife set forth that the residential property had a net value of $9,000, and the apartment house property had a net value of $12,000. The husband made no reply to that claim of valuation, as set forth by the wife. It would seem that if there was any unfavorableness in the division of the real property, it was in the husband's favor, and against the wife. In any event, there is nothing from the transfer of the real properties, or from the division of the community property, that would lead us to believe that it was contemplated that the agreement was an integrated bargain. No one seems to contend that the wife got any advantage out of any transfer.

The agreement recites, following the provisions for the support and maintenance installments which total $450, that "the aforesaid payments to be the only payments made by Husband to Wife as and for support and maintenance." The concluding sentence of the paragraph providing for what the wife was to receive is, "In addition thereto, Husband agrees to pay to Wife the sum of $2500 cash upon the execution of this Agreement, receipt by Wife of which is hereby acknowledged."

[4] No place is it set forth in the agreement that the money payments are to be "in consideration of the property division". We believe that the court properly proceeded to reject the agreement as to support and maintenance and grant alimony upon a reasonable basis. Adams v. Adams, supra; Puckett v. Puckett, 21 Cal. 2d 833, 136 P.2d 1; Alexander v. Alexander, 88 Cal.App.2d 724, 199 P.2d 348.

[5, 6] In this case the trial court had before it "the agreement, the circumstances under which it was made, and the nature and value of the property as related to its division and the amount of the periodic payments giving consideration to the statutory rules on the subject." Adams v. Adams, supra [29 Cal.2d 621, 177 P.2d 268]. On the appeal, we must take the facts most favorably and strongly in favor of the respondent, including all reasonable inferences therefrom. Cameron v. Cameron, 85 Cal.App.2d 22, 27, 192 P.2d 89. Furthermore, the award of support and maintenance to the wife is a matter of discretion of the trial court, and it must be upheld unless there is no substantial evidence to support it, or in other words, that there is a clear abuse of discretion. Horton v. Horton, 18 Cal.2d 579, 583, 116 P.2d 605.

[7, 8] In determining the matter the court was not required to consider that the wife could sell her home and thereby secure funds to live on. "The law is settled in California that when a wife is the owner of nonincome producing property she is not required to have recourse to such property for her support before seeking support from her husband." Buehler v. Buehler, 73 Cal.App.2d 472, 475, 166 P.2d 608, 610. See, also, Farrar v. Farrar, 45 Cal.App. 584, 586, 188 P. 289. Substantially the same thing may be said about the allowance of attorney's fees, as has been

said about the support for the wife. Heck v. Heck, 63 Cal.App.2d 470, 147 P.2d 110; Westphal v. Westphal, 122 Cal.App. 388, 390, 10 P.2d 122; Fallon v. Fallon, 83 Cal. App.2d 798, 189 P.2d 766.

[9] We can see nothing in the conduct of the wife which would constitute a waiver of her right to insist or stand upon the rescission. On each check which she received from the husband she made an endorsement to the effect that such check was being received by her as part payment of the order of court and not under the contested agreement. The husband never, at any time, took any steps to make it plain on the checks or otherwise that the acceptance of such check would constitute a discharge of the provisions of the agreement. The court order in the first instance continued until modified or replaced by the decree, and the husband took no steps to modify the order at the time the agreement was executed, and in our opinion, the trial court very properly considered the delinquent amounts in giving the husband appropriate credit upon the $2,500 paid to the wife.

[10, 11] It is true that Finding Number 7 was not entirely supported by the evidence. The doctor, apparently, did not locate the actual heart condition until a few days before the trial in November, and not in June or July. However, the doctor did examine the wife shortly after the agreement was signed, and he did advise the wife of a new development. There is no doubt that the finding is, in the main, substantially supported by the evidence, if not literally and entirely so. In American National Bank of San Francisco v. Donnellan, 170 Cal. 9, 15, 148 P. 188, 190, it was said: "* * * that it is only when a judgment rests upon some particular finding for its validity and support that the lack of sufficient evidence to support such finding, * * * will necessitate a reversal of the case."

It would, in our opinion, be unconscionable to hold, under the circumstances of this case, that the wife should be compelled to accept the terms of the agreement for her future support and maintenance. The trial court, quite properly from the evidence before it, held that the agreement was, as to her, unfair and inequitable.

The judgment is affirmed.

WHITE, P. J., and DORAN, J., concur.

Hearing denied; CARTER, TRAYNOR and SCHAUER, JJ., dissenting.



148 Cal.App.2d 276

The PEOPLE of the State of California, Plaintiff and Respondent,

v.

John Henry CLIFTON, Defendant and Appellant.

Cr. 5671.

District Court of Appeal, Second District, Division 2, California.

Feb. 4, 1957.

Prosecution for burglary. The Superior Court, Los Angeles County, Charles W. Fricke, J., entered judgment of conviction and defendant appealed. The District Court of Appeal, Moore, P. J., held that evidence was sufficient to sustain conviction.

Affirmed.

1. Criminal Law ⇐1144(13)

In determining whether evidence is legally sufficient to support judgment, District Court of Appeal must assume truth of all facts found and all inferences reasonably deducible therefrom. West's Ann.Pen. Code, § 459.

2. Burglary ⇐29

In prosecution for burglary, defendant's intent to enter apartment for purpose of assaulting former wife would be inferred from the established fact as to his conduct before his entrance and after his exit. West's Ann.Pen.Code, § 459.

3. Burglary ⇐29

In burglary prosecution where it was charged that defendant entered apartment occupied by former wife with intent to commit assault by means of force likely to produce great bodily injury, court acted within its province in inferring that tire iron, in defendant's possession when he entered apartment, was a deadly instrument and means that could if applied produce great bodily harm. West's Ann.Pen.Code, § 459.

4. Criminal Law ⇐1159(2)

Reviewing court is powerless to reweigh the evidence.

5. Burglary ⇐2

Where defendant entered apartment of former wife with intent to assault her, fact he did not commit assault was immaterial as burglary was complete the moment he entered her home with intent to steal her possessions or to do her bodily harm.

6. Burglary ⇐41(3)

In burglary prosecution where defendant claimed his intoxication prevented his having a specific intent, evidence supported implied finding that he had formed a specific intent at time of entering apartment.

7. Burglary ⇐41(1)

Evidence sustained conviction for burglary in first degree. West's Ann.Pen. Code, § 459.

Fred H. Almy, San Bernardino, for appellant.

Edmund G. Brown, Atty. Gen., Elizabeth Miller, Deputy Atty. Gen., for respondent.

MOORE, Presiding Justice.

Convicted by the court without a jury of burglary in the first degree and sent to prison, appellant demands a reversal of the judgment on the ground that the evidence was insufficient to support a finding that he had committed a felonious battery upon the prosecutrix or had "the specific intent nccessary to a burglary."

Appellant had been the husband of Opal Saunders for more than seven years prior to their divorce in 1952. On January 17, 1956, at 10 p. m. he called at Opal's apartment on Harcourt Street where she lived with her son, ten years of age. When she answered the doorbell and asked him what he wished, he demanded that she open the door and said he desired to talk about "me and you." She replied that the son had gone to sleep and that he and she had nothing to talk about and that she would not open the door. He retorted: "Are you going to open the door or do you want me to knock it down and come in and get you?" On her refusal he began to knock down the door. Opal ran to her child, took him out through another door and visited her neightbors, the Townsends. She heard the "crack of glass and the sounds of his breaking of everything" in her apartment. He broke the mirrors, dishes, china closet, buffet and furnishings of the living room and dining room. The police came in response to the call of the Townsends. She then returned home to find it "all torn up"; the front door was torn off, and had to be replaced; the carpeting was bloody; the dishes, all the glass in the china closet and the mirrors were broken; glass was strewn all over the floor, food was over the curtains and the drain board was on the floor. The total damage exceeded $1,000.

Witness John C. Long was aroused by the sounds of destruction. Investigating, he saw appellant emerge from Opal's apartment with a tire iron in his hand. He followed the staggering miscreant down the street about two blocks and witnessed his arrest. Officer Sentam who apprehended the marauder found him with a tire iron in his rear pants' pocket, bleeding from cuts on his hand and face; not drunk, but his breath betrayed his consumption of alcohol. He told the officer that he had already been to the location on Harcourt; that he had broken into the house and smashed up the interior; that his former wife lived there; that she be-

longed to him and he had been having trouble with her; that he knew his acts violated the law; that they might take him to jail but as soon as he got out he would do the same thing over again. "I'll bust her up the same as I did the house." As he stood on the Harcourt lawn he addressed Opal as follows: "I'll kill you." He told the police that he would not hurt "that boy" but he "would sure fix her up good; I would bust her up."

Appellant contends that he had no intention of striking his wife when he entered her apartment; that he cannot recall having the tire iron then or whether he got it in Opal's apartment; that he did not remember telling her that he would kill her; that he had been drinking heavily; had drunk his share of a quart of whiskey after five p. m. and some beer besides. He denied the testimony of the officers or did not recall it. It was the testimony of Miss Hickman that when she drank a can of beer with him at five o'clock, he was drunk.

Appellant's contention that he did not assault with a deadly weapon or an assault with means likely to do great bodily harm, Pen.Code, § 245 in Mrs. Saunders' apartment is utterly gratuitous. He was not even accused of having assaulted anyone. He was charged with burglary as defined by the Penal Code, section 459. That section provides that every person who enters a house with intent to commit a felony is guilty of burglary. The Information alleges that he entered the house occupied by Opal Saunders *with intent* then and there "feloniously to commit assault by means of force likely to produce great bodily injury * * * a felony."

[1–7] A finding of his guilt is determined not only by his crime within the apartment but also by his conduct before his entrance and after his exit. He threatened to go in and get her against her will. His subsequent acts indicate that he meant to do no less. On leaving the wrecked apartment, he had a tire iron in his hand and retained it until his arrest. It is an easy inference that he took that instrument into the apartment and that he intended to inflict harm upon Opal Saunders. Such inference is supported by his subsequent declarations that (1) he will "bust her up the same as I did the house"; (2) "I'll kill you"; (3) "would sure fix her up." From such declarations the court might justifiably have found that on entering her apartment he intended to do violence to the body of Opal Saunders. In determining whether the evidence is legally sufficient to support the judgment, we must assume the truth of all facts found and all inferences reasonably deducible therefrom. People v. Franklin, 106 Cal.App.2d 528, 530, 235 P.2d 402. Appellant's intent may therefore be inferred from the established facts. Ibid. Likewise, the court acted within its province in inferring that the tire iron was a deadly instrument and was a means that could if applied produce great bodily harm. See People v. Kinman, 134 Cal.App.2d 419, 422, 286 P.2d 28; People v. Lee, 23 Cal.App.2d 168, 170, 72 P.2d 572. In view of the violent temper of appellant as demonstrated by him on the occasion in question, of his threats then to "come in and get" Mrs. Saunders, and of his threats made to her and to the officers, it was a reasonable inference that appellant entered her apartment with the intent to assault the lady with force likely to produce great bodily injury. By reason of the latter fact as well as the fact that he entered an inhabited dwelling house at night, his burglary was of the first degree. Penal Code, § 460. The fact that he did not assault her is immaterial. His crime was complete the moment he entered her home with intent either to steal her possessions or to do her bodily harm. People v. Shaffer, 81 Cal.App. 752, 754, 254 P. 666; People v. Rhodes, 137 Cal.App. 385, 30 P.2d 1026. The contention that appellant's drunkenness prevented his having a specific intent to commit a burglary misses the mark. The evidence on his state of inebriation was conflicting. The court adopted the proof that he was not. Therefore, the implied finding that he was able to conceive a specific intent is supported. The reviewing court is

powerless to reweigh the evidence. People v. Newland, 15 Cal.2d 678, 681, 104 P.2d 778. Appellant's contention that the instrument carried into Mrs. Saunders' home was not a deadly weapon would have been pertinent had it been presented to the jury. But it has no virtue to a reviewing court. Whether it was deadly was disposed of by the jury's implied finding. People v. Newland, supra.

Affirmed.

FOX and ASHBURN, JJ., concur.



148 Cal.App.2d 88

Joseph FLEISHMAN, Plaintiff and Respondent,

v.

David BLECHMAN and Frances Blechman, his wife, Defendants and Appellants.

Rachel FLEISHMAN, Plaintiff in Intervention and Appellant,

v.

Joseph FLEISHMAN, David Blechman, and Frances Blechman, his wife, Defendants in Intervention.

Civ. 16507.

District Court of Appeal, First District, Division 1, California.

Jan. 29, 1957.

Rehearing Denied Feb. 28, 1957.

Quiet title suit by trustor of revocable oral trust to obtain declaration of exclusive ownership of trust property. The Superior Court, City and County of San Francisco, John B. Molinari, J., rendered judgment, and certain parties appealed. The District Court of Appeal, Agee, J. pro tem., held, in part, that in view of apparent interest of trustor's wife in accounts from which balance of purchase price for trust property had been paid, evidence was insufficient to sustain finding that entire balance had been put up by trustor.

Judgment affirmed in part and reversed in part and case remanded.

1. Appeal and Error ⇐110

Order denying new trial motion was nonappealable.

2. Trusts ⇐59(1)

Trust was revocable in absence of agreement that it was to be irrevocable. West's Ann.Civ.Code, § 2280.

3. Trusts ⇐62, 91

A constructive or resulting trust is a remedial device created to prevent unjust enrichment.

4. Trusts ⇐325

In absence of repudiation or bad faith by trustees under express oral trust, they are entitled to presumption that they have acted in good faith. West's Ann.Civ.Code, § 2216.

5. Trusts ⇐280

Where trustees under oral trust made June, 1950 payment to wife of trustor, instead of to latter, under provision requiring such if trustor became disabled, and payment to wife was made in good faith and upon reasonable belief that trustor had become disabled, trustees would not be charged with such payment, though it was subsequently determined that trustor had not become disabled. West's Ann.Civ. Code, § 2269.

6. Executors and Administrators ⇐207

Though trustees under revocable oral trust, which gave them authority to make payments to wife of trustor if trustor became disabled, would be charged, after notice of revocation, with payments made to wife in good faith and in reasonable belief that trustor had, though he had not, become disabled, trustees would be entitled to reimbursement from wife's estate. West's Ann.Civ.Code, § 2269.

7. Trusts ⇐59(4)

Any writing, including verified complaint, which clearly manifests intention of trustor to revoke trust, is sufficient

writing under section providing that unless expressly made irrevocable by instrument creating trust, every voluntary trust shall be revocable by trustor by "writing filed with trustee." West's Ann.Civ.Code, § 2280.

See publication Words and Phrases, for other judicial constructions and definitions of "Writing Filed With Trustee".

8. Trusts ⇐59(4), 282

Verified complaint in quiet title suit filed by trustor of revocable oral trust, was sufficient written notice to trustees of revocation of trust; and it thereupon became their duty to wind up and terminate trust, render accounting and convey trust estate to whoever was rightfully entitled thereto, especially where, under circumstances, formal written notice of revocation would have been ineffectual. West's Ann.Civ.Code, §§ 2280, 3532.

9. Evidence ⇐63

There is a presumption of competency.

10. Trusts ⇐46

In quiet title suit by trustor of revocable oral trust which authorized trustees to make payments to trustor's wife if trustor became disabled or incompetent, evidence sustained finding that trustor, who had purported to revoke trust, was neither disabled nor incompetent.

11. Trusts ⇐59(4)

Where husband acted as trustor in creation of oral revocable trust with full knowledge and consent of wife, and oral agreement of trust was between husband and trustees, husband and wife were co-beneficiaries under trust but not co-trustors, and wife need not have joined in husband's revocation of trust.

12. Trusts ⇐59(1)

Even if husband did not have authority from wife to revoke trust, he did have authority in his capacity as trustor to revoke insofar as his own separate interest therein was concerned, and such revocation would necessitate termination of trust, at least as to that interest, and would require determination of respective interest of husband and wife in trust.

13. Quieting Title ⇐7(1)

Quiet title action is proper type of action to determine validity of any adverse claims based upon asserted trusts. West's Ann.Code Civ.Proc., § 738.

14. Quieting Title ⇐43

Where answer of trustees to trustor's quiet title action alleged that they owned one-fifth interest outright in trust property, and held title to remaining four-fifths as trustees under "irrevocable" trust, these allegations would be deemed controverted. West's Ann.Code Civ.Proc., § 462.

15. Quieting Title ⇐43

Where trustor of oral express trust brought action to quiet title to trust property in himself, and trustees answered claiming that trust was "irrevocable", issue whether trustor had revoked trust, if revocable, was properly before court for determination under these pleadings. West's Ann.Code Civ.Proc., §§ 462, 738.

16. Evidence ⇐594

Even though no other witness directly contradicted witness, trial court was not required to accept her testimony as the truth.

17. Husband and Wife ⇐262(1)

Where evidence shows without conflict that husband has voluntarily caused funds to be put into accounts standing in name of wife, there is presumption that he intends such funds to be the separate property of the wife.

18. Husband and Wife ⇐232(3)

In quiet title suit by trustor of revocable oral trust to obtain declaration of exclusive ownership of trust property, in view of apparent interest of trustor's wife in accounts from which balance of purchase price for trust property had been paid, evidence was insufficient to sustain finding that entire balance had been put up by trustor.

Hyman & Hyman, San Francisco, for defendants and appellants David Blechman and Frances Blechman.

Delany, Fishgold, Freitas & Rowe, Matthew M. Fishgold, San Francisco, for plaintiff in intervention and appellant Rachel Fleishman.

Wolff & Wolff, Harry K. Wolff, Jr., Harry K. Wolff, Sr., San Francisco, for plaintiff and respondent Joseph Fleishman.

AGEE, Justice pro tem.

This litigation was commenced on June 29, 1950, by the filing of a complaint by Joseph Fleishman against David Blechman and Frances Blechman, his wife, to quiet title to certain real property on the southeast corner of Irving Street and 8th Avenue, in the City and County of San Francisco. David and Frances answered that they were the outright owners of a one-fifth interest and held the remaining four-fifths interest under an oral trust for the benefit of Joseph and his wife, Rachel. Rachel filed a complaint in intervention alleging a beneficial interest in the property and naming Joseph, David and Frances as defendants therein. Joseph died before the trial and his representatives were substituted for him. Judgment was rendered on December 3, 1953, decreeing that David and Frances were the owners of a one-fifth interest in the property and the rents therefrom and that they held the remaining four-fifths interest and the rents therefrom in trust for Joseph's representatives. Each interest was charged with its proportionate share of any necessary disbursements made for the maintenance and preservation of the property. David and Frances were ordered to execute a deed of said four-fifths interest to Joseph's representatives and account to them for said rents and disbursements since June, 1950. Rachel was denied any interest in the property. The respective motions of Rachel, David and Frances for a new trial were denied.

[1] David and Frances have appealed from all of the judgment, except the portion establishing their one-fifth interest, and from the order denying their new trial motion. Such order being nonappealable, the purported appeal therefrom is dismissed. Rachel has appealed from the entire judgment and from the order denying her new trial motion. The purported appeal from such order is likewise dismissed, for the same reason just stated. Rachel died during the pendency of this appeal and her representative has been substituted herein. For the purpose of simplicity, the original parties and their representatives are referred to herein as Joseph, Rachel, David and Frances, respectively.

Joseph and Rachel were married on February 27, 1943. They were then over 70 and 60 years of age, respectively. Each had children by previous marriages. Two of Joseph's children are his representatives herein and Frances is Rachel's daughter and administratrix. Joseph's main source of income was the rent received from properties on Pierce Street and on Divisadero Street, in San Francisco. He had a life estate in these properties, having deeded the remainder to his children.

The property which is the subject of this litigation was acquired by deed, dated April 23, 1947, and recorded May 5, 1947. It conveys the record title to David and Frances, as joint tenants. Although Joseph, in his complaint, alleged ownership of the entirety, he admitted in his answer to Rachel's complaint in intervention that David and Frances owned an undivided one-fifth interest and such interest is not in dispute. The dispute is over the remaining four-fifths, which David and Frances have always acknowledged was acquired by them as trustees for Joseph and Rachel.

The trial court made findings that Joseph had orally agreed with David and Frances that he would contribute four-fifths and they would contribute one-fifth of the purchase money; that they would take title to the property in their own names but "were to hold and administer the said four-fifths (⅘ths) undivided interest therein of said Joseph Fleishman for the benefit of said Joseph Fleishman and the plaintiff in intervention, Rachel Fleishman, his wife, until such time as Joseph Fleishman became

disabled or died, and thereupon for the sole benefit of said Rachel Fleishman"; that the moneys used by Joseph to make the purchase were his separate funds and that Rachel had no interest in the property; that Joseph never became disabled; that the trust was revocable; that in June, 1950, Joseph repudiated and revoked the trust agreement and demanded of David and Frances that they convey the trust property to him; that they refused to do so.

[2] The finding that the trust was revocable is correct, since there was no agreement that it was to be irrevocable. Civ.Code, sec. 2280.*

The trial court concluded that David and Frances are holding said four-fifths interest in trust for the benefit of Joseph alone and that Rachel owns no interest therein.

The Legal Position of David and Frances

[3, 4] David and Frances have never attempted to raise the defense of the Statute of Frauds and it is not an issue herein. Their answer acknowledges the trust and sets up the oral agreement as to their duties as trustees in the following language: "That in the event of disability of Joseph Fleishman, or in the event of his death, the entire four-fifths interest and the income thereupon, should become the property of the said Rachel Fleishman. That so long as Joseph Fleishman was alive and in good health, the net income on the four-fifths interest should be paid to said Joseph Fleishman and said Rachel Fleishman." This is in complete accord with the findings quoted above. The trial court did not find or *impose* a constructive or resulting trust, which is a remedial device created to prevent unjust enrichment. There was no necessity to do so. It found an express trust created by an oral agreement, voluntarily accepted by the trustees. Civ.Code, sec. 2216. There was no finding of repudiation or bad faith by the trustees and they are entitled to the presumption that they acted in good faith. In re Estate of Canfield, 80 Cal.App.2d 443, 451, 181 P.2d 732.

David collected the rents, made the loan payments and other necessary disbursements on the property, and, until June, 1950, paid over to Joseph four-fifths of the remainder. In June, 1950, however, he paid over said four-fifths, amounting to $216, to Rachel. David testified that his reason for transferring the payments from Joseph to Rachel was that Joseph had become disabled and that, under the terms of the trust, he, as trustee, was obligated to do so. The trial court found, however, as follows: "That as of June, 1950, said Joseph Fleishman was a man of approximately 80 years of age; that at all times herein involved said Joseph Fleishman was sick and infirm, but not disabled, * * *"

After June, 1950, David continued for a time to pay various amounts to Rachel but nothing to Joseph. All other moneys which have accumulated under the trust agreement are being held by David, under a mutual agreement of the parties, to await the outcome of this litigation.

[5, 6] The trial court found that David and Frances held said four-fifths interest "for the benefit of said Joseph Fleishman and the plaintiff in intervention, Rachel Fleishman, his wife, *until such time as Joseph Fleishman became disabled or died,* and thereupon for the *sole* benefit of said Rachel Fleishman." (Emphasis added.) It is apparent that David and Frances were required to decide if and when Joseph became "disabled." This power was discretionary in them and there is no evidence or finding of fraud, bad faith or abuse of discretion on their part. Section 2269 of the Civil Code provides: "A discretionary power conferred upon a trustee is presumed not to be left to his arbitrary discretion, but may be controlled by the proper Court if not reasonably exer-

* The first sentence of this section provides as follows: "Unless expressly made irrevocable by the instrument creating the trust, every voluntary trust shall be revocable by the trustor by writing filed with the trustee."

cised, * * *." The trial court evidently found that David and Frances had reasonably exercised their discretion in this respect because it did not charge them with the payment which was made to Rachel in June, 1950. The judgment only requires David and Frances to account for and deliver over to Joseph's representatives his share of the rents *"since* June, 1950." The trial court charged David and Frances with the payment made to Rachel in July, 1950, and the payments made to her thereafter. This is consistent with the finding that Joseph "repudiated and revoked said oral agreement with the defendants David Blechman and Frances Blechman in June, 1950, and demanded of said defendants David Blechman and Frances Blechman that they convey to him all of his interest in said real property, * * *" Joseph's complaint was not filed until June 29, 1950, and copies thereof could not have been served upon David and Frances until thereafter. Although the exact date of the June, 1950, payment by David to Rachel does not appear in the record, it is reasonable to assume that it was made before such service. This being so, the record supports the implied finding of the trial court that the June, 1950, payment to Rachel was made in good faith and upon reasonable cause and that, for this reason, David and Frances should not be charged therewith. But, after notice of the revocation of the trust, David and Frances would be chargeable with further payments to Rachel, even though made in good faith and in the reasonable belief that Joseph was disabled. However, they should be entitled to reimbursement from Rachel's estate for the total amount thereof. This is all that David and Frances directly have at stake in this litigation. They have not asked for compensation for their services as trustees.

Was the Trust Revoked?

[7, 8] Rachel claims that it was not and that, therefore, she became entitled to the entire trust upon Joseph's death. The trial court found that Joseph revoked the trust "in June, 1950." The only evidence in the record of such revocation is that Joseph filed his verified complaint herein on June 29, 1950, in which he claimed the property in its entirety, free and clear of any other claim or interest, and prayed for a decree quieting title in him alone. David testified that he was served with a copy of this complaint. He and Frances filed their answer to the complaint on July 22, 1950. Section 2280 of the Civil Code provides in part as follows: "Unless expressly made irrevocable by the instrument creating the trust, every voluntary trust shall be revocable by the trustor *by writing filed with the trustee.*" (Emphasis added.) We think that any writing which clearly manifests an intention of the trustor to revoke is a sufficient writing under this section. (See 54 Am.Jur. 80, Trusts, sec. 77.) The complaint served this purpose. We conclude that the record supports the finding of revocation within the meaning of the statute, based upon the filing and serving of the complaint and the answer of the trustees "to the complaint on file herein." This was sufficient written notice to them of the revocation of the trust and it thereupon became their duty to wind upon and terminate the trust, render an accounting and convey the trust estate to whoever was rightfully entitled thereto.

Moreover, the delivery of a formal written notice of revocation to David and Frances, prior to the filing of suit, would have been an idle act on Joseph's part, which the law does not require. Civ.Code, sec. 3532. Their answer pleaded that the trust was "irrevocable" and it is quite clear from the record throughout that they would not have acknowledged Joseph's right to revoke whether they were or were not served with a formal notice of revocation prior to suit.

Did Joseph Become "Disabled" or Incompetent?

[9, 10] Appellants contend that Joseph became "disabled" by at least June, 1950, within the meaning of that term as used in the trust agreement. Joseph contends that

he was not then or ever disabled and the trial court so found. There is sufficient evidence in the record, in addition to the presumption of competency, to support this finding. One of Joseph's daughters testified that he collected the rents and managed the property on Pierce Street right up to the time of his death. This property was a three-story building containing twelve apartments and, according to Rachel's testimony, required a great amount of personal supervision.

The same answer applies to the contention that Joseph could not effectively revoke the trust because he was mentally incompetent. There was a conflict in the evidence which was resolved by the trial court in favor of the presumption of competency and the other evidence in support thereof.

Was it Necessary for Rachel to Join in or Concur in the Revocation of the Trust?

[11, 12] Rachel argues that, in order to effectively revoke the trust, it was necessary that she join in the revocation. We do not agree. Joseph acted as the trustor in the creation of the trust with the full knowledge and consent of Rachel. The oral agreement of trust was between Joseph, as trustor, and David and Frances, as trustees. Joseph and Rachel were co-beneficiaries under the trust but not co-trustors. Under such circumstances, the revocation of the trust agreement by Joseph alone was as effective as though joined in by Rachel. Even assuming that Joseph did not have authority from Rachel to revoke the trust, he did have authority in his capacity as trustor to revoke insofar as his own separate interest therein was concerned and such revocation would necessitate a termination of the trust, at least as to that interest. In such event, it would require a determination of the respective interests of Joseph and Rachel in the trust res. Rachel's death has made the question as to whether the trust continued as to her interest, following Joseph's revocation, moot.

Was the Issue of Revocation Before the Court?

The trial court found that the trust was revocable and has been revoked by Joseph. Appellants contend that the issue of revocation was not before the court. We think it was.

[13–15] The complaint alleged a cause of action to quiet title in Joseph and the prayer asked that it be declared that he "is the owner" of the property. This is a proper type of action to determine the validity of any adverse claims based upon asserted trusts. Code Civ.Proc. § 738; Butterfield v. Graves, 138 Cal. 155, 158, 71 P. 510, Truesdail v. Lewis, 45 Cal. App.2d 718, 721, 115 P.2d 218. The answer of David and Frances alleged that they owned a one-fifth interest outright and held title to the remaining four-fifths as trustees under an "irrevocable" trust. These allegations are deemed controverted. Code Civ.Proc. § 462. Among the issues raised by said answer was the issue as to whether David and Frances had the right to retain title to said four-fifths interest or whether title to such interest should be quieted in Joseph. This necessarily required not only a determination of whether the trust was revocable or irrevocable but also, if revocable, whether it had been revoked. Joseph's right to a decree quieting title could be defeated on either of these two grounds and, by necessary implication, both were placed in issue by the answer. It would seem obvious that, if the trial court found that the trust was revocable, it must then also determine whether the trust was still in existence or whether it had been revoked. Only by so doing could it determine in whom to quiet title to said four-fifths interest.

The Interest of Rachel

The total purchase price of the property, inclusive of incidental closing costs and expenses, was $53,245.06. David and Fran-

ces contributed $5,300 and $27,000 was loaned by a building and loan association upon the security of a deed of trust upon the property, executed by David and Frances. The trial court found that the balance, $20,945.06, was put up by Joseph.

The findings upon which the judgment against Rachel is based are as follows: "That the portion of the purchase price paid by Joseph Fleishman [$20,945.06] consisted of moneys which were the sole and separate property of said Joseph Fleishman; that the plaintiff in intervention, Rachel Fleishman, paid no part of the consideration for said real property and owns no interest in said real property."

The sum of $20,945.06 was made up of the following items:

$ 1,000.00	—withdrawn on February 13, 1947, from savings account no. 1316 in Bank of America, McAllister-Fillmore Branch, in names of "Rachel Fleishman or Frances Blechman." (initial payment under deposit receipt agreement)
4,000.00	—withdrawn on February 20, 1947, from same account (no. 1316) to complete required deposit.
4,700.00	—withdrawn on May 1, 1947, from account no. 1316.
10,000.00	—withdrawn on May 1, 1947, from savings account no. 20179 in The San Francisco Bank, in names of "Rachael Leah Fleischman or Frances Blechman."
800.00	—cashier's check dated May 1, 1947, issued by Bank of America, Arguello-Geary Branch, payable to "Josef Fleishman."
445.06	—personal check of Bowen A. Bridges, dated May 1, 1947, drawn on Bank of America, Arguello-Geary Branch.
$20,945.06	

To recapitulate, of the $20,945.06 which the trial court found was contributed by Joseph, $9,700 came from account numbered 1316, Bank of America, McAllister-Fillmore Branch, standing in the names of "Rachel Fleishman or Frances Blechman," $10,000 came from account numbered 20179, The San Francisco Bank, standing in the names of "Rachael Leah Fleischman or Frances Blechman," and $1,245.06 came from two unsecured loans of $800 and $445.06, made by Bridges to Joseph.

Frances has never claimed any interest in either of the two accounts and both were closed out by the respective withdrawals of $4,700 and $10,000.

[16] Rachel's pleadings and her testimony were that the funds in the Bank of America (account no. 1316) were those of herself and Joseph jointly and that the funds in The San Francisco Bank (account no. 20179) were her sole and separate property. She testified that this was in accordance with Joseph's desires and their mutual understanding. It is apparent, however, that the trial court did not believe her. Her interest is obvious and her testimony was conflicting in some respects. Even though no witness directly contradicted her, the trial court was not required to accept her testimony as the truth. See Blank v. Coffin, 20 Cal.2d 457, 462, 126 P.2d 868.

However, disregarding Rachel's testimony entirely, the record in this case requires a reversal of the judgment against Rachel.

The $800 item in the "break-down" detailed above came from a loan obtained by Bowen A. Bridges from the Bank of America, Arguello-Geary Branch. The $445.06 item was found by the trial court to be "an advance by Bowen A. Bridges on the personal credit of Joseph Fleishman." (Bridges was the real estate broker who handled the sale.) No finding was made as to the credit upon which the $800 loan was made. The proceeds of these two loans, totaling $1,245.06, are presumed to be community property and the community acquired an interest thereby in the proportion which such sum bears to the

total contribution, to-wit, 1,245:20,945, or approximately 1/17th. There is no evidence in the record to rebut this presumption.

In Gudelj v. Gudelj, 41 Cal.2d 202, 259 P.2d 656, 661, the husband bought a one-fourth interest in a cleaning business for $11,500. He made a down payment of $1,500 from separate funds and executed a note for $10,000. The trial court found that the entire interest was his separate property. The judgment was reversed, the Supreme Court holding that that part of the payment for the interest which was represented by the note was community property. The court said that "the character of property acquired by a sale upon credit is determined according to the intent of the seller to rely upon the separate property of the purchaser or upon a community asset. [Citing authorities.] In the absence of evidence tending to prove that the seller primarily relied upon the purchaser's separate property in extending credit, the trial court must find in accordance with the presumption." 41 Cal.2d at page 210, 259 P.2d at page 661. The presumption referred to is that property acquired on credit during marriage is community property.

In the instant case, there likewise was no evidence as to what credit the lender relied upon in making the loans. The trial court found that the $445.06 loan was upon the personal credit of Joseph but there is no evidence to support this. When the initial deposit of $1,000 was made, Bridges' salesman accompanied Joseph and Rachel to the bank, where *she*, not he, drew out the money from an account standing in the names of herself and daughter. When the sale was closed at the title company, some months later, Bridges was there and it was Rachel who produced and endorsed cashier's checks payable to *her* in the amounts of $10,000 and $4,700, respectively. The title company's closing record shows the receipt of these checks. It also shows that the sum of $445.06 was needed to close and that Bridges gave his personal check for this amount. Bridges must have known that Joseph was not taking title to the property in his name but that David and Frances were and that they had an individual interest therein. There not only is no evidence to support the finding that Bridges loaned the money on the personal credit of Joseph but what evidence there is would indicate that this was not so.

[17] As before pointed out, the trial court had the right to disbelieve the testimony of Rachel that Joseph had given her the money which was in the account at The San Francisco Bank, even though there was no witness who contradicted her, Joseph having died before trial. But where the evidence shows without conflict that a husband has voluntarily caused funds to be put into an account standing in the name of the wife there is a presumption that he intends such funds to be the separate property of the wife. There is nothing in the record to rebut this presumption. In Cash v. Cash, 110 Cal.App.2d 534, 243 P.2d 115, a husband knowingly deposited his separate funds in a bank account standing in the names of himself and his wife as joint tenants. In a divorce action between them, the trial court found that the account was the separate property of the husband. The judgment was modified on the ground that there was no evidence to support the finding. This court said, 110 Cal.App.2d at page 538, 243 P.2d at page 118: "He knowingly deposited his separate property in the joint tenancy account. The form of the account created a joint tenancy. That constituted a gift to his wife. While it is true that, as between husband and wife, at least while both are still alive, and the contest is between them, parol evidence is admissible to show an agreement that they intended that what appears to be joint tenancy property was to be the separate property of either or the community property of both, for this rule to apply there must be some relevant evidence of an agreement between the parties. The opening of a joint tenancy bank account by husband and wife creates a rebuttable presumption that the money therein is joint tenancy property. Either may rebut this presumption, but in the absence of rebutting testimony the presumption must prevail. These

principles are well settled. [Citing authorities.]

"In the instant case there is no evidence at all that the parties intended that the joint account should be other than what it purports to be. It is true that respondent testified that originally most of the moneys going into the account were his separate property, but that falls far short of proving an agreement that it was to remain his separate property. Evidence as to the source of the funds standing alone, cannot rebut the presumption that the account was intended to be what it states it is—a joint tenancy account. In the instant case, neither the actions nor the words of the parties rebuts the presumption. That being so, the presumption must prevail. The finding contrary to it is unsupported."

In the instant case, there is likewise no evidence to rebut the presumption that the money in The San Francisco Bank account was Rachel's sole and separate property. Indeed, the same would be true as to the account in the Bank of America had it not been for the testimony of Rachel that this account belonged to them jointly. It may well be that, if Joseph had been alive at the time of trial, he could have rebutted the presumption, but this does not affect the record as presented on this appeal.

In the Cash case, supra, this court was able to modify the judgment by ordering the joint tenancy account involved therein to be divided equally between the parties. But the state of the record in this case is such that we cannot ascertain with any accuracy the proportionate interests of Rachel and Joseph. One example of this is the confusion arising as to the source of funds which went into the purchase of an interest in certain real property on McAllister Street in San Francisco, which was bought and sold during the marriage. The funds resulting from the sale of this property apparently went into the purchase of the Irving Street property. Another example concerns the disposition of the rents from the properties on Divisadero and on Pierce Streets, which properties were admittedly the separate property of Joseph.

[18] Accordingly, that portion of the judgment against Rachel which holds that she has no interest in the trust estate is reversed and the lower court is instructed to retry this issue. That portion of the judgment establishing the one-fifth interest of David and Frances and decreeing that they hold the remaining four-fifths interest in trust and are required to render an accounting for the period since June, 1950, is affirmed. That portion of the judgment requiring them to transfer the trust estate to Joseph's representatives is modified by providing that they are to transfer such interest to whoever is ultimately determined to be entitled thereto. In the interests of justice, each of the parties is to bear his or her own costs on appeal.

PETERS, P, J., and FRED B. WOOD, J., concur.



148 Cal.App.2d 223

Pearl CLARK and Alice Brewer, Plaintiffs and Respondents,

v.

John W. CLARK and Ruth Giddings Clark, his wife, Sutter Buttes Land Company, a corporation, Meridian Farms Water Company, a public utility, and Paul Newell, Defendants,

John W. Clark and Ruth Giddings Clark, his wife, Appellants.

Civ. 8631.

District Court of Appeal, Third District, California.

Feb. 1, 1957.

Rehearing Denied Feb. 20, 1957.

Hearing Denied March 27, 1957.

Proceeding to obtain right of way for road purposes against owners of land. The Superior Court, Sutter County, Arthur Coats, J., entered judgment adverse to owners, and owners appealed. The District Court of Appeal, Van Dyke, P. J., held that

evidence was sufficient to sustain finding that claimants and their predecessors in interest had used road openly, notoriously, in hostility to owners of fee, and adversely to them for a sufficient period of time to acquire title by prescription to easement.

Affirmed.

1. Easements ⇐27

Where servient land on which claimed private right of way easement existed came into ownership of owner of dominant estate, the claimed private easement became merged in fee, irrespective of what prior use others may have made of roadway, and, therefore, easement claimants could not go back of such owner's grant of claimed dominant estate.

2. Easements ⇐8(1), 9(1, 2), 36(1)

The user, in order to initiate and ultimately establish a prescriptive easement, must be in hostility to legal title, and must be under a claim of right actually or impliedly communicated to owner of land, and adverse user must exist for five years and proof of user must overcome presumptions that occupation by claimant is in subordination to legal title.

3. Easements ⇐37

Whether user made was matter of neighborly accommodation or was adverse is question of fact to be determined by trial court in light of relations of parties, their conduct, situation of property and all surrounding circumstances.

4. Easements ⇐36(3)

In proceeding to establish right of way easement for road purposes over owners' land, evidence was sufficient to sustain finding that claimants and their predecessors in interest had used road openly, notoriously, in hostility to owners of fee and adversely to them for a sufficient period of time to acquire title by prescription to easement.

5. Easements ⇐38

An owner of fee is entitled to use the land in any way not inconsistent with easement.

6. Easements ⇐36(3)

In proceeding for right of way for road purposes over owner's land, evidence sustained finding that claimants under their prescriptive right were entitled to have free and open use of roadway clear of all gates, fences, ditches, and other obstructions.

7. Judgment ⇐133

In proceeding to obtain right of way for road purposes against owners of land on which road lay, wherein court granted easement over part of road located on one defaulting codefendant's land in excess of that sought in complaint, other codefendant could not object to court's action.

8. Easements ⇐61(12)

In proceeding to obtain right of way for road purposes against owners of land on which road lay, wherein judgment commanded owners to restore road to condition in which it was before they constructed ditch, owners could not complain that judgment was unfair because others had made like use of road and no injunction had been issued against them.

Weis & Weis, Yuba City, for appellants.

Manwell & Manwell, Marysville, for respondents.

VAN DYKE, Presiding Justice.

[1] This case involves a claim of plaintiffs and respondents to a right of way for road purposes over a strip of land 40 feet wide and one mile long, constituting the north 40 feet of the south half of the north half of section 18, township 15 north, range 1 east, M. D. B. & M. in Sutter County. Plaintiff joined as defendants the owners of the entire 40 foot strip which we shall hereafter call the roadway. The record disclosed that long ago one Jim Jones owned the whole section and that he and his neighboring landowners had used the 40 foot strip across the section as a roadway. Prior to 1900 the strip in use lay along the south line of the north half of the north half of the section. About 1900 the roadway was

shifted 40 feet south to its present location. Use was made of the relocated roadway by successors in interest of Jim Jones from that relocation to the present time. The use was not chronologically continuous. There were interruptions due to various causes. For instance, in 1940 a flood so encumbered the eastern end of the roadway as to make it impassable to any but heavy-powered machinery, such as farm tractors. How many people used the roadway is not made certain by the testimony, but the record sufficiently shows that a fairly continuous use was made and that after the relocation and, indeed, even before that, there was a definite location of a 40 foot strip across the section. At times the surface was scraped and graded. Prior to 1936, however, the north half of the section containing the roadway came into the ownership of Sutter Buttes Land Company and respondents' title comes down to them from a grant made by Sutter Buttes Land Company to their predecessors in interest in 1936. So far as respondents' claims are concerned, they cannot go back of this grant to their predecessors in interest because, the easements being private, the grantor, by owning the fee, had merged in itself the entire title irrespective of what prior use others may have made of the roadway. Nevertheless the testimony above referred to concerning the use of the roadway by Jim Jones and his neighbors is material as being some proof that the claimed adverse user by respondents and their predecessors in interest was over the same strip of land that had been so long used for road purposes. In 1936 Sutter Buttes Land Company conveyed to respondents' predecessors in interest approximately 24 acres of land, the north boundary of which ran approximately along the center line of the roadway for a distance of 1220 feet east from the west line of section 18. In 1948 Sutter Buttes Land Company conveyed to appellants the strip of approximately 20 feet in width lying between respondents' north line and the north line of the roadway. Thus respondents and appellants have a common boundary along a line approximating the center of the roadway for a distance of 1,220.6 feet. Respondents claim road easement rights over the north 20 feet of the roadway strip along the common boundary. The deed to appellants from Sutter Buttes Land Company also conveyed to them the fee of the roadway strip easterly from the end of said common boundary to the north and south center line of the section. The balance of the fee to the roadway still remains in Sutter Buttes Land Company against whom a default judgment was rendered in favor of respondents.

Appellants contend that the evidence is insufficient to support the judgment that respondents have road rights along that portion of the whole roadway now belonging to appellants and they further contend that the same insufficiency applies to that portion of the whole roadway which crosses the lands of Sutter Buttes Land Company and assert they have the right to attack the judgment againt the land company because of its adverse effect upon appellants.

[2, 3] We will first consider the sufficiency of the evidence as to the prescriptive easement. The rules governing the sufficiency of proof of a prescriptive easement are familiar law and appellants cite Clarke v. Clarke, 133 Cal. 667, 66 P. 10, Schudel v. Hertz, 125 Cal.App. 564, 13 P.2d 1008, Los Angeles Brick & Clay Products Co. v. City of Los Angeles, 60 Cal.App.2d 478, 141 P.2d 46, and other cases as determinative of what the proof must show. These cases hold that the user, in order to initiate and ultimately establish a prescriptive easement, must be in hostility to the legal title, and must be under a claim of right actually or impliedly communicated to the owner of the land. The adverse user must exist for five years and the proof must overcome presumptions that occupation by the claimant is in subordination to the legal title. Appellants accept the further rule that whether or not the user made was a matter of neighborly accommodation or was adverse is a question of fact to be determined by the trial court in the light of the relations of the parties, their conduct, the situation of

the property and all the surrounding circumstances. Testing the record by these rules we find the following: Mrs. Pearl Clark, one of respondents, testified that she started using the 40 foot roadway in 1930; that there was an open road at that time over the whole strip across the section and that it remained an open roadway at all times until appellants closed it in 1951; that it was a dirt road upon which two cars could pass and that she used it every year; that after the 1940 flood the easterly part of the mile long roadway was not in good condition for about two years, although tractors used it; that people worked on the road a little each year until 1943 when the east portion of the road was put back in condition and used from that time on. She said that all of the people in the neighborhood used the road for heavy equipment and that it constituted the only way that such equipment could be taken through that part of the neighborhood; that counting the years before she acquired title her use as a person farming land in that vicinity continued for 30 years. Ida Jones was called to the stand by appellants. She was the daughter-in-law of Jim Jones and lived in the vicinity of the roadway up to 1938 when she moved into the town of Meridian. She testified that Jim Jones took the land up somewhere around 1851 and that as far as she knew the road had always been a farming road across the section. Her description of the road may be summed up in the following question and answer: "Q. People who used this road, nobody stopped them? A. Oh, no, it was wonderful, they went through there, to the trading post, and it was really a public road, you might say." Clyde Jones, son of Ida and grandson of Jim Jones, testified that the road had been established by his family many years before he had become familiar with it; that the road in its present location has existed since 1901, prior to which time it was 40 feet to the north; that it was like all the roads were in those days, a dirt road, a straight road that went across the section; that he had used the whole road continuously down through the years; that the road had always been open, was well defined and traveled; that after the flood in 1940 for three years gates were maintained across this strip, but they were taken down and the road was open until the appellants closed it by fencing across it in 1951 or 1952, whereupon "they" knocked the fences down. James Clark, husband of Pearl, testified that beginning in 1930 he knew the road and used it up to the time when appellants closed it; that it was a long straight dirt road and though damaged by the 1940 flood had even then been used by tractors and heavy farm equipment because the other roads were paved and the law prohibited their use in that manner; that by 1943 it was in such condition that automobiles went back and forth over it. From respondents' testimony it could be inferred that their immediate predecessors in interest had also used the road for the benefit of the land now owned by respondents.

[4] Although much of the testimony was as to use from immemorial time by members of the public and particularly by those living in the neighborhood, respondents did not seek to prove, nor did the court find, that the road was a public road. Respondents' case is based on the theory that they and their predecessors in interest since 1936 had made such use of the road as to acquire a prescriptive right appurtenant to their own land and a burden upon the owners of the fee for the entire length of the mile long roadway. We think the evidence is sufficient to sustain the trial court's findings that respondents and their predecessors in interest had used the roadway openly, notoriously, in hostility to the owners of the fee and adversely to them for a sufficient period of time to acquire title by prescription to the easement claimed by them. The evidence negatives any idea that respondents' use of the roadway was not under claim of right and done in hostility to the legal title. There can be no doubt from the testimony that the use was as continuous as the needs of respondents and their predecessors required in the use of their property.

[5, 6] Appellants contend that the judgment appealed from is too broad in so far as it determines that respondents have a right to the free and open use of the roadway "clear of all gates, fences, ditches and other obstructions." They refer to the well-known rule that the owner of the fee is entitled to use the land in any way not inconsistent with the easement and that the fencing in of the roadway, the erection of gates across it, the use of it for grazing purposes and prevention of its use by the general public are uses not inconsistent with the easement rights which are shown by the record. It is true, as contended by appellants, that many easements for road purposes across privately owned land are so limited as to permit the owners to maintain fences across the right of way with gates to permit passage by occupants of the dominant holding, and to permit other uses by the owners of the fee. But the real question, as in any easement case, is the extent and nature of the easement acquired. The easement here declared by the court to exist was acquired by prescription which, under the code, is one of the recognized modes of acquiring interest in real property and, therefore, the question posed by the appellants is whether or not that easement was of such a nature that the enclosure of the roadway by fences and gates and the maintenance of a drainage ditch along it would be inconsistent with the easement acquired. Here again we think the issue was one of fact for the trial court and that the inference which the trial court drew from the evidence as to the nature and extent of the easement is supported by the testimony we have recited. In view of the record we cannot say that the court's finding as to the extent of the right of use is broader than is supported by the record.

[7] Appellants contend that the trial court exceeded its jurisdiction in awarding respondents more than their complaint asked for. It appears that the complaint sought to establish the easement for a distance of 3,960 feet into the section from its west boundary and did not seek to establish it across the entire section. 3,960 feet from the west line of the section takes the roadway beyond the land of appellants and into the land owned by Sutter Buttes Land Company which defaulted in the case. Appellants seek to apply the rule that in the case of a default judgment plaintiff may not be awarded more relief against a defaulting defendant than his pleadings have demanded. The point is not available to appellants. It is no concern of theirs that the relief against their codefendant exceeded the relief demanded.

[8] Finally, appellants contend that the judgment is unfair. It appears that prior to the judgment appellants had constructed and were using a drainage ditch on that part of the roadway, the fee of which was owned by them. They were enjoined by the judgment from continuing such use of the roadway strip and from interfering in any manner with the free and open use of the road. The judgment further commanded appellants to restore the way to the condition in which it was before the commencement of the action and before they had obstructed it by constructing their drainage ditch. Appellants do not contend that the evidence does not justify the trial court in ordering them to restore the way to the condition in which it was before they constructed their ditch. Rather, they say that others had made like use of the way and no injunction was issued against them. Here again we think it does not lie with the appellants to make this complaint of discrimination. They wrongfully constructed their ditch and must now bear the burden of undoing that wrong.

Appellants seek a reversal of the order denying their motion for new trial. The motion was made upon the grounds of newly-discovered evidence, insufficiency of the evidence and error in law. We have examined their argument in support of their contentions in this respect and find them without merit. We think a detailed discussion is not necessary.

The judgment appealed from is affirmed.

PEEK and SCHOTTKY, JJ., concur.

148 Cal.App.2d 176

Lila Lee CHRISTENSEN, by her guardian ad litem Frederick O. Christensen, and Frederick O. Christensen, Plaintiffs and Appellants,

v.

Robert BERGMANN and Ward Harris, Incorporated, a corporation, Defendants and Respondents.

Civ. 16908.

District Court of Appeal, First District, Division 2, California.

Feb. 1, 1957.

Hearing Denied March 27, 1957.

Action for injuries sustained by plaintiff, a pedestrian when struck by automobile of defendant while the plaintiff was crossing the highway in an unmarked crossway at an intersection, when defendant drove by a truck which had stopped to permit the plaintiff and others to pass and struck the plaintiff. From a judgment for defendant entered upon a verdict of the jury and an order denying the plaintiffs' motion for judgment notwithstanding the verdict in the Superior Court, County of San Mateo, John P. McMurray, J., the plaintiffs appealed. The District Court of Appeal, Comstock, J. pro tem., held that the case was properly submitted to the jury and that the instruction on imminent peril was not prejudicial error.

Judgment and order affirmed.

1. Automobiles ⇐244(6), 245(6)

In action for injuries sustained by pedestrian crossing a highway in unmarked crosswalk at intersection when struck by defendant's automobile, evidence justified the submission of the case to the jury, and the evidence sustained verdict for the defendant. West's Ann.Vehicle Code, § 560 (a, b).

2. Automobiles ⇐160(4), 173(6)

A violation by a motorist of the statutes respecting pedestrians' right of way at crosswalks and that when a vehicle has stopped at a marked crosswalk or an unmarked crosswalk at an intersection to permit a pedestrian to cross, the driver of any other vehicle approaching from the rear shall not pass the stopped vehicle, constitutes negligence as a matter of law in the absence of reasonable explanation for such conduct. West's Ann.Vehicle Code, § 560 (a, b).

3. Automobiles ⇐245(6)

In action for injuries sustained by pedestrian crossing a highway in an unmarked crosswalk at an intersection where a truck had stopped to permit the pedestrian and others to cross and defendant approaching from the rear of the truck drove by and struck the pedestrian, the case was properly submitted to the jury. West's Ann.Vehicle Code, § 560(a, b).

4. Automobiles ⇐217(5)

One about to cross a highway on which motor vehicle traffic is to be expected must make reasonable observations to learn traffic conditions confronting him, look to the vicinity from which, were a vehicle approaching, it would be an immediate danger to his passage, try to make a sensible decision as to safety and generally exercise ordinary care, including reasonable use of his senses, to avoid the accident.

5. Automobiles ⇐245(72)

In action for injuries sustained by pedestrian when struck by defendant's automobile while pedestrian was crossing highway in an unmarked crosswalk at an intersection where a truck stopped to permit the pedestrian and others to pass, and defendant approaching from the rear drove by the truck and struck the pedestrian, the question of the plaintiff's contributory negligence was properly submitted to the jury. West's Ann.Vehicle Code, § 560(b).

6. Automobiles ⇐246(37)

Instruction on imminent peril in automobile accident case, was not error on ground as given that it could only have applied to defendant because using the masculine pronoun while plaintiff was a girl, where instruction was a broad general statement of principle applied to a standard of

conduct of "a person" confronted by a sudden emergency not caused by his own negligence.

7. Trial ⇐285

The masculine pronoun "he", "his", "him", are used in instructions to refer to nouns of indefinite gender, as everyone, a person, etc.

See publication Words and Phrases, for other judicial constructions and definitions of "He", "Him" and "His".

8. Appeal and Error ⇐930(2)

It will not be assumed that the jury is lacking in fundamental knowledge of English and would be misled by an instruction.

9. Trial ⇐191(6)

In automobile accident case, instruction on imminent peril was not improper on the ground that it was partly predicated upon the assumption that defendant was negligent as a matter of law and that plaintiff was free from contributory negligence as a matter of law, where such questions were under the evidence for the jury.

Alexander S. Keenan, Jr., San Francisco, for appellants.

Ropers & Majeski, Redwood City, for respondents.

COMSTOCK, Justice pro tem.

This is an appeal by plaintiffs from a judgment for defendant entered upon the verdict of a jury and from an order denying plaintiffs' motion for judgment notwithstanding the verdict. Plaintiff Lila Lee Christensen is a fourteen-year-old minor girl. She sued through her father and guardian ad litem, Frederick O. Christensen, who also sued in his individual capacity. Damages for personal injuries were claimed for the minor; her father sought to recover for expenses paid by him for her care and treatment.

Defendant Robert Bergmann was the servant and employee of defendant Ward Harris Incorporated and was acting within the course and scope of his employment.

The action arose from a collision in which a 1953 Chevrolet Club Coupe, driven by the defendant Bergmann, struck the plaintiff Lila Lee Christensen, who, as a pedestrian, was crossing a highway in an unmarked crosswalk at an intersection.

El Camino Real is a highway running northerly and southerly through Redwood City in San Mateo County. It intersects with Dumbarton Avenue, which enters El Camino Real from the east, and Oakwood Drive, which enters it from the west opposite and in prolongation of Dumbarton Avenue.

Plaintiff Lila Lee Christensen and defendant Robert Bergmann were the principal actors. For convenience they will be referred to, respectively, as plaintiff and defendant.

At the time of the accident, approximately 11:00 a. m., June 15, 1953, plaintiff and three other girls, one being of the same age as plaintiff and two aged nine years, were walking westerly on the southerly side of Dumbarton Avenue, intending to cross El Camino Real to look at a swimming pool located westerly of the highway. The crosswalk on the southerly side of the intersection was unmarked. There was a marked crosswalk on the northerly side of the intersection. The girls stopped at the southeast corner of Dumbarton Avenue and El Camino Real to let traffic go by. A high, white-colored, Ford Vanette, walk-in Delivery truck traveling northward in the northbound lane of El Camino Real closest to the curb near which the girls stood came to a stop about eight or ten feet southerly of the girls. The truck driver motioned the girls across in front of him. Plaintiff and one of the nine-year-old girls started across the street first. They were holding hands, plaintiff on the left and closer to the truck. According to plaintiff's direct testimony, she walked past the truck and had gotten a few feet into the other lane (in which defendant was driving), and did not see defendant's car until the instant it hit her. Cross-examination of the plaintiff developed that she looked to the

south before she left her position on the corner and again when she came to the edge of the truck, and, also, just as she passed the edge of the truck; that she could see "down there" but did not see defendant's car.

Plaintiff and her nine-year-old companion were injured, plaintiff receiving a fractured leg and other serious injuries.

The driver of the truck testified that he was proceeding northerly on El Camino Real in the lane next to the curb, just before the accident, at a speed of about 30 or 35 miles per hour. When he was about 150 feet south of the Dumbarton intersection he saw four children at the corner waiting to cross, so he slowed down. He did not remember whether he made any signal. He stopped to let the girls by. They passed the front of his truck, and, as they did so, he observed in his rear-view mirror that defendant's car was approaching rapidly from his rear in the lane next to his. He yelled a warning but did not know whether the girls heard him. Two of the younger girls jumped back and he "believed" one of the other girls jumped back but was hit a glancing blow and thrown in front of his truck. One girl kept on going and was "hit right straight." He did not hear the other car sound a warning nor hear its brakes being applied but did see skid marks afterward. He did not see defendant's car turn to the left nor recall that the skid marks showed a turn to the left, but he identified a photograph of the skid marks and admitted that it showed that they did turn a little to the left.

Mrs. Rose Boner witnessed the accident from her automobile which had halted on Oakwood Drive facing east preparatory to turning south on El Camino Real. She saw four children attempting to cross the highway. Two of them were hit. They were looking straight ahead at all times that she observed them. They were not walking slow and were not running. She believed their gait was a rapid walk, hurrying. The truck appeared to her to be turned at an angle to its right. She estimated the speed of the car which hit the children as medium, between 30 and 45 miles per hour.

There was no conflict in the testimony that at all pertinent times the truck was in the easterly northbound lane, designated by witnesses as lane number one, and defendant in the next adjoining northbound lane, designated as lane number two.

Defendant Robert Bergmann was driving north on El Camino Real in lane number two. The weather was good, the sun was shining and the highway was dry. The traffic was light in front of him. There were no vehicles ahead of him in the same lane. He first noticed the truck when he was about 4 or 5 blocks from Dumbarton Avenue. It was proceeding in lane number one about 50 or 60 feet ahead of him. Their speed was approximately the same, 30 to 35 miles an hour. When the truck was approximately 100 to 150 feet from Dumbarton Avenue it began to slow down gradually. He took his foot off the accelerator but gained on the truck. He could see straight ahead and to his left and looked toward the front of the truck but it obscured his view to its front and beyond it. He was familiar with the locality and could see the intersection except the portion obscured by the truck. He thought the truck was going to turn right. When it stopped it was turned at an angle to the right. At the moment the truck stopped, defendant's car was about 10 feet from its left rear end. At this same moment he could see for the first time the girls' heads; "they just started to come out." As soon as he saw them "poke their heads out" he "slammed" or "jammed" on his brakes and swerved to the left. The two girls ran out in front of him from in front of the truck when he first saw them. His main concern was to stop the car somehow or other, to get out of the way, so that it would not hit them. His car struck the two girls. He had not seen the girls standing at the corner of the intersection nor until their heads appeared coming past the front of the truck.

Plaintiff was familiar with the highway and the intersection and knew that there was a marked crosswalk on the north side and an unmarked crosswalk on the side where she was crossing. She said she knew that beside the truck there might well be other vehicles using the roadway there at the same time.

Plaintiff challenges the judgment and order upon three grounds:

1. That the record is barren of any evidence to support the verdict and judgment.

2. That the trial court committed prejudicial error in instructing the jury, at the request of respondents, on the doctrine of "imminent peril."

3. That the record shows that respondents were negligent and appellants free of contributory negligence as a matter of law.

[1] We have concluded that none of plaintiff's contentions can be sustained. The case was a proper one to submit to the jury and the verdict has substantial support in the evidence. The instruction was an accurate statement of the law and was appropriate to be considered by the jury in relation to both the issue of negligence and the issue of contributory negligence.

[2] It is true, as argued by plaintiff and conceded by defendant, that a violation of either subsection (a) or (b) of section 560 of the Vehicle Code would constitute negligence as a matter of law in the absence of reasonable explanation for such conduct. Satterlee v. Orange Glenn School District, 29 Cal.2d 581, 177 P.2d 279; Ornales v. Wigger, 35 Cal.2d 474, 218 P.2d 531; Gray v. Brinkerhoff, 41 Cal.2d 180, 258 P.2d 834.

Section 560 of the Vehicle Code reads as follows: "560. *Pedestrians' Right of Way at Crosswalks.* (a) The driver of a vehicle shall yield the right of way to a pedestrian crossing the roadway within any marked crosswalk or within any unmarked crosswalk at an intersection, except as otherwise provided in this chapter.

"(b) Whenever any vehicle has stopped at a marked crosswalk or at any unmarked crosswalk at an intersection to permit a pedestrian to cross the roadway, the driver of any other vehicle approaching from the rear shall not overtake and pass such stopped vehicle."

In this case, the defendant offered an explanation which the trial judge thought presented an issue of fact for the jury. At plaintiff's request, the court read to the jury the provisions of section 560 of the Vehicle Code (Instruction No. 10 requested by plaintiff), and also instructed them that "A violation of law is of no consequence in this action unless it was the proximate cause of the injuries found by you to have been suffered by the plaintiff." (Instruction No. 13 requested by plaintiff.)

In Driver v. Norman, 106 Cal.App.2d 725, 236 P.2d 6, the court rejected plaintiff's contention that defendant was negligent as a matter of law and held that although a violation of section 560 of the Vehicle Code *could* constitute such negligence, it was for the jury to decide under the facts of that case whether the defendant's failure to yield the right of way to the plaintiff amounted to negligence. At page 728, of 106 Cal.App.2d, at page 8 of 236 P.2d, the court stated: "Under all the circumstances the jury could properly have determined that appellant was not negligent in failing to yield the right of way since his vision was obscured by the Cadillac which preceded him. For the same reason, his failure to see respondent might be excused since she appeared suddenly from in front of the other vehicle. At the least, the evidence is not such that the court is impelled to say reasonable men could and must draw only the inference of negligence. Under such circumstances, violation of a statute is not negligence *per se* proximately contributing to the accident." The facts in that case were quite similar to the facts in this.

Ornales v. Wigger, 35 Cal.2d 474, 218 P.2d 531, 534, was a case where the defendant driver of a vehicle failed to yield the right of way to a pedestrian crossing the roadway within a marked crosswalk. It

was a dark, rainy night. Plaintiff claimed she had looked in both directions before crossing the street. She was dresssed in black and carrying an umbrella. She said she looked again just after she crossed the center line. She had taken two or three additional steps when she was struck by or walked into an automobile driven by the defendant. The defendant testified that she did not see the plaintiff prior to the accident, and that all she had seen was a black parasol going by the left-hand window of the car. The case was tried before a jury. Plaintiff's motion for a directed verdict was denied. The jury returned a verdict for defendant and plaintiff then made a motion for judgment notwithstanding the verdict and for a new trial, both of which were denied. The court fully discussed the Satterlee case and other authorities dealing with the question of what facts will excuse the violation of a statute. It recognized the rule that the fact which will excuse the violation of a statute is one resulting "from causes or things beyond the control of the person charged with the violation." Quoting from the Satterlee case, the court said, "In the application of this rule each violation of a statutory requirement must be considered in connection with the surrounding circumstances. Ordinarily, the excuse relied upon by the violator presents a question of fact for the jury's determination." It was held that the case was a proper one for the jury.

[3] In our case, defendant saw no pedestrian in the crosswalk in front of him; his view of the crosswalk and other space in front of and beyond the truck was obscured; the truck stopped at an angle to its right and he thought it was going to turn easterly into Dumbarton Avenue; he saw the girls' heads for the first time as they came past the front of the truck; he said they ran out in front of him; he applied his brakes and swerved to his left immediately as he saw the truck stop and noticed the girls' heads "stick out" or come past the truck and when he was about 10 feet from its left rear end. This was his explanation of his conduct. We think the trial court was right in submitting the case to the jury for its determination. Indeed, it appears that it would have been error to take the question from the jury. Bishop v. Reid, 120 Cal.App.2d 391, 261 P.2d 303.

Cases relied upon by plaintiff in support of her argument that defendant's explanation of his conduct did not afford a sufficient excuse to overcome the presumption of negligence arising from a prima facie case of violation of a statute are clearly distinguishable upon the facts. People v. Lett, 77 Cal.App.2d 917, 177 P.2d 47, was a manslaughter case. As the defendant approached a crosswalk in which decedent was walking, his eyes were blinded by the lights of another car. Notwithstanding he was blinded he took no precaution except to "let up on the gas—the accelerator." It was held that he had no right to assume the road was clear and that the fact that he did not know that decedent was in the crosswalk was no excuse for his failure to give warning or for not keeping a proper lookout for pedestrians. He was held guilty of negligence as a matter of law in failing to yield the right of way to decedent, in failing to sound his horn and in driving at a speed greater than was reasonable or prudent under all the circumstances. His admission that the lights of the opposing car blinded him for a distance of 50 or 75 feet before he struck decedent, that he did nothing to slow his car, except to "let up on the accelerator", and that he traveled 75 feet after he struck decedent before he stopped was held to fix his responsibility. The court said that the case might be different if the blinding lights had flashed suddenly, allowing insufficient time for defendant to check his speed. Fischer v. Keen, 43 Cal.App.2d 244, 110 P.2d 693, was a case in which the court held a driver of an automobile which struck plaintiff in an unmarked crosswalk to be guilty of negligence per se but sustained a judgment for the defendant upon the ground that it was a proper case for the jury on the issue of plaintiff's contributory neg-

ligence. Defendant relied for his excuse in violating section 560, subsection (a) of the Vehicle Code upon the facts that the misty condition of his windshield prevented him from seeing to his left and that he was blinded by the headlights of approaching automobiles. He had not removed his foot from the accelerator or applied his brakes at any time prior to the accident. The court held that when he found he could not see to his left and thereby ascertain whether anyone was within the crosswalk, it was his duty to slacken his admitted speed of 25 miles per hour and place his car under such control that he could stop within the time and distance intervening between his ability to see the crosswalk and his arrival thereat. Pierce v. Black, 131 Cal.App.2d 521, 280 P.2d 913, is totally unlike the case before us. It was one in which defendant was held guilty of negligence as a matter of law, where defendant entered his automobile and started the motor while his door next to the curb was open and the car was in reverse gear, causing it to start suddenly backward, striking and injuring plaintiff who had walked up to the curb and had just looked to his left to see if there was any traffic coming preparatory to crossing the street. Defendant's car had been standing at the curb, 10 or 15 feet to plaintiff's right, facing away from him, and he had not seen the operator in the vehicle. It was held that defendant's own testimony established beyond peradventure of doubt that he was guilty of negligence proximately causing plaintiff's injuries and that it was equally apparent that plaintiff was free from contributory negligence.

[4, 5] Plaintiff's argument that, as a matter of law, she was free from contributory negligence, ignores settled principles that one about to cross a highway on which motor vehicle traffic is to be expected must make reasonable observations to learn the traffic conditions confronting him; look to the vicinity from which, were a vehicle approaching, it would immediately endanger his passage; try to make a sensible decision whether it is reasonably safe to attempt the crossing, and generally exercise ordinary care, including reasonable use of his senses, to avoid an accident. The evidence posed questions of whether plaintiff ran out or walked rapidly from an obscured position in front of the truck into defendant's path without looking in any direction except forward; whether she should have heard the truck driver yell and should have jumped back as at least two of the other girls did; whether she looked at or in the direction from which defendant's car was approaching; whether she made reasonably careful use of her eyesight to see defendant; whether defendant was plainly to be seen, and whether she saw defendant but carelessly moved into his path. It is difficult to see how the trial court could properly have done otherwise than deny the motion for a directed verdict and submit the case to the jury as a factual problem. It was certainly well within the law in so doing. Sanker v. Humborg, 48 Cal.App.2d 203, 119 P.2d 431; Salomon v. Meyer, 1 Cal.2d 11, 32 P.2d 631; McQuigg v. Childs, 213 Cal. 661, 3 P.2d 309; Hudson v. Rainville, 46 Cal.2d 474, 297 P.2d 434; Francis v. City and County of San Francisco, 44 Cal.2d 335, 282 P.2d 496; Reaugh v. Cudahy Packing Co., 189 Cal. 335, 208 P. 125; Lavin v. Fereira, 10 Cal.App.2d 710, 52 P.2d 518; Reed v. Stroh, 54 Cal.App.2d 183, 128 P.2d 829. The cases of Le Blanc v. Browne, 78 Cal.App.2d 63, 177 P.2d 347, and Pierce v. Black, 131 Cal.App.2d 521, 280 P.2d 913, do not support plaintiff's position under the facts.

[6–9] The instruction on imminent peril given by the trial court at defendant's request was as follows: "A person who, without negligence on his part, is suddenly and unexpectedly confronted with peril arising from either the actual presence, or the appearance, or imminent danger to himself or to others, is not expected, nor required, to use the same judgment and prudence that is required of him, in the exercise of ordinary care, in calmer

and more deliberate moments. His duty is to exercise only that care that an ordinarily prudent person would exercise in the same situation. If at that moment he does what appears to him to be the best thing to do, and if his choice and manner of action are the same as might have been followed by an ordinarily prudent person under the same conditions, he does all the law requires of him, although, in the light of after-events, it should appear that a different course would have been better and safer." The contention that it was prejudicial error to give it in this case is largely predicated upon the assumption that defendant was negligent as a matter of law and plaintiff free from contributory negligence as a matter of law, of which we have previously disposed. However, the argument proceeds upon the premise that before an instruction on imminent peril is proper, two elements are necessary: (1) At least two courses of action are present after the danger is perceived; (2) No negligence is chargeable to the person to whom those courses of action are open. Defendant does not dispute the accuracy of the law as stated in cases cited by plaintiff in support of this proposition. Plaintiff says that neither element is present in this case; that defendant had no choice of action; that the giving of the instruction may have misled and confused the jury and was therefore prejudicial. We disagree with this assertion. As above stated, it was a question of fact for the jury to decide whether or not negligence was chargeable to the defendant. We are of the opinion that he had open to him a choice of several courses of action when the truck stopped about 10 feet ahead of him and he saw the heads of the girls appear, and that this situation was an emergency not of his making. He could have sounded his horn, or swerved sharply to the left, or to the right, or relied upon his brakes alone, or done a combination of these things to avoid the collision or lessen the probability of striking the plaintiff. Whether he was negligent in not selecting the best or safest of these courses in the face of the emergency was for the jury to decide. Plaintiff agrees that the instruction was a correct statement of the law and that she herself could have asked for it, but argues that as given it could only have applied to the defendant; that it uses the masculine pronoun throughout while plaintiff is a very feminine young girl. There is no merit in this contention. The instruction was a broad, general statement of principle applying to a standard of conduct or duty of "a person" confronted by a sudden emergency not caused by his own negligence. It was grammatically correct to use the masculine pronoun after identifying the subject as "a person." Thus, elementary rules teach us that the masculine pronouns ("he", "his", "him") are used to refer to nouns of indefinite gender, as "everyone", "a person", etc. It will not be assumed that the jury were lacking in a fundamental knowledge of English and would be misled. As a correct statement of the law, this instruction could properly have been given by the court on its own motion to aid the jury in judging the conduct of plaintiff or defendant and analyzing how each performed his duty of ordinary care under all the surrounding circumstances. It was beneficial to either, depending upon how the jury viewed the facts.

Since we take this view of the challenged instruction, it is unnecessary for us to discuss in detail the arguments on both sides as to whether or not there was a waiver of the objection to it by plaintiff for failure to ask for a clarification or by inviting any possible error by herself requesting the instruction which the trial judge gave, immediately following the questioned one, to the effect that "a person who, himself, is exercising ordinary care has a right to assume that others too will perform their duty under the law, * * *."

The judgment and order appealed from are affirmed.

DOOLING, Acting P. J., and KAUFMAN, J., concur.

Hearing denied; CARTER and TRAYNOR, JJ., dissenting.

148 Cal.App.2d 313

Joseph GOTTLOEB, Plaintiff and Appellant,

v.

MELROSE HEALTH BATHS, Sam Minster, Jane Doe Minster, Harvey Emerson, Jane Doe Emerson, Oscar Goldstein, Jane Doe Goldstein, Does I to VI, Roe Partnership, Roe Corporation, Defendants,

Melrose Health Baths, a co-partnership, and Sam Minster, Respondents.

Civ. 21827.

District Court of Appeal, Second District, Division 2, California.

Feb. 6, 1957.

Hearing Denied April 2, 1957.

Action for injuries sustained by patron when he slipped and fell on tile step or bench in defendants' "Russian" steam bath room. The Superior Court, Los Angeles County, Arthur Crun, J., rendered a judgment of nonsuit, and plaintiff appealed. The District Court of Appeal, Moore, P. J., held that evidence was sufficient to take case to jury on issue as to whether defendants had been negligent in failing to complete job of covering all of the tile with a less slippery material, and held that evidence did not require finding as a matter of law that plaintiff had been contributorily negligent in not noticing slippery tile and guarding against accident.

Reversed.

1. Trial ⇐139(1), 142

Nonsuit motion made at close of plaintiff's case should be denied if there is any substantial evidence which, with the aid of all legitimate inferences favorable to plaintiff, tends to establish allegations of complaint.

2. Appeal and Error ⇐927(3), 989

Court reviewing judgment of nonsuit must view evidence in light most favorable to plaintiff, disregarding all contradictions and inconsistencies and drawing only such inferences as may be reasonably drawn in favor of plaintiff, even though there is conflict in evidence and only some of it tends to sustain plaintiff's case and different findings could reasonably be drawn.

3. Negligence ⇐32(1)

Owner of premises must exercise reasonable care to keep same in reasonably safe condition for business invitee.

4. Negligence ⇐136(22, 27)

In action for injuries sustained by patron when he slipped and fell on tile step or bench in defendants' "Russian" steam bath room, evidence was sufficient to take case to jury on issue as to whether defendants had been negligent in failing to complete job of covering all of tile with less slippery material; and evidence did not require finding as a matter of law that plaintiff had been contributorily negligent in not noticing slippery tile and guarding against accident.

5. Trial ⇐311

Jury must, at times, and particularly in negligence cases, evaluate evidence in light of human experience; and jurors are not required to shut their eyes to matters of common knowledge.

6. Evidence ⇐8

It is a matter of common human experience that wet tile is more slippery than some other surfaces, including wood.

Paul Braslow, Hollywood, for appellant.

Carol G. Wynn, Los Angeles, for respondents.

MOORE, Presiding Justice.

Appeal from a judgment of nonsuit in an action for damages for personal injuries sustained when plaintiff slipped and fell on a tile step or bench in the steam room of defendants' bath house.

The Complaint

The complaint alleges that on August 21, 1954, plaintiff was a paying business invitee of the Melrose Health Baths; that at that time and place "defendants herein did so negligently operate, maintain, and conduct the above mentioned premises as to

cause to allow and exist and permit to remain a dangerous and defective condition in that a portion of the 'steam bath steps' located in the steam room were not covered with a non-slippery substance and were in fact constructed of tile and that because of the steam and humidity said tile became wet and slippery and unfit to walk on and that business invitees were invited and instructed to use said steps to walk on to attain the desired density of air and steam; that pursuant to the directions of defendants plaintiff did use said steps in said steam room and did slip and fall upon the uncovered tile portion of said steps (the remainder of the area of said steps being covered with non-slippery wood) * * *."

The Answer

The answer admits that plaintiff was a paying business invitee; denies generally the remainder of the foregoing allegations; but contains affirmative defenses of contributory negligence and assumption of risk.

The Evidence

On August 21, 1954, plaintiff entered the place of business of the defendants, of which Sam Minster was one of the owners, to take a steam bath. While he had been in the habit of taking steam baths for many years, he had never patronized the establishment of defendants. The type of bath involved is known as a "Russian Bath," an oven being employed to heat bricks over which hot water is poured to create the steam. It is the custom of the patrons of defendants to use soapy water mixed in a pail to apply to each other, using a brush or broom of eucalyptus leaves.

The steam room had an oven or "steam generator" and "bench-bleachers" lining two walls. The higher up the benches one goes, the hotter it gets. The bleachers lining two walls of the room were either constructed of or were covered with wood with the exception of a small area three or four feet wide in the two bottom bleachers made of tile. In that area the accident happened. Also, the floor of the room was glazed tile. In one place a wooden stairway had been constructed for patrons to reach the upper benches, and the steps there were covered with either a rubber matting or a composition material with gravel, which was a rough-surface safety device. There was always soapy water on the steps or benches.

It appears that when plaintiff entered the hot-room with Isadore Troianoff, he saw two friends, Gross and Isenberg. He stopped and chatted with them for a minute or so. Then Gross asked Troianoff to give him a rub and they both went up to the top bench. Plaintiff followed and sat on the second bench in the tile section with his feet hanging in the stairway. Desiring a drink of water, he turned around and put his feet on the first bench. He stood up "and I went sailing and that is the last thing I remember." There is testimony to the effect that plaintiff turned around because Troianoff was blocking his way on the stairs. Plaintiff testified that he was not on the second bench long enough to notice the nature of the surface on which he was sitting and did not look at the surface of either the first or second bench before falling. By the fall, plaintiff fractured his left wrist.

The Motion for Nonsuit

At the conclusion of plaintiff's case, defendants moved for nonsuit on the following grounds:

1. Insufficient evidence to warrant a finding by the jury of negligence on the part of defendants proximately causing the accident;

2. Plaintiff's evidence showed he was guilty of contributory negligence as a matter of law which itself was the proximate cause of the accident.

The trial court granted the motion, but it is not clear from the record whether it was granted on one or both grounds. This appeal followed.

[1, 2] It is axiomatic that a motion for nonsuit at the close of plaintiff's case should be denied if there is any substantial evidence, which, with the aid of all legitimate

inferences favorable to the plaintiff, tends to establish the allegations of the complaint. Murphy v. Atchison, T. & S. F. Ry. Co., 139 Cal.App.2d 792, 294 P.2d 458. An appellate court in reviewing a judgment of nonsuit must view the evidence in the light most favorable to the plaintiff, disregarding all contradictions and inconsistencies and drawing only such inferences as may be reasonably drawn in favor of plaintiff Murphy v. Atchison, T. & S. F. Ry. Co., supra; Kirk v. Los Angeles Ry. Corp., 26 Cal.2d 833, 161 P.2d 673, 164 A.L.R. 1, even though there is a conflict in the evidence and only some of it tends to sustain the plaintiff's case and different findings can reasonably be drawn. Sunset Milling & Grain Co. v. Anderson, 39 Cal.2d 773, 249 P.2d 24.

[3] Inasmuch as plaintiff was concededly a business invitee, he was entitled to the protection of the doctrine which requires owners of premises to exercise reasonable care so to maintain their premises in a reasonably safe condition as not to injure the invitee. Richter v. Adobe Creek Lodge, 143 Cal.App.2d 514, 299 P.2d 941; Butcher v. Queen City Iron & Metal Co., 99 Cal. App.2d 25, 221 P.2d 265; Ashley v. Jones, 126 Cal.App.2d 328, 332, 271 P.2d 918.

[4–6] Now there is substantial evidence in the record from which the jury could have found that the defendants failed in their duty to maintain a reasonably safe place for an invitee. Therefore, it was the duty of the court to submit to the jury for its determination the question of negligence of defendants. They could reasonably have inferred negligence from the very fact that the defendants covered most of the tile benches with a wooden covering, leaving uncovered only the small portion in which plaintiff met with his accident. It could have been inferred that by covering a portion of the tile with wood, the defendants had recognized that uncovered tile constituted a potentially dangerous condition in a room filled with steam and in which soapy water was prevalent, and had commenced the process of protecting against the danger. The jury could reasonably have inferred that failure to complete the task constituted negligence.

Defendants argue that there is no testimony whatever that the covered portion of the bath facilities was any more or less slippery than the tile portion. But direct testimony was not necessary on this point. A jury must at times, and particularly in negligence cases, evaluate the evidence in the light of human experience. Certainly, they are not required to shut their eyes to matters of common knowledge. It is a matter of common human experience that wet tile is more slippery than some other surfaces, including wood. In Sischo v. City of Los Banos, 26 Cal.App.2d 642, 649, 80 P.2d 116, 1020, 1021, the court in denying a rehearing declared: "It is common knowledge that tiling, when wet, is slippery, and in this cause the testimony shows that the tiling was wet, and therefore slippery."

In any event, it was a question of fact, to be determined by the jury, whether or not the tile portion was slippery and dangerous; whether failure to cover the tile portion was negligence on the part of defendants; and whether such negligence was the proximate cause of the accident. We cannot say, from the evidence before us, that there was no actionable negligence on the part of the defendants *as a matter of law*. The issue should have been submitted to the jury.

Respondents urge that the instant case is governed by Lewis v. Reinberg, 136 Cal.App. 554, 29 P.2d 439, 440, in which a judgment of nonsuit was sustained in a "slip and fall" case in a steam room. That case is distinguishable on its facts. There the plaintiff and her companion occupied a private room about six or eight feet square. Instead of waiting for the attendant to clean the room with a hose after the previous occupant departed, they did it themselves. Furthermore, in the complaint it was alleged that the injuries were caused solely by reason of the soap's accumulation on the steps and "that said soap was negli-

gently allowed to be accumulated by the defendant." The appellate court held that the plaintiff had failed to present any evidence to sustain the essential allegations of her complaint. It was not shown that any "soap" had accumulated on the steps. In the case at bar the plaintiff has alleged a "dangerous condition and a defective condition in that a portion of the 'steam bath steps' were not covered with a nonslippery substance." The evidence is without conflict that this allegation is true. It was a question for the jury as to whether the maintenance of that condition was negligence on the part of the defendants proximately causing plaintiff's injuries.

Respondents only cursorily discuss the issue of contributory negligence on the part of plaintiff. However, since it was one of the grounds for the granting of the motion for nonsuit, a brief comment will not be amiss. It has been stated in Anthony v. Hobbie, 25 Cal.2d 814, 155 P.2d 826, and followed in many decisions that cases in which it can be said as a *matter of law* that the negligence of plaintiff contributed proximately to the accident are rare, and that before it can be held as a matter of law that contributory negligence exists, the evidence must point unerringly to that conclusion. This is not such a case.

The evidence shows that plaintiff was in the steam room not more than five minutes before the accident occurred and was seated on the second tile bench only two or three seconds before he stood up on the first bench. Therefore, it was for the jury to determine whether in that short interval of time, considering that his vision was somewhat impaired by the steam and that he had never been in the room before, he was negligent in not noticing the slippery tile and not guarding against the accident. In short, it was for the jury to decide whether plaintiff did or did not conduct himself as a reasonably prudent man under all the circumstances. It was not a question of law, but one of fact.

Plaintiff has raised two points of error in connection with the exclusion of evidence, but in view of our conclusion that there is sufficient evidence already in the record to justify submitting the matter to the jury, it is not necessary to consider the other assignments.

The judgment is reversed.

FOX and ASHBURN, JJ., concur.



148 Cal.App.2d 280

The PEOPLE of the State of California, Plaintiff and Respondent,

v.

James Stanley GARNETT, Defendant and Appellant.

Cr. 5765.

District Court of Appeal, Second District, Division 2, California.

Feb. 4, 1957.

Defendant was convicted on four counts of violating the Health and Safety Code by possessing opium and some of its numerous derivatives and of burglary. The Superior Court, Los Angeles County, Louis H. Burke, J., entered judgment, and defendant appealed. The District Court of Appeal, Moore, P. J., held that where reliable informant told police officer that certain person had a supply of narcotics in his hotel room, officer was justified in searching the room without a warrant.

Judgment affirmed.

1. Arrest ⇐63(4)

Where reliable informant told police officer that certain person had a supply of narcotics in his hotel room, officer was justified in arresting such person, though officer had no warrant.

2. Searches and Seizures ⇐3(1)

Where reliable informant told police officer that certain person had a supply of narcotics in his hotel room, officer was jus-

tified in searching the room without a warrant. West's Ann.Pen.Code, § 836.

3. Searches and Seizures ⇐3(1)

Where reliable informant told police officer that certain person had a supply of narcotics in his hotel room, and officer went to hotel, and when such person saw the officer such person ran down the hall, act of such person in running down the hall was sufficient reason for belief of officer that some crime had been committed and authorized a search of the room without a warrant. West's Ann.Pen.Code, § 836.

4. Searches and Seizures ⇐7(28)

Where reliable informant told police officer that certain person had a supply of narcotics in his hotel room, and officer went to the hotel and asked such person if officer could look around the room, and such person told the officer to go ahead, voluntary consent by such person to the search was sufficient authority for the search, by the officer without a warrant. West's Ann.Pen.Code, § 836.

5. Searches and Seizures ⇐3(1)

Where a police officer testifies in good faith that he acted on the information of an unnamed informant in making search without a warrant, and that such informant is reliable, the officer thereby establishes a firm basis for his search. West's Ann.Pen. Code, § 836; West's Ann.Code Civ.Proc., § 1963, subds. 15, 33.

6. Searches and Seizures ⇐3(1)

So long as the good faith of an arresting officer with respect to reliability of his informant satisfies the scrutiny of the trial judge, the officer is in substantially the same position as if he came with a warrant of arrest. West's Ann.Pen.Code, § 836; West's Ann.Code Civ.Proc., § 1963, subds. 15, 33.

7. Searches and Seizures ⇐7(28)

Fact that police officer having suspect in custody inquired for permission to search suspect's room without a warrant did not destroy the permission given by the suspect as a voluntary consent. West's Ann.Pen. Code, § 836.

8. Arrest ⇐71

Where arrest of suspect without a warrant was lawful, search and seizure of narcotics in suspect's hotel room were legal, because made in order to obtain the fruits of the crime so as to facilitate the court's investigation of charges against suspect. West's Ann.Pen.Code, § 836.

9. Searches and Seizures ⇐7(1)

The purpose of the constitutional guarantee against unreasonable searches and seizures is to prevent unreasonable invasions of the peace and security of the people.

10. Searches and Seizures ⇐3(1)

If a police officer is convinced, on the basis of reasonable information, that a person is sheltering evidence of a specific felony and sees such person enter a house, the officer should not hesitate to make a reasonable search. West's Ann.Pen.Code, § 836.

Rafter & Fredricks, Hermosa Beach, for appellant.

Edmund G. Brown, Atty. Gen., Elizabeth Miller, Deputy Atty. Gen., for respondent.

MOORE, Presiding Justice.

Appellant was convicted on four counts of violating section 11500 of the Health and Safety Code, to wit, possession of opium and some of its numerous derivatives[1] on or about May 20, 1956. Also, he was convicted of burglary for having entered the Guild Drug Store with intent to commit theft on May 19, 1956. The matter was submitted on the preliminary transcript and the exhibits received in evidence before the municipal court. The burglary was determined to be of the second degree. Ap-

1. Isonipecaine, amidone, morphine sulphate, pantapon, dihydrocodeinone, dilaudid hydrochloride, codeine and papaverine, dolophine hydrochloride, papaverine.

pellant was found to be a narcotics addict, hence, the court having made the prison terms run concurrently, recommended his treatment at the Facility of Vacaville.

Appellant seeks to effect a reversal of the judgment on the ground that his home was illegally searched.

Pharmacist George Guild closed his store at Hermosa Beach at 10:00 p. m. on May 19, 1956. When he opened up the following morning, he found narcotics scattered over the floor, and that such drugs and money had been removed. Soon after the crime had been reported to the police, Officer Palmer was told by a reliable informant that there was supposed to be a quantity of narcotics in appellant's room 203 in a local hotel. Because the informant had been found to be reliable for a period of over three years and because the officer knew appellant and that he occupied room 203 in the specified hotel, he followed the reputed addict to the hostelry and straightway knocked at appellant's door. When his alarm brought no response, he procured the passkey from the landlady and knocked again before entering the room. At this juncture, one Thurston appeared, followed by appellant who suddenly dashed down the hall. He returned, however, on the order of the officer who demanded converse. Appellant protested that he had done nothing and told his official guest to "go ahead and look around." As a suitcase was laid upon the bed, appellant exclaimed: "I didn't put that in there. Somebody planted something on me. I don't know what is in there * * * I didn't put it in there. Somebody planted it on me."

When Officer Palmer found the valise contained 25 bottles, he placed appellant under arrest and passed the evidence to Deputy Sheriff Hatfield at 2:00 p. m. May 20 in the office of the Chief of Police of Hermosa Beach, appellant repeated that he had no knowledge of how the bottles got into his suitcase and insisted that some one must have planted them and asserted his readiness to account for his time during the preceding evening and the morning of the twentieth. However, when invited to do so, he maintained silence, whereupon the officers accompanied him back to room 203.

On entering, Deputy Hatfield asked appellant whether they might search the place. The only response was: "You are the boss." Taking those words as an affirmative reply, the search began. A black box was found in the pocket of a coat in the closet. In the box was an eye dropper, a burnt spoon, a plastic case with two hypodermic needles and a small plastic-top box containing a number of white tablets. Hatfield sealed the suitcase containing the black box and 25 bottles and other movables, delivered it to the sheriff's crime laboratory on the following day. Chemist Cromp examined its contents and found the contents of 18 of the 25 bottles were nine derivatives of opium. The tablets in the black box were found to be morphine sulphate.

Mr. Guild had not authorized the entrance into his store or the removal of the merchandise.

[1–4] There was no proof that the search of room 203 was illegal or unreasonable. Even though Officer Palmer had no warrant, the arrest was lawful. The officer's first information relative to appellant as a suspect came from an informant who, during the preceding three or four years, at different times had correctly reported violations of the law and had thereby gained the confidence of the officer. He stated to Palmer: "There is supposed to be a bunch of narcotics in Garnett's room in 203." By reason of the previous relationship of Palmer and such informant, it was a reasonable inference for him to deduce that the latter intended to indicate that there was in fact a generous supply of contraband narcotics in room 203. Such facts so reported were reasonably sufficient to warrant Officer Palmer's search of room 203. People v. Guy, 145 Cal.App.2d 481, 302 P.2d 657; Trowbridge v. Superior Court, 144 Cal. App.2d 13, 300 P.2d 222. But the officer was not obliged solely to rely upon the

report of such informant as the basis for the arrest of appellant or for a search of his room. When appellant first saw the officer in room 203, he ran. Such act in and of itself was sufficient reason for believing some crime had been committed and for authorizing a search. People v. Martin, 46 Cal.2d 106, 108, 293 P.2d 52; People v. Blodgett, 46 Cal.2d 114, 117, 293 P.2d 57. In compliance with Palmer's command to return, appellant re-entered his room, engaged in conversation with the officer, and consented to a search of his room. That voluntary consent was alone sufficient authority for the search. His arrest having been justified by the reports of the officer's informant, by appellant's flight and by discovery of opium in the latter's open valise, a search of the room was an incident of his arrest. People v. Dixon, 46 Cal.2d 456, 458, 296 P.2d 557; United States v. Rabinowitz, 339 U.S. 56, 61, 70 S.Ct. 430, 433, 94 L.Ed. 653.[2] Moreover, after appellant had returned to his room on the order of the officer, the latter asked him "if I could look around in the room and he said, 'Sure, go ahead, I haven't done anything' * * * Somebody planted something on me.'" Taking such reply as consent to a search, the officer found in appellant's open suitcase bottles of opium derivatives.

[5, 6] Appellant assumes that police officers would, to suit their convenience, make use of fictitious informants as bases for illegal searches and seizures. Such assumption is unauthorized and is contrary to statutory presumptions that official duty has been regularly performed and that the law has been obeyed. Code Civ.Proc., § 1963, subds. 15, 33. A finding that an officer in a specified case, People v. Cahan, 44 Cal.2d 434, 436, 282 P.2d 905, obtained evidence "in flagrant violation" of the federal and state constitutions is no justification for concluding that every policeman has abused the rights of citizens while performing his duties. When an officer has in good faith testified that he had acted upon the information of an unnamed person and that such informant was reliable, he has thereby established a firm basis for his search of a suspect's premises. Penal Code, § 836. Consequently, when a reliable informant told Officer Palmer that appellant had a supply of narcotics in room 203, the officer was then authorized to make the arrest. There is nothing in the Cahan decision, supra, or in any subsequent case that attempts to nullify section 836. So long as the good faith of the arresting officer with respect to the reliability of his informant satisfies the scrutiny of the trial judge, he is in substantially the same position as if he had come with a warrant of arrest. People v. Gonzales, 141 Cal.App.2d 604, 608, 297 P.2d 50.

[7, 8] The fact that the officer having defendant in custody inquired for permission to search does not destroy its significance as a voluntary consent. Ibid; People v. Lujan, 141 Cal.App.2d 143, 148, 296 P.2d 93. The officer premised appellant's consent upon the latter's assertion that he had done nothing unlawful. Also, since his arrest was lawful, the search and seizure were legal in that they were made in order to obtain the fruits of the crime whereby to facilitate the court's investigation of the charges against the accused. Hatjis v. Superior Court, 144 Cal.App.2d 426, 301 P.2d 44. The honorable efforts of peace officers to procure evidence of a crime should not be discouraged. By their labors in fetching proofs to the prosecutor, they render a notable service to the state

2. "The right 'to search the place where the arrest is made in order to find and seize things connected with the crime as its fruits or as the means by which it was committed' seems to have stemmed not only from the acknowledged authority to search the person, but also from the longstanding practice of searching for other proofs of guilt within the control of the accused found upon arrest * * * It became accepted that the premises * * * under the control of the person arrested and where the crime was being committed, were subject to search without a search warrant. Such a search was not 'unreasonable.'"

and assure convictions of many major crimes that would otherwise go unpunished.

[9, 10] There was nothing unreasonable about the search. The purpose of the constitutional guaranty is to prevent unreasonable invasions of the peace and security of the people. If an officer is convinced on the basis of reasonable information that a person is sheltering evidence of a specific felony and sees the accused enter that house, the officer should not hesitate to make a reasonable search. People v. Maddox, 46 Cal.2d 301, 306, 294 P.2d 6.

Judgment affirmed.

FOX and ASHBURN, JJ., concur.



148 Cal.App.2d 285

The PEOPLE of the State of California, Plaintiff and Respondent,

v.

Arthur D. GALVIN, Defendant and Appellant.

Cr. 3232.

District Court of Appeal, First District, Second Division, California.

Feb. 5, 1957.

Hearing Denied April 2, 1957.

Defendant and another were convicted of seven counts of robbery and four counts of assault with a deadly weapon. The Superior Court, County of San Mateo, Murray Draper, J., entered judgment on all counts and defendant appealed. The District Court of Appeal, Comstock, J., held that evidence sustained conviction for all counts of robbery and two counts of assault but that as two acts of assault were concurrent with acts of robbery, defendants should not have been sentenced for the offenses separately.

Judgment in accordance with opinion.

1. Criminal Law ⇐1130(5)

Appellate court is not required to speculate as to errors which an appellant seeks to have reviewed unless he particularly sets them forth with appropriate supporting references and authorities. West's Ann. Rules on Appeal, rule 15(a).

2. Robbery ⇐6

In prosecution for robbery and assault, evidence established that bartender and patron of bar were assaulted before each was robbed and that force inflicted in assaults was essential element of robbery and not independent act.

3. Assault and Battery ⇐92
Robbery ⇐24(1)

In prosecution for robbery and assault with deadly weapon, evidence sustained finding that defendants acted in pursuance of common design, and aided and abetted each other in every act of which they were accused.

4. Robbery ⇐15

Where defendants, who robbed two bars, acted in pursuance of common design, each defendant was fully responsible as principal for acts of the other.

5. Assault and Battery ⇐92
Robbery ⇐24(1)

In prosecution on seven counts of robbery and four counts of assault with deadly weapon, evidence sustained conviction for all counts of robbery and two counts of assault.

6. Criminal Law ⇐1159(3)

An appellate court does not concern itself with conflicts in evidence where that in support of prevailing side has substance.

7. Criminal Law ⇐984

Where assaults with deadly weapons committed by defendants were not independent acts but were in concurrence with robbery, defendants should not have been sentenced for both assault and robbery. West's Ann.Pen.Code, § 654.

8. Criminal Law ⇐1209

Co-operative acts constituting but one offense when committed by same person at same time, when combined, charge but

one crime and but one punishment can be inflicted.

9. Criminal Law ⇐29

In crimes against the person, there are as many offenses as persons affected.

10. Indictment and Information ⇐185

Where each count alleged robbery generally and then specifically pleaded facts, later proved, which constituted first degree robbery, conviction of first degree robbery was not improper.

11. Indictment and Information ⇐185

Even a charge of robbery without specifying the degree is sufficient to sustain conviction of robbery in first degree.

Arthur D. Galvin, in pro. per.

Edmund G. Brown, Atty. Gen., Clarence A. Linn, Asst. Atty. Gen., William M. Bennett, Deputy Atty. Gen., for respondent.

COMSTOCK, Justice pro tem.

Arthur D. Galvin and Manuel Gonzales, his co-defendant in the court below, were indicted and jointly charged by the Grand Jury of San Mateo County on seven counts of robbery and four counts of assault with a deadly weapon. They were tried by a jury and both were found guilty of all counts. Each of the robberies was found by the jury to be robbery in the first degree. Judgments were duly pronounced and entered. Each defendant moved for a new trial and for probation. These motions were denied.

Arthur D. Galvin alone appeals from the judgment of conviction against him in which he was sentenced to imprisonment in the state prison for the terms prescribed by law, the sentences to be served concurrently. He also appeals from the order denying his motion for a new trial.

Appellant appears here in propria persona. It is most difficult for us to determine from his brief the grounds relied upon for reversal. His brief is devoid of any of the supporting transcript references required by Rule 15(a) of the Rules on Appeal. A cursory perusal of the brief discloses that appellant is illiterate and unskilled in the law. Obviously, he labors at a great disadvantage in attempting to present his appeal. In the main, the brief consists of a diatribe against the law and its processes. An excerpt will illustrate this. We quote verbatim:

"Since every court in this union seems to overrule this case it leaves appellant with no other opinion except to pray to this court to reverse the false double jeopardy convictions, and order appellant in this case discharged from custody, upon each ground set fourth independantly with many combinations of compounded denials of due process of law denied them in this case, which will shock justice to see the compounded, heaped up multiple errors inflicted against them under a steam rollijg chronic, ghastly, gruesome, slavish, restricted, gagged, curtained, calculated nortorious exclusion, of disclosures of all *petenent* circumstances of true facts which should have been produced into an open court trial but was excluded under the cloak of laws with accompanying hardship, and preventions by subverted exact *exclusins* of denial of due process of law in this case appellants were doomed helpless in their tracks, with no possible chance to receive an open court fair trial, with swelling streams of broadsided news papers, of hatred, and violent bitterness against them, to create a climate of hysteria against them, by fanning the fires of hatred, not allowing appellants a sketchy token of a speculation of their rights to have an open court fair trial in this case."

[1] Respondent has moved to dismiss the appeal upon the grounds that appellant's brief is lacking in any supporting transcript references or applicable authorities and that it is frivolous and without merit. While it is true that appellate court is not required to speculate as to the errors which an appellant seeks to have reviewed unless he particularly sets them forth with appropriate supporting references and authorities, we are disposed to indulge liberality in this case and shall, therefore, disregard technical defects and consider the substance

of the brief insofar as we are able to understand the points attempted to be made. The appeal will be disposed of on its merits rather than upon the motion to dismiss.

Disentangled from the wholly unjustified vilification which practically obscures its substance, the essence of the appeal is: (1) That the verdict and judgment are contrary to law and the evidence; (2) that appellant has been placed twice in jeopardy for the same offense in violation of the Fifth Amendment to the Constitution of the United States and Article 1, Section 13 of the Constitution of California, and has been convicted and is being punished twice for the same offense, contrary to the provisions of section 654 of the Penal Code; (3) that appellant was charged with second degree robbery and convicted of first degree robbery.

The record, viewed in the light most favorable to the People, discloses facts which may be summarized as follows:

On October 3, 1955, at approximately 1:30 a. m., Arthur Galvin and his co-defendant, Manuel Gonzales, entered a tavern or barroom known as the 751 Club in South San Francisco. Each held in one hand an object resembling a metal bar or pipe, wrapped or rolled in newspapers, and held a handkerchief to his face with the other hand. Present in the barroom were the proprietor and bartender, Herman Gambero, his wife Antoinette Gambero, Fred Rodgers and William Wallace Maher. Immediately upon entering, both defendants announced, "This is it—this is a stick-up", or words to that effect, whereupon, Gonzales took a revolver from his pocket and menaced with it all the occupants of the room. He pointed the revolver at Herman Gambero while appellant moved quickly behind the bar and ordered Gambero to open his cash register. Gambero complied and appellant emptied its contents, taking therefrom $95. Both defendants ordered Mr. and Mrs. Gambero, Rodgers and Maher to go behind a low partition in the room and lie face down on the floor. They complied. Appellant ordered Herman Gambero back again behind the bar and commanded him to open a second "till" in which nothing was found. He also directed Gambero to hand him his wallet, which Gambero did, appellant taking $100 therefrom. Gambero was again ordered by defendants to lie face down on the floor behind the partition. While said four people were lying on the floor, appellant struck William Wallace Maher on the head with a heavy instrument which he held in his hand. Rodgers stated that the instrument was a bar or pipe, rolled in newspapers, and that appellant had several times poked and jabbed him with it while causing the victims to lie on the floor. Maher said he was not sure what it was that hit him, but it felt like a gun. While the victims were lying down, the door to the barroom was opened and closed a couple of times and bottles were being "juggled around" by the defendants. Before the defendants left the premises, they shoved all four victims into the ladies' room where they remained five or six minutes. After the bandits left, one and one-half cases of whiskey were found to be missing from Gambero's stock of liquor. The entire series of events from the time of defendants' entry until their departure consumed about twenty minutes. During this time, defendants played the "juke box" on occasions. Several times they removed the handkerchiefs from their faces, affording the victims a good opportunity to see them. Mr. and Mrs. Gambero and Mr. Rodgers positively identified both defendants. Neither Rodgers nor Maher was robbed. One of the counts of assault with a deadly weapon dealt with the striking of Maher. No charge was made with respect to any act against Rodgers or against Mrs. Gambero.

On October 18, 1955, at approximately 1:30 a. m., appellant and Gonzales entered a bar known as the Towne House in South San Francisco. They held handkerchiefs to their faces and announced, "This is a stick-up", or similar words. Upon entering, each held an instrument in one hand resembling a metal bar or pipe, rolled in newspapers. Gonzales stood by the door

and pulled a revolver from his pocket, menacing with it all occupants of the barroom, of whom there were approximately twelve or fourteen. Appellant moved promptly to the bar where Chester Luchini, the owner and one of the bartenders, was standing and struck Luchini a hard blow on the head as he walked around the end of the bar. Luchini was knocked down and "passed out" for awhile. The instrument used was the metal object, wrapped in newspapers, held in the hand of appellant. Appellant looted the cash register and safe of approximately $1,500. When defendants entered, some of the occupants of the room were seated on stools at the bar and some seated at tables in booths. All were told by defendants to put their heads down, to not look up and to put their money, wallets, purses or billfolds on the bar or tables. Before the people were ordered into the booths, a patron described only as "Eddie", a cousin of Luchini's from Canada, was on the dance floor with one of the female patrons. He thought the holdup was a joke and started to dance but was promptly struck on the head by Gonzales with the revolver. Then they were all herded by defendants into the booths and ordered to sit down and put their heads on the tables. John Sartoris and Charles Soldani, also known by the nickname "Speedy", were in one of the booths with others. Sartoris attempted to argue with Gonzales who fired a revolver at him, the bullet striking the back of the booth and being later recovered from the floor. The discharge was close to Pearl Verandes who received a powder burn on the arm. Gonzales struck Soldani a blow across the forehead with the revolver. (The details of this assault on Soldani will be further set out and discussed later in this opinion.) When the victims were ordered into the booths, defendants commanded them, "Throw your billfolds on the tables." Among others, Soldani put his money on the table in the booth where he was seated. Later they were all ordered to go into the washroom and stay there, the defendants announcing that they were not going to leave right away. The door to the washroom was locked by the defendants. During the time defendants were in the room they played the "juke box" several times. After defendants departed from the premises, the victims were released from the washroom and all of them who had placed money, purses, wallets and billfolds on the bar or tables found their money missing. The evidence indicated that defendants took the money from the tables while the victims were in the washroom. Defendants removed the handkerchiefs from their faces several times during the sequence of related events. Both of them were positively identified by several witnesses.

[2] Count three of the Indictment charged the defendants with a robbery against Chester Luchini and count four charged them with an assault with a deadly weapon against the same person. Count five charged them with a robbery against Soldani and count six with an assault with a deadly weapon against Soldani. In view of appellant's contentions with respect to these charges being based upon a single, indivisible act, a more detailed discussion of the facts as related to these two victims is in order. Luchini testified that just before he was struck, he was busy making change for a customer. He did not know a robbery was in progress until he was hit on the head. The $1,500 was taken from the safe and cash register after he was struck. He was groggy from the blow during the time the people were herded into the booths and then into the washroom. The weapon with which he was struck was wielded by appellant and was a metal bar or pipe, rolled in newspapers. He bled from the blow and subsequently required medical and hospital attention as a result. It definitely appears from direct testimony that the force inflicted upon him in the assault was the very force which was an essential ingredient of the robbery of the $1,500. With respect to Soldani, he testified that he was struck across the forehead with a gun by Gonzales "during the course of the robbery"; that it was done while the appellant was robbing the cash

register, when "they" were "moving people around"; that defendants said, "Throw your billfolds on the table"; that he did so and "found" $45 missing from it. Other witnesses testified that it was after they came from the washroom that the money they had placed on the bar or tables was found to be missing. The looting of the $1,500 from the cash register and safe was done early in the course of the robbery. So was the shooting at John Sartoris in the booth where Soldani was and Pearl Verandes received her powder burn. From this, and other evidence dealing with the sequence of events it appears that the striking of Soldani was done before defendants came into actual possession of his money. There is no direct evidence that the blow was struck after defendants obtained Soldani's $45. It thus fairly appears that the force used directly upon him was an essential element of the robbery committed against him and was not a later, independent act.

Gonzales was arrested at an early morning hour on October 19, 1955, just after he came out of Cadena's Bar on Third Street, in San Francisco, and entered a car equipped with license plates listed with the police as belonging to a wanted vehicle. Three police officers ordered him to halt. He refused and, instead, put his car rapidly in motion and attempted to run down one of the officers. They fired several shots both into the air and at Gonzales' car. He crashed into a parked car belonging to one of the officers and then crouched out of sight in his vehicle before emerging on command. A .38 caliber pistol cartridge was found by the police under the mat in the Gonzales automobile containing a bullet identical in size and weight to that recovered in the Towne House. Upon being interviewed at the Potrero Station, after arrest, Gonzales gave a false name of John Martinez. He also gave evasive and false answers to questions. A search of his person revealed another, identical .38 caliber pistol cartridge, concealed in the watch pocket of his trousers. Identifying papers were found in Gonzales' car and he later admitted his true identity.

Appellant was arrested about 2:30 a. m., on October 19, 1955, in an automobile parked near a house known to the police as Gonzales' residence in San Francisco. Galvin and Simon Gonzales, a half brother of Manuel, had been drinking together. Both were asleep in the car. Galvin had not reported for work on October 19, 1955, at his regular job with Plastic Productions, in Redwood City. Upon being interviewed, he denied any knowledge of the robberies and claimed he was only casually acquainted with Manuel Gonzales, though he had known Simon since 1950.

At the trial, both defendants denied categorically any part in the offenses charged. Galvin claimed he had never been in the Towne House and Gonzales that he had never been in South San Francisco. Each offered evidence which, if believed by the jury, would have tended to establish an alibi. Upon being cross-examined each admitted having been formerly convicted of a felony.

[3–6] Each robbery victim testified to his money having been taken from his person or immediate presence by the defendants, as charged in the indictment, and described the force used, or threats of force, putting him in fear, in the taking. There was abundant corroboration. Several witnesses testified to all essential facts to establish the four charges of assault with a deadly weapon. The evidence leaves no doubt that defendants acted in pursuance of a common design, aiding and abetting each other in every act of which they were accused. Each was therefore fully responsible as a principal for the acts of the other. The claim that the evidence does not support the judgment and that it is against law is without merit as to all counts upon which the guilty verdicts were based except counts four and six, charging assaults with a deadly weapon upon Chester Luchini and Charles Soldani, respectively. These two counts will be discussed later. The jury

heard the evidence and obviously believed the case made by the People and rejected the evidence brought forward by the defendants. An appellate court does not concern itself with conflicts in the evidence where that in support of the prevailing side has substance. Here, the case made by the People was very strong upon the facts.

[7, 8] Turning to appellant's contention that he was subjected to double jeopardy and deprived of his statutory rights under section 654, Penal Code, we find it unnecessary to enter upon an extended discussion of the constitutional questions as such, involving possible fine distinctions between double jeopardy in the constitutional sense, and statutory safeguards against conviction or punishment for a criminal offense perpetrated by one, separate and indivisible act and also for a lesser included offense. Appellant's claim of error in this regard is adequately disposed of by a consideration of the effect of section 654 of the Penal Code as applied to the facts of this case. As we have seen, the assaults upon Luchini and Soldani were made preceding or concurrently with the taking of their money. As was said in People v. Logan, 41 Cal.2d 279, at page 290, 260 P.2d 20, at page 26, "The one act of inflicting force with the bat cannot both be punished as assault with a deadly weapon and availed of by the People as the force necessary to constitute the crime of robbery, for 'co-operative acts constituting but one offense when committed by the same person at the same time, when combined, charge but one crime and but one punishment can be inflicted.'" (Citing cases.) That case is determinative of the appeal here so far as the judgment and sentence apply solely to counts four and six of the indictment and the verdicts limited thereto. In said case, the decisive factors were that the defendant struck his victim a vicious blow upon the head with a baseball bat, then snatched her purse, containing money, and fled. The instant case is like that and must be distinguished from cases like Ex parte Chapman, 43 Cal.2d 385, 273 P.2d 817, where the victim was first robbed by being menaced by one of the robbers with a deadly weapon and placed in fear, then fled and was pursued, tackled by one defendant and beaten with the weapon by the other, the decision being that the assault was a separate, divisible act, independent of the robbery and not an element thereof.

[9] Appellant's argument on the double jeopardy or included offense theory seems also to be based on the premise that the entire series of events on each date, October 3, and October 18, 1955, constitute but one, or, at most, two crimes. This claim is clearly untenable. In crimes against the person, there are as many offenses as persons affected. People v. Lagomarsino, 97 Cal.App.2d 92, 217 P.2d 124.

[10, 11] Appellant contends that he was indicted for robbery in the second degree and convicted of robbery in the first degree. This claim is also without merit. In the first place, each robbery count alleged robbery generally and then specifically pleaded facts, later proved, which constituted first degree robbery. Even a charge of robbery without specifying the degree is sufficient to sustain a conviction of robbery in the first degree. People v. Hayes, 118 Cal.App. 341, 5 P.2d 439.

We find no other points in appellant's brief which merit discussion.

The judgment of conviction of assault with a deadly weapon as to counts four and six is reversed. As to all other counts and in all other respects the judgment is affirmed. The order denying appellant's motion for a new trial is affirmed. Since we have considered and disposed of the appeal on its merits, the People's motion to dismiss the appeal is denied.

DOOLING, Acting P. J., and KAUFMAN, J., concur.

Hearing denied; SCHAUER, J., dissenting.

The PEOPLE of the State of California, Plaintiff and Appellant,

v.

Joe John VALENTI, Defendant and Respondent.*

Cr. 3246.

District Court of Appeal, First District, Division 2, California.
Feb. 7, 1957.

Hearing Granted April 2, 1957.

Prosecution for illegal wagering on football game results. The Superior Court, Santa Clara County, William J. Keough, J. pro tem., entered an order dismissing the information against defendant, and the People appealed. The District Court of Appeal, Kaufman, J., held that where dismissal of information, on ground that supporting evidence was inadmissible as having been obtained in connection with illegal arrest, occurred after jeopardy had attached, reversal of trial court's decision and remand for new trial would be futile, and accordingly People's appeal would be dismissed, even though reviewing court recognized fully error of trial court.

Appeal dismissed.

1. Criminal Law ⇐204, 290

Defense of former jeopardy must be pleaded, and failure affirmatively to plead it is waiver of defense.

2. Arrest ⇐63(4)
Criminal Law ⇐395

Where deputy sheriff had placed bets at liquor store, sheriff's office had been informed that bets there taken were collected at certain time each week, and automobile of individual who had previously been fined for similar type of activity was several times observed parked in vicinity of store at collection time, there were sufficient grounds for arrest of such individual without warrant after he had been observed going into and leaving store; and evidence seized as incident to such arrest was admissible against such individual in his subsequent prosecution for illegal wagering. West's Ann.Pen.Code, § 337a, subd. 6.

3. Criminal Law ⇐1131(4)

Where dismissal of information, on ground that supporting evidence was inadmissible as having been obtained in connection with illegal arrest, occurred after jeopardy had attached, reversal of trial court's decision and remand for new trial would be futile, and accordingly People's appeal would be dismissed, even though reviewing court recognized fully error of trial court.

Edmund G. Brown, Atty. Gen. of the State of California, Clarence A. Linn, Asst. Atty. Gen., John S. McInerny, Deputy Atty. Gen., for appellant.

E. M. De Mattei, A. F. De Marco, San Jose, for respondent.

KAUFMAN, Justice.

This is an appeal by the People from an order dismissing the Information against defendant on the ground of the illegality of defendant's arrest.

Defendant and respondent, Joe Valenti, was charged by an Information with a felony, a violation of Penal Code, § 337a, subd. 6 (illegal wagering on football game results). He pleaded not guilty. Trial by jury commenced on April 11, 1956. Testimony was given by several witnesses for the prosecution and on the following day two witnesses for the prosecution were examined in the absence of the jury. The court having concluded that there had not been reasonable grounds for arresting defendant without a warrant, made an order dismissing the Information, and discharged the jury.

The record shows that prior to defendant's arrest the sheriff's office of Santa Clara County received an anonymous telephone call informing them that a liquor store in a certain part of San Jose was distributing cards used in illegal wagering on the results of college football games.

* Opinion vacated 316 P.2d 633.

Deputy Sheriff Barlow was then assigned to attempt to lay bets on football games at this liquor store. He placed several bets by means of the selection cards upon which the games were listed and odds given as to the results. The sheriff's office had been informed that the bets were collected on Friday nights at about ten o'clock. The officers had knowledge that respondent had a record of being arrested and fined for two misdemeanors relating to a similar type of activity. Checking license numbers through the State Motor Vehicle Department, they learned that respondent's car was one of the cars that they had observed parked in the vicinity of the liquor store on two Friday nights. Respondent was arrested on a Friday night, November 18, 1955, without a warrant. He had been observed going into and leaving the liquor store, and was standing across the street from it when arrested. Captain Salt of the sheriff's office testified that on the night of November 18, and prior to the arrest, Mr. Stewart, a clerk in the liquor store, advised Salt that he was receiving the tickets from respondent Valenti, and that the pay-offs were made by him.

Respondent contends that the appeal should be dismissed because the order made by the trial court is not appealable. The People have no right of appeal except in the cases specified in Penal Code, § 1238, and respondent maintains that the order made herein does not fall within any of the six subdivisions of that section. Even if it be assumed that the order was erroneous, respondent points out that no statutory provision has been made for a right of appeal in such instance.

In the present case the question before the trial court for its decision was whether or not the evidence was admissible, and it was objected to by respondent on the ground that it had been obtained as the result of an illegal arrest. The court, after hearing the testimony surrounding the arrest, decided that there were reasonable grounds for obtaining a warrant of arrest, but that there were insufficient grounds for arrest without a warrant. Instead of ruling that the evidence was inadmissible and allowing the case to go to the jury, the court announced to counsel that he was dismissing the information for insufficiency of the evidence based on lack of reasonableness of the arrest. The jury was then called in and discharged, the court stating that there was no question to be presented to the jury, and the Court had, therefore, on its own motion dismissed the information. Bail was then exonerated, and the defendant discharged. Respondent argues that the order herein was an order dismissing the action and a final determination of the case, and since the court had power to dismiss the action, the order made herein was in effect a dismissal of the action.

The respondent contends that the order is not appealable citing the opinion of the Supreme Court in denying a hearing in People v. Knowles, 27 Cal.App. 498, 506, 155 P. 137; People v. Morris, 115 Cal.App. 2d 585, 252 P.2d 681 and People v. Baxter, 119 Cal.App.2d 46, 258 P.2d 1093. These cases hold that no appeal lies from an order of dismissal entered after the empanelment of a jury.

The People rely on People v. Burke, 47 Cal.2d 45, 301 P.2d 241, as overruling these decisions.

The Supreme Court in People v. Burke, 47 Cal.2d 45, 301 P.2d 241, does not expressly disapprove its own decision denying rehearing in People v. Knowles, 27 Cal.App. 498, 155 P. 137, or the decisions in People v. Morris, 115 Cal.App.2d 585, 252 P.2d 681, and People v. Baxter, 119 Cal.App.2d 46, 258 P.2d 1093. It is difficult to discover a tacit overruling of these decisions in the Burke opinion. The Supreme Court there dealt with an order made after the defendant was found guilty of the offense charged. This order reduces the punishment imposed by striking the charge of a prior offense. There is some language suggesting that such an order could be appealable under Subdivision 1 of Penal Code, § 1238. However, the People had not appealed. They asserted impropriety of the order striking

the charge of a prior offense only as respondent. The opinion's statements as to appealability merely establish the basis for the statement that "Regardless of whether the action * * * be regarded as 'an order setting aside (a part of the) * * * information' or as 'an order modifying the verdict or finding by reducing the degree of the offense or the punishment imposed,' it would appear that the People, if they were successfully to attack such action, must not only not have assented to it but must have taken an appeal." [47 Cal.2d 54, 301 P.2d 246.] Neither had been done, and we do not view the affirmance of the judgment as a holding that an order such as is involved in the case at bar is appealable.

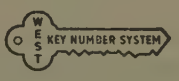
[1–3] In any event, it is entirely clear that defendant has been once in jeopardy, and that reversal and remand for new trial would therefore be futile. Defendant did not appeal, and thus there can be no application of the rule that an appealing defendant, in seeking reversal and new trial, waives the defense of double jeopardy. Here the People appeal. They concede that the point at which jeopardy attaches was passed in this case. They argue, however, that defendant waived his defense of double jeopardy by accepting the benefits of the order of dismissal. This claim amounts only to the assertion that defendant should have taken the affirmative step of objecting, in the trial court, when the court on its own motion ordered the dismissal. No authority is cited, and we can find none, which supports this novel theory. Reason would seem clearly to negative the view that a defendant must seek to stop action by the trial court, which he has not sought by motion or otherwise, in order to avoid the waiver of a fundamental right.

It is true that the defense of former jeopardy must be pleaded, and that failure affirmatively to plead it is a waiver of the defense. However, as was pointed out by Judge (now Mr. Justice) Schauer in People v. Matiasevich, 12 Cal.App.2d Supp. 759, 55 P.2d 942, 943: "The lower court, even if a new trial were granted by this court, could not lawfully try the defendant again (at least, in the absence of his consent thereto and his resistance to this appeal negatives such consent)."

Under these circumstances, there can be no reversal of the judgment, even though we recognize fully the error of the trial court.

The appeal is ordered dismissed.

DOOLING, Acting P. J., and DRAPER, J. pro tem., concur.



148 Cal.App.2d 311

The PEOPLE of the State of California, Plaintiff and Respondent,

v.

Salvatore SINATRA and Kenneth John Wood, Defendants,

Kenneth John Wood, Defendant and Appellant.

Crim. 5676.

District Court of Appeal, Second District, Division 1, California.

Feb. 6, 1957.

Prosecution for robbery of liquor store proprietor while armed with deadly weapon. The Superior Court of Los Angeles County, Clement D. Nye, J., entered judgment upon conviction and denied defendant's motion for new trial. Upon appeal, the District Court of Appeal, Doran, J., held that evidence sustained conviction.

Judgment and order affirmed.

1. Robbery ⇐24(1)

Evidence sustained conviction of robbery of liquor store proprietor, and that at time of commission of offense defendant was armed with a deadly weapon.

2. Witnesses ⇐280

In prosecution for robbery of liquor store proprietor while armed with deadly weapon, ruling sustaining People's objection to certain questions on cross-examination by defense were proper and did not deprive defendant of his right to fair and impartial trial under the law.

Forno & Umann, Harry M. Umann, Los Angeles, for appellant.

Edmund G. Brown, Atty. Gen., Lynn Henry Johnson, Deputy Atty. Gen., for respondent.

DORAN, Justice.

Appellant was charged with robbery and that at the time of the commission of the offense he was armed with a deadly weapon. Salvatore Sinatra was a co-defendant. Sinatra pleaded guilty. Following a jury trial Wood was adjudged guilty. The appeal is from the judgment that followed, and from the order denying defendant's motion for a new trial.

The record reveals, as recited in respondent's brief, that, "Maurice W. Blaine is part owner of a retail liquor store at 792 Van Nuys Boulevard, Van Nuys. At approximately 12:26 a. m. on the morning of January 13, 1956 Blaine was in his store when the store was entered by two men. One was appellant Wood. Upon reaching the far corner of the store, Wood turned with a gun in his hand and spoke, saying to Blaine, 'This is a stick up'. Wood then walked over to Blaine, ordered Blaine to put his hands up and marched him into a back room. (The gun appeared to be a .38 or .45 automatic.)

"In the back room Blaine listened to Wood's voice further as there was conversation about how to open the cash register and whether the money in the cash register was all there was. Also Wood kept ordering Blaine to turn around and ordered Blaine to lie on the floor when he made his departure. During the robbery the man with Wood rifled the cash register while Wood stood guard over Blaine in the back room with a gun poked in Blaine's ribs. Blaine kept sneaking glimpses of Wood's face, each time being ordered to turn around. Blaine saw Wood's face, altogether, probably thirty to forty seconds. After the robbers left, Blaine found that some $230 had been taken from the cash register. The reason Blaine let the robbers take the money was because of the presence of the gun.

"Police Officer Stevens was cruising in a squad car in the immediate vicinity when he saw two men leave the store around 12:30 a. m. and begin to run a car parked across the street. He immediately gave chase but was not able to catch them. He was never close enough to see their faces but did get the license number of their car. It was registered to Salva*dor* Sinatra. Sinatra was arrested that same day and appellant Wood was arrested two days later, January 15, 1956, after the police had talked with Sinatra."

It is contended on appeal that, I. "The evidence was insufficient to sustain a conviction, as a matter of law." II. "The evidence was insufficient to sustain a determination that defendant was armed, as a matter of law." III. "The trial court erred in sustaining the People's objection to certain questions on cross-examination by defense, and thereby deprived defendant of his right to a fair and impartial trial under the law."

[1] Appellant's contention that the evidence was insufficient to sustain the conviction, as a matter of law, is not supported by the record. The trial judge and the jury heard the evidence and observed the witnesses, and the record, as a matter of law, supports their conclusion. The record also supports the conclusion that defendant was armed, as a matter of law.

[2] Appellant's contention that the court erred in sustaining the People's objection to certain questions on cross-examination by the defense is also unsupported by the record and the law. It would serve no useful purpose to go into detail regarding this contention. It is sufficient to note that the

court's rulings regarding this issue are in conformity with the law on this subject.

There are no prejudicial errors appearing in the record and the judgment is affirmed, as well as the order denying the motion for a new trial.

WHITE, P. J., and FOURT, J., concur.



148 Cal.App.2d 102

Ethel FAULKNER, Plaintiff and Appellant,

v.

J. Robert FAULKNER, Defendant and Respondent.

Civ. 22009.

District Court of Appeal, Second District, Division 1, California.

Jan. 29, 1957.

Divorce action. From a judgment entered in the Superior Court in Los Angeles the petitioner appealed from part of the judgment awarding custody. The District Court of Appeal, ordered a writ of supersedeas and a petition was made to the Supreme Court for a hearing which petition was granted and the cause was retransferred to the District Court of Appeal for the filing of an opinion. The District Court of Appeal, Fourt, J., held that where custody of children was awarded to father, and wife sought to appeal therefrom, wife was not entitled to supersede judgment of trial court pending appeal with respect to custody where no application was made for a stay of the Superior Court.

Writ of supersedeas vacated and discharged and petition denied.

1. Appeal and Error ⇐477

Since the legislature has provided a method by which trial court in a proper case may grant stay by supersedeas, the Appellate Court should not, except in some unusual emergency, exercise their power until the petitioner has first presented the matter to the trial court. West's Ann.Civ.Code, § 138.

2. Divorce ⇐312.4

In divorce action where custody of children was awarded to father and wife sought to appeal therefrom, wife was not entitled to supersede judgment of trial court pending appeal with respect to custody where no application was made by wife for a stay of the Superior Court judgment. West's Ann.Code Civ.Proc., § 949a; West's Ann.Civ.Code, § 138; West's Ann.Rules on Appeal, rule 56(a) (1).

3. Divorce ⇐298(1, 4)

In a divorce action, court need not find one parent unfit before it can award custody of a child to the other parent, and court determines after considering the evidence, how the best interests of the child shall be subserved.

4. Divorce ⇐296, 312.6(5)

In divorce action, the trial court has broad discretion in determining whether "other things are equal", in awarding custody of children and in absence of abuse of that discretion, the trial judge's determination should not be set aside.

5. Appeal and Error ⇐901

An Appellate Court cannot presume error.

6. Appeal and Error ⇐458(1)

A supersedeas is issued usually to protect the appellate court's jurisdiction and if a stay can be granted only at the risk of destroying rights which belong to the respondent if the judgment is affirmed, it cannot be said to be necessary to the complete exercise of appellate jurisdiction.

7. Divorce ⇐301

In a divorce action, the granting or denial of a motion to reopen a case to permit the introduction of evidence respecting the fitness of the respective parent for the award of custody of the children is largely within the discretion of the trial court.

8. Divorce ⇐312.4

In divorce action, where custody of children was awarded to father, refusal of trial court to reopen case to permit introduction of evidence as to fitness of mother and father's unfitness and as to what would be to best interests of children was not an abuse of discretion warranting the issuance of a writ of supersedeas, pending an appeal by mother from an award of custody to the father.

Edmund M. Bluth, Los Angeles, for appellant.

LeSage & Bowman, Pasadena, for respondent.

FOURT, Justice.

This is a matter involving a petition for and the granting of a writ of supersedeas. The petition before this court alleges, among other things, that the trial of the divorce case between the parties was heard in Department 19 of the superior court in Los Angeles, and a judgment was entered on June 25, 1956; that the petitioner has appealed from that part of the judgment which provides that the custody of three of the four children of the parties be awarded to J. Robert Faulkner, hereinafter referred to as the father; that the names and ages of the children awarded to the father were Dennis Stephen Faulkner, aged 13, Suzanne Roberta Faulkner, aged 4, and Bonnie Larisa Faulkner, aged 6; that custody of Verenna Louise Faulkner, aged 16 was awarded to the mother. Petitioner further quotes section 949a of the Code of Civil Procedure, and sets forth that unless the writ is granted she will lose custody of the three minor children to the father, pending her appeal from the judgment. Petitioner then sets forth that she has good cause for appeal "in that there was no finding of unfitness or incapability of Petitioner as a mother to care for * * *", and that she made a motion in the trial court to set aside the submission and to reopen the case for further evidence and offered to present fifteen affidavits of persons showing the fitness of petitioner to care for the three minor children awarded to the father, and that the motion was denied. Petitioner also quotes section 138 of the Civil Code. It is further stated in the petition that the findings of fact and conclusions of law contain no finding of unfitness of the mother, and that there was no evidence to indicate that she was unfit to care for the children; that for the petitioner to lose the custody of the three minor children during the appeal would allow a miscarriage of justice.

An answer was filed wherein it was alleged, among other things, that the order of custody made August 22, 1955, wherein the mother was awarded the custody of all of the children, was pendente lite only, and that in any event the parties hereto and all of the children resided together in the family home until May 18, 1956, the Friday before the start of the trial of the action, at which time the petitioner removed herself with Suzanne and Bonnie; that Dennis refused to leave with the petitioner and still refuses to live with her. It was denied that the petitioner has good cause for appeal on the grounds alleged, or upon any other grounds, and it was set forth that there was substantial evidence in support of the award to the father, and that the court found that the best interests of the three minor children would be served by awarding them to the father; that the motion to reopen was made in the trial court only after the trial judge had, on June 4, 1956, made, filed and served upon counsel its memorandum of decision announcing its decision concerning the custody of the children; that the affidavits attached to the motion to reopen were in large part the opinions or conclusions of the signers thereof, or are hearsay. It was denied that the award is contrary to law, and further sets forth that to leave the three children with the mother during the long months of the appeal would not be to the best interests of the children and would be to their detriment; that in the four months since the mother moved from the family home, in May, 1956, she has lived with Suzanne and Bonnie in three separate

places; that the mother has continued, at times at least, to associate with the same person with whom the trial court found she was wrongfully associating. Further, as a second and separate defense, respondent alleges that the petition does not state facts sufficient to constitute grounds for the issuance of a writ of supersedeas.

An order to show cause why the writ of supersedeas should not issue was made by this court, and the matter was placed upon the calendar for hearing for October 2, 1956, and such hearing was held on October 4, 1956. On October 9, 1956, a writ of supersedeas was ordered wherein the superior court was restrained from enforcing the judgment entered on June 25, 1956, insofar as said judgment awarded custody of the three children to the defendant father until the final determination of the appeal, or until the further order of this court. A petition for a rehearing was filed and the same was denied, and a petition was thereupon made to the Supreme Court for a hearing, which petition was granted and the cause was then retransferred to this court for the filing of an opinion.

[1] No petition or application was made by the petitioner herein for a stay in the superior court as is provided for in section 949a, Code of Civil Procedure. It was appropriately stated in Nuckolls v. Bank of California, Nat. Ass'n, 7 Cal.2d 574, at page 577, 61 P.2d 927, at page 928: "Not only does the petition fail to allege that such an application was made to the trial court, but on the oral argument it was admitted that no such application had been made. Inasmuch as the Legislature has provided a method by which the trial court, in a proper case, may grant the stay, the appellate courts, assuming that they have the power, should not, except in some unusual emergency, exercise their power until the petitioner has first presented the matter to the trial court."

It is obvious that the legislature, in adopting section 949a, Code of Civil Procedure, in 1955, had in mind to correct an evil which had existed for some time. The "Third Progress Report of the Legislature by the Senate Interim Judiciary Committee", 1955, pages 34–35, sets forth, among other things, the following:

"(42) Minors—Orders Awarding or Affecting Custody—Permission to Leave Jurisdiction—Effect of Appeal. Under present law, and by force of general statutory provisions, an appeal from an order awarding custody of a minor child automatically stays further proceedings in the trial court. (Secs. 946 and 949, C.C.P.; In re Barr, 39 C.2d 25 [243 P.2d 787]; Lerner v. Superior Court, 38 C.2d 676 [242 P.2d 321]; Gantner v. Gantner, 38 C.2d 691 [242 P.2d 329].)

"This statutory rule has been substantially criticized. Thus, if there is a modification of a custody order previously entered, the very reason for the modification in nearly every case will be that the trial judge has determined that the welfare of the child demands a change. Yet the mere perfecting of an appeal by the losing party will delay execution of the order, sometimes for very substantial periods. As a result the child is subjected to a continuance of the same conditions which brought about the change order. The rule is conducive to appeals for considerations other than those relating strictly to the merits of the appeal.

"In actions for divorce and separate maintenance, the statutes expressly empower the court to make, vacate and modify orders for custody, guided by what appears to be for the best interests of the child (Civ.Code, Sec. 138). However, this discretionary authority comes to an abrupt end, under present law, upon an appeal being taken.

"During the period of the appeal, the appellate court has power to transfer custody pending the appeal. The power, it is believed, is not one that in the nature of things can be expected to be exercised with frequency or in any but extreme cases, under the present legislative mandate.

"The solution which has been suggested in some earlier decisions, that of making the child a ward of the juvenile court

pending the appeal, does not appear practical nor in the interests of the child.

"While the trial court's findings and order may upon occasion be erroneous, and a reversal therefore required, in the vast majority of cases, it is believed, the converse is true.

"Assembly Bill 1617 in proposed Section 949a in effect gives presumptive validity to the order of the trial court, so far as immediate execution of the custody order is concerned. The burden is placed upon the appellant for this limited purpose.

"The section proposed, however, provides that the trial court, in its discretion may stay execution. Moreover, the appellate court's power to issue an appropriate writ or order (including an injunction) is expressly recognized.

"The proposed new section also deals specifically with provisions of an order or judgment permitting the child to be removed from the jurisdiction. These would be stayed for a period of 30 days by operation of law. Likewise this matter is subject to power of the appellate court to act in aid of its jurisdiction. When an appeal has been taken or is to be taken, removal from the jurisdiction seriously affects both the appellate court's jurisdiction and the right of appeal. (See e.g., Lerner v. Superior Court, 38 C.2d 676 [242 P.2d 321]; Gantner v. Superior Court, 38 C.2d 688 [242 P.2d 328].)

"It is expressly to be noted that the new section is not limited to custody orders in domesic relations cases but would apply 'in any civil action, action filed under the Juvenile Court Law, or special proceeding.'" (Also, see, State Bar Jl., Vol. 29, page 225 [1954].)

[2] Appellate courts should not nullify the plain statutory purpose by issuing a writ of supersedeas. Private Investors v. Homestake Min. Co., 11 Cal.App.2d 488, 491–492, 54 P.2d 535; United States of America v. Berg, 202 Cal. 10, 14–15, 258 P. 942.

[3] Furthermore, the error claimed by the petitioner, insofar as her petition is concerned, which, including the affidavits, is all we are entitled to act upon, indicates that her claim of error is based upon "no finding of unfitness or incapability of Petitioner as a mother" having been made by the trial judge. It is well settled that the court does not need to find one parent unfit before it can award a child to the other parent. The trial judge shall determine, after considering the evidence, how the best interests of the child shall be subserved. Taber v. Taber, 209 Cal. 755, 756, 290 P. 36; Matter of Cozza, 163 Cal. 514, 126 P. 161; Lampson v. Lampson, 171 Cal. 332, 153 P. 238; Foster v. Foster, 8 Cal.2d 719, 68 P.2d 719; Davis v. Davis, 41 Cal.2d 563, 565, 261 P.2d 729; Holsinger v. Holsinger, 44 Cal.2d 132, 135, 279 P.2d 961.

[4] Petitioner contends that under the provisions of section 138 of the Civil Code she is entitled to custody of the children. Suffice it to say in answer to that contention that the court has broad discretion in determining whether "other things are equal", and in the absence of some abuse of that discretion the trial judge's determination should not be set aside. Frazier v. Frazier, 115 Cal.App.2d 551, 557, 252 P.2d 693; Munson v. Munson, 27 Cal.2d 659, 666, 166 P.2d 268; Holsinger v. Holsinger, supra.

[5] It is apparent, therefore, that under the proceedings as they presently appear before us, that probable error has not been made to appear. In Nuckolls v. Bank of California, supra, 7 Cal.2d at page 578, 61 P.2d at page 929, it was said:

[6] "In the second place, probable error has not been made to appear. From the rather incomplete and unsatisfactory showing, it appears that there were at least two grounds for the trial court's judgment, either of which would be sufficient to sustain it. We cannot presume error. This court must consider the rights of respondents as well as those of appellants. Affirmances must be contemplated as well as reversals; in fact, until the contrary is shown, the

presumption is in favor of the lower court's decision. A *supersedeas* is issued usually to protect the appellate court's jurisdiction. If a stay can be granted only at the risk of destroying rights which would belong to the respondent if the judgment is affirmed, it cannot be said to be necessary or proper to the complete exercise of appellate jurisdiction. Hulbert v. California Portland Cement Co., 161 Cal. 239, 118 P. 928, 38 L.R.A. (N.S.) 436; 2 Cal.Jur. 465, sec. 217."

[7, 8] A point is made by the petitioner that she was not permitted to reopen the case in the trial court and present the evidence of neighbors and others as to her fitness and the father's unfitness, and as to what would be to the best interests of the children. Certainly it appears to us that it would have been better practice, and certainly more in the interests of the welfare of the children, for the court to have reopened the case for the purpose of hearing the additional testimony—in other words, the court should have been interested in getting all of the information and testimony possible bearing upon what was for the best interests of the children, assuming, of course, that the testimony to be introduced was not merely cumulative. However, in this instance, the court saw fit not to hear the additional evidence, and under the circumstances, we do not believe that it was such an abuse of discretion as to, in and of itself, warrant the issuance of a writ. "The granting or denial of such a motion is largely within the discretion of the trial court. Mowry v. Starbuck, 4 Cal. 274." San Mateo P. M. Co. v. Davenport R. Co., 218 Cal. 702, 712–713, 24 P.2d 787, 792.

In our opinion, where the legislature has not made provision for a stay by an undertaking or by appeal, a stronger showing must be made by petitioner to obtain the extraordinary writ of supersedeas, than has been made in this case.

Lastly, rule 56(a) (1), Rules on Appeal, provides as follows:

"If the petition might lawfully have been made to a lower court in the first instance, it shall set forth the circumstances which, in the opinion of the petitioner, render it proper that the writ should issue originally from the reviewing court;".

Nothing whatsoever is mentioned by the petitioner about why the petition was not presented to the trial court in the first instance.

The writ of supersedeas heretofore issued is vacated and discharged, and the petition is denied.

WHITE, P. J., and DORAN, J., concur.



148 Cal.App.2d 163

The PEOPLE of the State of California, Plaintiff and Respondent,

v.

Quincy CANNON, Defendant and Appellant.

Cr. 3239.

District Court of Appeal, First District, Division 2, California.

Jan. 30, 1957.

Defendant was convicted of maintenance of place for disposal of narcotics in violation of West's Ann. Health and Safety Code, § 11557, after two prior convictions. The Superior Court, City & County of San Francisco, C. Harold Caulfield, J., rendered judgment, and defendant appealed. The District Court of Appeal held that officers had reasonable cause to believe that defendant had committed or was committing one or more violations of narcotics law sufficient to justify arrest and search of defendant and apartment without a warrant.

Judgment affirmed.

1. Arrest ⇐63(3), 64

A search of a person and the place where he is arrested as an incident to a

lawful arrest may be justified only if he was committing or attempting to commit an offense in officer's presence, or the officer had reasonable cause to believe he had committed a felony, or the arrest was made pursuant to a warrant.

2. Arrest ⇐63(4)

"Reasonable cause" to justify an arrest is such a state of facts as would lead a man of ordinary care and prudence to believe or entertain an honest and strong suspicion that the person is guilty of a crime, and may consist of information obtained from others and is not limited to evidence that would be admissible at trial on the issue of guilt, and while information provided by an anonymous informer is relevant on the issue of reasonable cause, an arrest may not be based solely on such information in absence of some pressing emergency.

See publication Words and Phrases, for other judicial constructions and definitions of "Reasonable Cause".

3. Arrest ⇐71

If before the search and seizure, officers were justified in making an arrest, it is immaterial that the search and seizure preceded rather than followed the arrest.

4. Arrest ⇐63(4), 71

Information that two men, previously convicted of violations of narcotics law, had rented apartment under assumed name and were maintaining it for sale of narcotics, observation of known addicts entering apartment, and two separate purchases of narcotics made in apartment by confidential operator of state bureau of narcotics enforcement afforded "reasonable cause" to believe that occupant of apartment had committed or was committing one or more violations of narcotics law made punishable by imprisonment in county jail or state prison and justified arrest and search of occupant and apartment without a warrant. West's Ann.Health & Safety Code, §§ 11500, 11557, 11712, 11713.

5. Arrest ⇐63(1)

An offense punishable by imprisonment in county jail or state prison is considered a "felony" for purpose of determining legality of arrest and search without a warrant.

See publication Words and Phrases, for other judicial constructions and definitions of "Felony".

6. Criminal Law ⇐1159(2)

In determining sufficiency of evidence to support conviction for maintenance of place for disposal of narcotics, the only question before reviewing court was whether there was substantial evidence that defendant maintained apartment for the purpose of unlawfully selling or giving away narcotics and fact that no narcotics were found in apartment and money given by confidential operator for purchase of narcotics was not found on defendant did not render other evidence insufficient. West's Ann.Health & Safety Code, § 11557.

7. Poisons ⇐9

Evidence sustained conviction for maintenance of place for disposal of narcotics in violation of Health and Safety Code. West's Ann.Health & Safety Code, § 11557.

Alfred J. Hennessy, Manton, for appellant.

Edmund G. Brown, Atty. Gen., Clarence A. Linn, Asst. Atty. Gen., Raymond M. Momboisse, Deputy Atty. Gen., for respondent.

PER CURIAM.

Appellant, together with his codefendant Frank G. Winborn, was found guilty by a jury of violation of section 11557 of the Health and Safety Code, maintenance of place for disposal of narcotics, after having admitted two prior convictions of which one was of possession of narcotics, § 11500 of said Code. Under section 11712 of said Code he was sentenced to San Quentin. He appeals from the judgment of conviction, arguing that the evidence is insufficient to support it, considering also that part of the evidence was allegedly inadmissible because obtained as the result of an allegedly illegal entry and search without a warrant. We have found the appeal without merit.

As a foundation for the admittance of evidence obtained by the entry and search on August 10, 1955 of the apartment rented by appellant, Inspector Chasten of the State Bureau of Narcotic Enforcement testified outside the presence of the jury in substance as follows: He had information that the two defendants had rented an apartment at 1411 A Golden Gate Avenue under an assumed name and maintained it for the selling of narcotics, and that addicts were entering the place day and night mainly through the back door. He knew of appellant's prior narcotics conviction and had before arrested him in relation to a narcotics violation. He knew of defendant Winborn's conviction as an addict and had observed symptoms of addiction on him. Beginning August 5, 1955 he placed the premises under observation at different times. He saw Winborn and also other known addicts enter the apartment through the back door and saw appellant enter the front entrance from whch the apartment is reached. However, he intended to make at least two purchases of narcotics before making an arrest. On the morning of August 10, 1955, he had a confidential operator of the State Bureau make two purchases of one bindle each. The operator informed him that when he visited the apartment for that purpose both defendants were there. With respect to these purchases the witness had before testified, in the presence of the jury, that the operator had been searched and all objects except a five dollar bill of which the number was recorded had been removed from him. Thereafter, the witness and another inspector accompanied the operator to the vicinity of the apartment, rented by appellant, saw him climb the back stairs to the apartment and enter its rear doorway at approximately 9:30 a. m. After a few minutes he returned and gave the inspector a small paper wrapped package, a bindle. When he was searched again the money he had been given was not on him. The whole procedure was repeated an hour later resulting again in the delivery of a bindle and the absence of the five dollar bill. Thereafter about noon the arrests and search were made without a warrant, the inspectors not forcing the entry into the apartment but waiting before its front entrance and entering only when somebody opened the door to go out.

[1–5] "A search of a person and the place where he is arrested as an incident to a lawful arrest may be justified only if he was committing or attempting to commit an offense in the officer's presence, or the officer had reasonable cause to believe he had committed a felony, or the arrest is made pursuant to a warrant. People v. Simon, 45 Cal.2d 645, 648, 290 P.2d 531. Reasonable cause is such a state of facts as would lead a man of ordinary care and prudence to believe, or entertain an honest and strong suspicion, that the person is guilty of a crime. People v. Kilvington, 104 Cal. 86, 92, 37 P. 799 [43 Am.St.Rep. 73]. Reasonable cause to justify an arrest may consist of information obtained from others and is not limited to evidence that would be admissible at the trial on the issue of guilt. People v. Boyles, 45 Cal.2d 652, 656, 290 P.2d 535. Information provided by an anonymous informer is relevant on the issue of reasonable cause, but in the absence of some pressing emergency an arrest may not be based solely on such information. Willson v. Superior Court, 46 Cal.2d 291, 294, 294 P.2d 36. Such information, together with the personal observations of the police, may justify their reliance on the information they had received. (Id.) If, before the search and seizure, the officers were justified in making an arrest, it is immaterial that the search and seizure preceded rather than followed the arrest. People v. Simon, 45 Cal.2d 645, 648–649, 290 P.2d 531." People v. Moore, 141 Cal.App.2d 87, 89–90, 296 P.2d 91, 92. The known circumstances stated constituted reasonable cause to believe that appellant had committed or was committing one or more of the narcotics violations made punishable by imprisonment in the county jail or state prison under sections 11712 and 11713 of the Health and Safety Code, which

offenses for the purpose of legality of the arrest are considered felonies. Cf. People v. Graff, 144 Cal.App.2d 199, 300 P.2d 837. The facts known to the inspector, together with the information received and the observation personally made constituted a sufficiently strong indication that appellant was maintaining the apartment he had rented for the purpose of unlawfully selling or giving away narcotics. § 11557, supra.

The further evidence received at the trial including that which was obtained by the search we have found not to have been unlawful, was to the following effect: The bindles obtained from the operator were proved to contain one grain of heroin each The person who opened the door before which the inspector waited was a known addict named Webber. Upon seeing the inspectors he placed a small white object in his mouth. When ordered to "spit it out" he spit it to the floor. (There was no evidence that he was forced to do so at pistol point as claimed by appellant.) The bindle was proved to contain one and one-half grains of heroin. The defendants were both in the apartment and on defendant Winborn was found among other currency the two five dollar bills which had been given to the operator. There were moreover two other known addicts in the apartment and during the presence of the officers in the apartment three more known addicts entered by the back door. No other narcotics than the bindle spit out by Webber were found. The manager of the apartment house testified that appellant rented the apartment using the name of George Reid. A couple of times defendant Frank Winborn paid the rent saying that George sent the rent by him. The defendants did not testify in their own behalf or introduce any evidence.

[6, 7] Appellant's contentions that the evidence was insufficient to support the judgment because no narcotics were found in the apartment except those on Webber for which appellant was not responsible, because the money given for the purchase of narcotics was not found on him and because the operator could have hidden the bindles he gave to the inspectors on his person because of imperfections in their search of him or have obtained the bindles elsewhere after passing through defendants' apartment are wholly devoid of merit. Appellant was not convicted of possession or sale of narcotics. The only question before us is whether there was substantial evidence that appellant maintained the apartment for the purpose of unlawfully selling or giving away narcotics. People v. Caritativo, 46 Cal.2d 68, 72, 292 P.2d 513; People v. Dragoo, 121 Cal.App.2d 322, 324, 263 P.2d 90. The renting of the apartment by appellant under a false name, the paying of rent and the occupation by both defendants, who both had records of prior conviction of narcotics violations, the numerous known addicts who frequented the place, of whom one tried to secret a bindle of heroin there, and especially the presence in the apartment on one of the defendants of the money given to the operator for the purchase of narcotics, without any evidence being offered by the defendants to explain this most suspicious fact, together certainly constituted substantial evidence that the defendants together maintained the apartment in violation of section 11557 of the Health and Safety Code as alleged in the information.

Judgment affirmed.

William MULLER, Plaintiff and Appellant,

v.

Charles REAGH and Leiah Muller, Jointly, Severally and in the Alternative, Defendants and Respondents.

No. 17068.

District Court of Appeal, First District, Division 1, California.

Jan. 30, 1957.

Rehearing Denied March 1, 1957.

Hearing Denied March 27, 1957.

Proceeding upon demurrer to second amended and supplemental complaint, and upon motion of plaintiff to quash proof of service of demurrer and to vacate ruling on demurrer, and upon plaintiff's motion to require service of notices and papers upon him by delivery to county clerk. The Superior Court, County of San Mateo, Edmund Scott, J., rendered judgment and orders adversely to plaintiff, and plaintiff appealed. The District Court of Appeal, Fred B. Wood, J., held, in part, that evidence supported order refusing to vacate dismissal order, where it appeared that plaintiff had actually been given notice of motion to dismiss.

Judgment affirmed. Appeals from nonappealable orders dismissed.

1. Dismissal and Nonsuit ⇐81(7)

In proceeding upon plaintiff's motion to vacate dismissal order upon ground that he had not received envelope in which demurrer and notice of motion to dismiss had been mailed and had never personally been served with motion and demurrer, having characterized his appearance as special, evidence supported order refusing to vacate.

2. Judgment ⇐490(2)

Where validity of service of notice of motion to dismiss was actually litigated and decided in former action between same parties adversely to this plaintiff, and this plaintiff could have reviewed that decision in appeal which he took but failed to prosecute, former decision could not be disturbed upon collateral attack.

3. Judgment ⇐405

Whether a defendant had waived any rights accruing to her from dismissal of former action between same parties, by virtue of fact that she had subsequently filed answer to complaint in former action, would be question for presentation and consideration in former action not in later action.

4. Judgment ⇐460(4)

In absence of allegation that plaintiff had not been served with complaint and summons in prior quiet title suit brought by defendants, or of fact that defendants had done anything to lull plaintiff into false sense of security concerning presentation of plaintiff's defense in that suit, plaintiff failed to allege extrinsic fraud, in reference to entry of default judgment in such quiet title suit.

5. Appeal and Error ⇐681

Where record on appeal did not indicate that plaintiff could, if permitted, further amend his complaint to supply vital defect, there was no basis for holding that it was error for trial court to withhold permission to amend when sustaining demurrers to an already twice amended complaint.

6. Judgment ⇐460(4)

Plaintiff, who sought to pare down effect of quiet title judgment which defendants had in prior suit obtained against him, could not claim that such judgment did not embrace element of fraud and deceit in obtaining from him unsigned deed, where his own complaint showed that prior judgment had depended upon deed and had necessarily found it valid. West's Ann.Civ. Code, § 1054.

7. Judgment ⇐747(5)

Both nondelivery of deed and forgery would be elements embraced in quiet title judgment, since each would have been complete defense in quiet title suit. West's Ann.Civ.Code, § 1054.

8. Replevin ⇐62
Trover and Conversion ⇐32(6)

In absence of allegation that any of three unsigned agreements had any value

or that plaintiff was damaged by their retention by a defendant, and in view of fact that prayer did not mention them in any way, count of complaint did not reflect intent or attempt to plead cause of action for conversion or for claim and delivery in respect to any of three unsigned agreements.

9. Pleading ⇐336

In proceeding upon plaintiff's motion to quash service of demurrer to complaint, evidence warranted finding that copy of demurrer had been served upon plaintiff, whom court had asked to participate in hearing but who had refused to do so, confining his appearance to a special one.

10. Appeal and Error ⇐1011(1)

Finding upon conflicting evidence will not be disturbed upon appeal.

11. Appearance ⇐22

By seeking relief upon merits, upon appeal, plaintiff waived basis for his special appearance.

12. Pleading ⇐336

Denial of plaintiff's motion to require defendants, when serving papers upon plaintiff, to forward them to clerk of court for plaintiff, violated none of plaintiff's rights, where plaintiff's residence was known. West's Ann.Code Civ.Proc., § 1011, subd. 2.

13. Pleading ⇐336

Provision of code of civil procedure that if party's residence is not known, service of notice or paper may be made by delivering same to clerk of court for such party, did not confer upon party to be served right to require notices and papers to be so served, especially a party whose address is known. West's Ann.Code Civ. Proc., § 1011, subd. 2.

14. Appeal and Error ⇐95

Orders denying motion to quash and to prescribe manner of serving plaintiff were nonappealable orders.

William Muller, Redwood City, appellant in pro. per.

Charles Reagh, San Francisco, for respondents.

FRED B. WOOD, Justice.

Plaintiff has appealed from a judgment rendered upon sustaining without leave to amend, a demurrer to the second amended and supplemental complaint; also, from an order denying his motion to quash proof of service of the demurrer and vacate the ruling on the demurrer, and from an order denying his motion to require service of notices and papers upon him by delivery to the county clerk for him.

By his first count herein, plaintiff seeks to vacate an order of March 11, 1953, which dismissed as to Lelah Muller an action previously brought by him against her and Charles Reagh, defendants in that action as well as in this.

By his second count herein, plaintiff seeks some of the same relief, and none other, that he sought in the earlier action.

(1) *The first count does not state a case for voiding the order dismissing the other action.*

Plaintiff contends he was not given notice of the motion to dismiss. However, it appears upon the face of the complaint herein that the question whether or not he was given such notice was presented to, considered and determined by the court in the former action.

The notice of motion to dismiss stated, as the ground therefor that the action was frivolous and groundless and would be predicated upon all the files and records of the court in that and in four other actions. This motion was "granted as prayed." Within two days thereafter plaintiff filed a notice of motion to vacate the dismissal order upon the ground that he "did not become the recipient of said envelope" in which the demurrer and notice of motion to dismiss were mailed and "was never personally served with said motion * * * and demurrer," characterizing this appearance as special and not general.

[1] His motion to vacate was heard and denied. We do not have the record

of the evidence adduced at that hearing but it does appear that there was an affidavit of the mailing of the notice of motion to dismiss and plaintiff's affidavit did not deny the mailing. It seems clear, therefore, that there was evidence tending to support the order refusing to vacate.

Plaintiff appealed from the order of dismissal and the refusal to vacate that order, but the appeal terminated as the result of plaintiff's delay in its prosecution and the orders appealed from became final.

[2] From this it seems clear that plaintiff had his full day in court in the former action. The validity of the service of the notice of motion to dismiss was actually litigated and decided in that action. Plaintiff could have reviewed that decision in the appeal which he took but failed to prosecute. In the absence of fraud practiced upon him preventing him from presenting his case, that decision should not be disturbed, should be immune from collateral attack. If citation of authorities be necessary, the following should suffice: Johnson v. Reed, 125 Cal. 74, 77, 57 P. 680; Wattson v. Dillon, 6 Cal.2d 33, 40, 56 P.2d 220; Hammell v. Britton, 19 Cal.2d 72, 83, 119 P.2d 333; Neblett v. Pacific Mutual Life Ins. Co., 22 Cal.2d 393, 398, 139 P.2d 934; Doran v. Sherman, 18 Cal.App.2d 479, 64 P.2d 442; Hosner v. Skelly, 72 Cal.App.2d 457, 461, 164 P.2d 573; Harpke v. Lankershim Estate, 101 Cal.App.2d 49, 224 P.2d 899.

[3] Plaintiff further alleges in the first count that Lelah Muller has waived any rights accruing to her from the March 11, 1953, dismissal because she later (October, 1954) filed an answer to the complaint in the former action. That is a question for presentation and consideration in that action, not in this action.

(2) *By the second count of the complaint herein plaintiff seeks, in effect, to vacate and annul a quiet title judgment Lelah Muller obtained against him.*

He alleges that, induced by her misrepresentations, he loaned her certain unsigned agreements and an unsigned deed; that she brought a quiet title suit against him and by use of the deed (and the writing of his name over his typed name on the deed) and a purported default proceeding against him, obtained a judgment against him; that there are pending, in said quiet title suit, proceedings to set the default aside and to vacate the judgment[1]; that the quiet title suit was instituted to defraud plaintiff of his real property. He prays for damages or that the deed be set aside and annulled and that Lelah release all of her pretended right in the property described in the deed.

Defendants do not claim that the dismissal of the former action in Lelah's favor is res judicata as to the merits of the cause pleaded in the second count of the complaint herein, because, they say, he could begin a new action against Lelah after the dismissal and before the running of the statute of limitations against the claims asserted by him in the former action. Defendants do claim that the second count herein fails to state facts sufficient to serve as a basis for relief from the judgment rendered in the quiet title suit.

[4] We, too, are of that view and so hold. The vital defect inheres in the insufficiency of the allegations as to the "purported default proceedings" and the circumstances under which the default occurred and was entered. There is no allegation that plaintiff had not been served with complaint and summons in the quiet title suit or that the defendants had done anything to lull him into a false sense of security concerning the presentation of his defense in that suit. That in itself spells a failure to allege extrinsic fraud. See Pico v. Cohn, 91 Cal. 129, 25 P. 970, 27 P. 537, 13 L.R.A. 336; La Salle v. Peterson, 220 Cal. 739, 32 P.2d 612; Westphal v. Westphal, 20 Cal.2d 393, 126 P.2d 105; Chung

1. This is a reference to the proceedings which, meanwhile, were determined adversely to plaintiff's claim. See Muller v. Muller, 141 Cal.App.2d 722, 297 P.2d 789.

Gee v. Quan Wing, 103 Cal.App.2d 19, 229 P.2d 50; Hammell v. Britton, supra, 19 Cal.2d 72, 119 P.2d 333.

[5] We derive from the record herein no indication that plaintiff could, if permitted, further amend his complaint to supply this lack; hence, there is no basis for holding it was error for the trial court to withhold permission to amend when sustaining the demurrers to an already twice amended complaint. In this connection, we may take judicial notice, see Hammell v. Britton, supra, 19 Cal.2d 72, 75, 119 P.2d 333, of our decision in Muller v. Muller, supra, 141 Cal. App.2d 722, 297 P.2d 789, holding that plaintiff was served with complaint and summons in the quiet title suit and was not prevented from presenting his defense therein. As we said in that case, "Appellant * * * [plaintiff herein] was validly served with process, and had been informed that his default was to be taken if he did not file his answer. Respondent [Lelah Muller] did nothing to prevent him from defending the action." At page 730 of 141 Cal.App.2d, at page 793 of 297 P.2d.

[6, 7] Plaintiff seeks to pare down the effect of the quiet title judgment. He says the judgment did not embrace the element of fraud and deceit in obtaining from him the unsigned deed. He is mistaken, for his very complaint herein shows that the judgment depended upon the deed and necessarily found it valid, a determination adverse to plaintiff's claim of fraud and deceit. Nondelivery, Civ.Code, § 1054, and forgery, Cutler v. Fitzgibbons, 148 Cal. 562, 83 P. 1075, likewise are elements embraced in the judgment. Each would have been a complete defense in the quiet title suit. Thus it appears that the second count fails to make out a case for recovery of the deed or for its asserted value or damages for its alleged wrongful use.

[8] Plaintiff further contends that his second count pleads causes of action for conversion and for claim and delivery of the three unsigned agreements, which consisted of a "form of Separate Property Agreement," a "form of Property Settlement Agreement," and a "form combining a Separate Property Agreement-Property Settlement Agreement" as described in the second count. We do not so read this count. There is no allegation that any of the three unsigned agreements had any value or that plaintiff was damaged by their retention by Lelah, and the prayer does not mention them in any way. The second count does not reflect an intent or attempt to plead a cause of action for conversion or for claim and delivery in respect to any of the three unsigned agreements.

(3) *It appears that the order denying plaintiff's motion to quash the service of the demurrers to the complaint finds support in the evidence.*

[9, 10] The record shows that seven days before the date set plaintiff received notice of the time and place for the hearing of the demurrer to the second amended complaint; that at said time and place he specially appeared and objected to the hearing upon the asserted ground he had not been served with a copy of the demurrer; that the court found it had been served upon plaintiff, which finding was based upon the affidavit attached to the demurrer and upon plaintiff's statement that the address shown in the affidavit was plaintiff's address; and that the court asked plaintiff to participate in the hearing but he refused to do so, confining his appearance to a special one. Such a finding upon conflicting evidence is not to be disturbed upon appeal. In re Estate of Standing, 99 Cal.App.2d 668, 672, 222 P.2d 465, 223 P. 2d 255.

It appears to us that the demurrer was properly served upon plaintiff by mail in accordance with sections 1010 and 1012 of the Code of Civil Procedure and other applicable provisions of law.

[11] It would also appear that by seeking relief upon the merits, upon this appeal, plaintiff has waived the basis for his special appearance. See De Matei v. Superior Court, 74 Cal.App. 147, 150, 239 P. 853.

(4) *The denial of plaintiff's motion to require defendants, when serving papers upon plaintiff, to forward them to the clerk for the plaintiff, violated none of plaintiff's rights.*

[12, 13] It is true that section 1011(2) of the Code of Civil Procedure provides that if a party's "residence is not known" service of a notice or paper may be made "by delivering the same to the clerk of the court * * * for such party", but it does not confer upon the party to be served the right to require notices and papers to be so served, especially a party, such as this plaintiff, whose address is known.

[14] The judgment is affirmed. The appeals from the orders denying the motion to quash and to prescribe the manner of serving plaintiff (nonappealable orders) are dismissed.

PETERS, P. J., and BRAY, J., concur.



148 Cal.App.2d 299

SAFEWAY STORES, Incorporated, a corporation, Plaintiff and Respondent,

v.

STATE BOARD OF EQUALIZATION of the State of California, and George R. Reilly, James H. Quinn, Herold L. Seawell, William G. Bonelli, and Thomas H. Kuchel, Individually and as members of, and as constituting, the State Board of Equalization of the State of California, Defendants and Appellants.

Civ. 8869.

District Court of Appeal, Third District, California.

Feb. 5, 1957.

Corporation brought action against the State Board of Equalization of the State of California and the members thereof for a refund of sales taxes paid under protest. The Superior Court, Sacramento County, J. O. Moncur, J., entered judgment in favor of the corporation, and the board and its members appealed. The District Court of Appeal, Schottky, J., held that where corporation engaged in retail grocery business and business of manufacturing and packing grocery products sold by it through its retail outlets purchased empty cardboard cartons and gave seller a certificate certifying that it was purchasing the cartons for resale, and corporation then used cartons as receptacles for packing its manufactured products and transporting them to its retail outlets, and at outlets goods were taken from cartons and displayed for sale, and 80% of the cartons, which were in sufficiently sound condition, were then used as receptacles into which to put items which retail buyers had selected from goods being offered for sale by corporation, sale of the cartons was a "retail sale" within meaning of Revenue and Taxation Code, and corporation was liable for sales tax on the cartons.

Judgment reversed with directions to enter judgment for Board and its members.

Licenses ⇐15.1(9)

Where corporation purchased empty cardboard cartons and gave seller a certificate certifying that it was purchasing cartons for resale, and corporation then used cartons as receptacles for packing its manufactured grocery products and transporting them to its retail outlets, and at outlets goods were taken from cartons and displayed for sale, and cartons which were in sufficiently sound condition were then used as receptacles into which to put items which retail buyers had selected, sale of cartons was a "retail sale" within meaning of Revenue and Taxation Code, and corporation was liable for sales tax on cartons. West's Ann.Rev. & Tax.Code, §§ 6007, 6094, 6364(a).

See publication Words and Phrases, for other judicial constructions and definitions of "Retail Sale".

Edmund G. Brown, Atty. Gen., by James E. Sabine and Irving H. Perluss, Asst. Attys. Gen., for appellants.

Orrick, Dahlquist, Herrington & Sutcliffe, San Francisco, for respondent.

SCHOTTKY, Justice.

Respondent is engaged in the retail grocery business and in the related business of manufacturing and packing the grocery products sold by it through its retail outlets. During the period from July 1, 1945 to June 30, 1947, there was a severe paper shortage and respondent was unable to obtain an adequate supply of paper bags. At various times during this period respondent purchased from sellers in the State of California certain empty cardboard cartons which were suitable for use in the packaging and delivery of groceries to retail customers. The cartons were purchased through the Douglas Paper Company, an unincorporated division of respondent for which separate books were kept. At the time of purchase a resale certificate was given to the seller of the cartons and no sales tax was paid.

After purchasing the cartons the Douglas Paper Company Division delivered them to various other units of respondent's operations. These operating units placed retail grocery items such as canned goods in these cartons and delivered the cartons and their contents to respondent's retail grocery stores. There the contents were removed from the cartons and placed on open shelves. The empty cartons were then placed at or near the check-out counters in the stores and were used for the packaging of grocery products purchased by retail customers. Substantially in excess of 80% of such cartons were used for packaging and delivery of groceries purchased by retail customers. The remainder were not used for delivery to retail customers because the cartons had been damaged.

Appellants concluded that the sales of cartons to respondent's Douglas Paper Company Division had been subject to sales tax and that the resale certificates should not have been given. Accordingly, appellants assessed sales taxes against respondent. Respondent paid the taxes under protest and filed a claim for refund, which was denied. Respondent then filed an action for a refund of said sales taxes, and following a trial judgment was entered in respondent's favor for the sum of $7,145.87 with interest. This appeal is from said judgment.

The relevant portions of the Revenue and Taxation Code here involved are as follows:

"§ 6007. A 'retail sale' or 'sale at retail' means a sale for any purpose other than resale in the regular course of business in the form of tangible personal property. * * *"

"§ 6364. There are exempted from the taxes imposed by this part, the gross receipts from sales of and the storage, use, or other consumption in this State of:

"(a) Nonreturnable containers when sold without the contents to persons who place the contents in the container and sell the contents together with the container. * * *"

"§ 6094. If a purchaser who gives a certificate makes any use of the property other than retention, demonstration, or display while holding it for sale in the regular course of business, the use shall be deemed a retail sale by the purchaser as of the time the property is first used by him, * * *."

Appellants contend that the sale of the cartons to Safeway was for a "purpose other than resale" within the meaning of section 6007; that Safeway used the cartons far more than by merely placing "the contents in the container and sell[ing] the contents together with the container" within the meaning of section 6364(a); and that because Safeway gave the seller of the cartons resale certificates and because Safeway used the cartons in its business, such use was a taxable retail sale under section 6094.

Appellants argue that it is settled law in California that the eventual resale of personal property by a person who has purchased such property for use will not prevent the original sale of such property from being a retail sale subject to tax. They cite Kirk v. Johnson, 37 Cal.App.2d 224, 99 P.2d 279, in which it was held that sales of cows to dairymen for the purpose of producing milk were not sales for resale merely because the purchaser ultimately intended to market the cows as beef. They also cite People v. Puritan Ice Company, 24 Cal. 2d 645, 151 P.2d 1, in which it was held that the sales of ice to shippers and packers of vegetables during shipment were retail sales subject to sales tax, although the purchasers of the vegetables were billed separately for the ice, since the ice was used by the shippers and packers as a preservative prior to the resale.

Respondent in reply points out that from 1936 to the present it has been recognized in appellants' regulations (see California Administrative Code, Title 18, sec. 1989) that sales of containers are not "retail sales" if the purchaser places goods in the containers and sells the contents together with the containers. In the case of Coca-Cola Co. v. State Board of Equalization, 25 Cal.2d 918, 156 P.2d 1, appellants argued that this administrative construction was in excess of their own powers under the statute. The court held that the construction was reasonable and authorized by the statute. In that case the Coca-Cola Company had purchased wooden barrels and kegs in which it stored, transported and sold its products. The court held that the sale of these containers to the Coca-Cola Company was not a "retail sale" and was accordingly not taxable. The court said in 25 Cal.2d at pages 920–922, 156 P.2d at page 2:

> "Although there is considerable conflict in the authorities concerning the time when the sale of a container at retail occurs, in 1936 the Board of Equalization, acting in accordance with the authority vested in it by section 27 of the Retail Sales Act, supra, adopted a rule which declared the policy it would follow in administering the California statute. That rule, in varying form, was in force at the time of the transactions which are the basis of the appellant's claim for refund. From January 22, 1936, to August 29, 1939, this rule, in so far as is pertinent, read as follows: 'Gross receipts from sales of containers such as fruit boxes, burlap sacks, bottles, cans and packing cases to growers, packers, bottlers and others who place the contents in the containers are not taxable if the containers are sold with the contents. * * * If, however, the containers are not sold with the contents, as is generally the case with * * * containers upon which deposits are taken to insure their return, the gross receipts from the sale of containers are taxable.' At all times subsequent to August 29, 1939, this ruling in so far as material to the present case, read as follows: 'The term "containers" as used herein means the articles and devices in which tangible personal property is placed for shipment and delivery. * * * The term "returnable containers" as used herein means those containers which are returned by the buyers of the contents and re-used by the packers, bottlers or sellers of the commodities contained therein. A container is classed as a returnable container if title to the container is retained by the packer, bottler, or seller of the contents or if the packer, bottler, or seller of the contents charges a deposit on the container. * * * The term "nonreturnable containers" as used herein means those containers which are sold with the contents and are not returned by the buyers of the contents for re-use by the packers, bottlers, or sellers of the contents. * * * Gross receipts from sales of nonreturnable containers to persons who place commodities to be sold in such containers are sales for resale and, accordingly, are not taxable.'

"* * * But the Board of Equalization now takes the position that its adoption of rule 10, construing the sales tax law to exempt the sale of nonreturnable containers to original users, was erroneous and contrary to the terms of the act. In any event, the board adds, the particular sales now in controversy are not within the meaning of the rule, for it does not appear that the barrels or kegs containing syrup were nonreturnable. However, the rule does not purport to exempt the sale of nonreturnable containers from taxation; it merely interprets the statute by explaining that the sale of 'nonreturnable containers to persons who place commodities to be sold in such containers' is not a retail sale and is therefore not taxable. There is no provision in the statute requiring a tax to be paid upon such transactions and the sales of barrels and kegs by the cooperage companies to the Coca-Cola Company clearly fall within the board's rule."

We cannot agree with respondent that the Coca-Cola Company case is determinative of the issue involved in the instant case, for in the Coca-Cola case there was no evidence of any use of the barrels other than to place the Coca-Cola syrup in them and sell them with the syrup. Accepting the trial court's findings in the instant case that respondent purchased the cartons for the purpose of using them by putting in them the items sold to customers and selling the package so made up to such customers, we are unable to see how respondent can escape from the effect of section 6094 of the Revenue and Taxation Code, which provides that if a purchaser who gives a certificate "makes any use of the property other than retention, demonstration, or display while holding it for sale in the regular course of business, the use shall be deemed a retail sale by the purchaser as of the time the property is first used by him."

At the time respondent purchased the empty cartons, it gave a certificate to the seller, certifying that it was then purchasing the cartons for resale. It then made, however, a substantial use of the cartons other than for retention, demonstration, or display while holding them for sale in the regular course of business. This use consisted of using the empty cartons as receptacles for packing its manufactured products and transporting them to its retail outlets. That use was an intermediate and completed use, for it had nothing to do with the resale. When the packaged goods reached the retail outlets, the goods were taken from the containers and otherwise displayed for sale. Eighty per cent of the cartons that had been so used, being in sufficiently sound condition, were then used as receptacles into which to put items which retail purchasers had selected from the goods being offered for sale by plaintiff. By the plain terms of section 6094 this intermediate and independent use must be "deemed a retail sale" by plaintiff as of the time that use was made by it, for whatever may be said as to the original sale of the cartons having been made for resale and therefore exempt from sales tax, we believe that the use made of said cartons as hereinbefore detailed made them subject to the tax.

In view of the foregoing we conclude that the court erred in holding that the State was not entitled to collect sales tax on the cartons here involved.

The judgment is reversed with directions to enter judgment for defendants.

VAN DYKE, P. J., and PEEK, J., concur.

Charlie Walter ALVES, Petitioner and Appellant,

v.

JUSTICE COURT OF CHICO JUDICIAL DISTRICT, COUNTY OF BUTTE, State of California, Respondent.

Civ. 9132.

District Court of Appeal, Third District, California.

Feb. 8, 1957.

Rehearing Denied March 6, 1957.

Hearing Denied April 2, 1957.

Prohibition proceeding was brought against the Justice Court of Chico Judicial District, County of Butte, State of California, to prevent prosecution of petitioner under an allegedly unconstitutional city ordinance. The Superior Court, Butte County, J. F. Good, J., entered an order denying writ of prohibition, and the petitioner appealed. The District Court of Appeal, Peek, J., held that city ordinance providing that it shall be unlawful for any minor under 17 years of age to be in or on any public street, park, square, or public place between 10:00 P.M. and 5:00 A.M., except when and where minor is accompanied by parent or legal guardian, or where presence of minor in such place or places is connected with, and required by, some legitimate business, trade, profession, or occupation in which minor is engaged, and making it a misdemeanor for any persons to assist, aid, abet, or encourage such minor to violate the ordinance, is unconstitutional as an unlawful invasion of personal rights and liberties.

Order reversed.

1. Municipal Corporations ⇐594(1)

Word "business" as used in city ordinance providing that it shall be unlawful for any minor under 17 years of age to be in or on any public street, park, square, or public place between 10:00 P.M. and 5:00 A.M., except where minor is accompanied by a parent or legal guardian, or where presence of minor in such place is connected with, and required by, some legitimate "business," trade, profession or occupation in which said minor is engaged, must be read with the words "trade, profession or occupation in which said minor is engaged." and, when so read, it is apparent that the word "business" refers to employment.

See publication Words and Phrases, for other judicial constructions and definitions of "Business".

2. Municipal Corporations ⇐595, 597

A municipality, under its inherent police power, may enact legislation, which may interfere with personal liberties of its citizens and impose penalties for violation thereof, where general welfare and public health and safety demand such enactment, but rule is always subject to rule of reasonableness in relation to objects to be attained.

3. Constitutional Law ⇐83(1)

The law-making body of a municipality has no power, under guise of police regulation, arbitrarily to invade personal rights and personal liberty of individual citizen. West's Ann.Const. art. 1, § 1.

4. Municipal Corporations ⇐63(1)

If law-making body of municipality passes an ordinance ostensibly in exercise of the police power, but which in fact interferes unnecessarily with the personal liberty of the citizen, courts have a right to examine the ordinance to see whether it relates to the objects which the exercise of the police power is designed to secure, and whether it is appropriate for the promotion of such objects. West's Ann.Const. art. 1, § 1.

5. Constitutional Law ⇐83(1)

The general right of every person to enjoy and engage in lawful and innocent activity, though subject to reasonable restriction by municipality, cannot be completely taken away under the guise of police regulation, and any regulation to the contrary will be stricken down as an arbitrary invasion of the inherent personal rights and liberties of all citizens. West's Ann.Const. art. 1, § 1.

6. Constitutional Law ⇐83(1)

City ordinance providing that it shall be unlawful for any minor under 17 years

of age to be in or on any public street, park, square, or public place between 10:00 P.M. and 5:00 A.M., except when and where minor is accompanied by parent or legal guardian, or where presence of minor in such place or places is connected with, and required by, some legitimate business, trade, profession, or occupation in which minor is engaged, and making it a misdemeanor for any persons to assist, aid, abet, or encourage such minor to violate the ordinance, is unconstitutional as an unlawful invasion of personal rights and liberties. U.S.C.A. Const. Amend. 14; West's Ann.Const. art. 1, § 1; West's Ann.Welfare & Inst.Code, §§ 700(m), 702.

7. Prohibition ⇐5(4)

One who was charged by complaint with violating unconstitutional city ordinance, was entitled to writ of prohibition to prevent his prosecution under ordinance. U.S.C.A.Const. Amend. 14; West's Ann. Const. art. 1, § 1; West's Ann.Welfare & Inst.Code, §§ 700(m), 702.

Laughlin & McKalson, Chico, for appellant.

Edmund G. Brown, Atty. Gen., by Doris H. Maier, Deputy Atty. Gen., Loyd H. Mulkey, Jr., Asst. Dist. Atty., Chico, and Grayson Price, City Atty., Chico, for respondent.

PEEK, Justice.

Appellant Alves was charged with a violation of section 702 of the Welfare and Institutions Code, the specific acts alleged being that he wilfully aided and abetted a minor to be in a public place at the hour of 11:30 p. m. in violation of the curfew law of the city of Chico (section 684a of the Chico Municipal Code), and that said act by the appellant caused the minor to come within section 700(m) of the Welfare and Institutions Code. At the preliminary hearing appellant moved to dismiss the complaint upon the ground that the ordinance in question is unconstitutional. His motion was denied, and he thereafter sought a writ of prohibition in the superior court which was also denied. He now appeals from the order denying the same. He does not question the right of the city to adopt a curfew ordinance. The essence of his contention is that the ordinance in question is offensive to Article I, section 1, of the California Constitution and to the Fourteenth Amendment to the Constitution of the United States, in that it unreasonably interferes with the exercise of personal rights guaranteed by the cited constitutional provisions.

Although no factual question is presented, it appears from the briefs that the appellant, aged 21, was sitting in an automobile at a drive-in restaurant with three other young persons, among whom was one Steve Lee Kirby who was under the age limit set out in said ordinance, but who was then married and emancipated from his parents' control.

The pertinent portions of the ordinance in question read as follows:

"Subdivision (a). It shall be unlawful for any minor under the age of seventeen years of age to be in or on any public street, park, square or any public place between the hours of 10:00 o'clock P.M. and 5:00 o'clock A.M. of the following day, except when and where said minor is accompanied by a parent or legal guardian having the care and custody of said minor, or where the presence of said minor in said place or places is connected with, and required by, some legitimate business, trade, profession or occupation in which said minor is engaged.

"Subdivision (b). Any person assisting, aiding, abetting or encouraging any minor under the age of seventeen years to violate the provisions of Subdivision (a) hereof shall be guilty of a misdemeanor; and when any minor is found violating the provisions of Subdivision (a) a presumption shall arise that the parent or legal guardian having the care and custody of said minor assisted, aided, abetted and encouraged said minor in so violating said Subdivision (a)."

The language of subdivision (a) is clear and explicit in that all minors under the stated age are prohibited from being in or on a public street or place except those minors who are accompanied by a "parent or legal guardian" or those whose presence "on any public street, park, square or any public place" between the hours set forth "is connected with, and required by, some legitimate business, trade, profession or occupation in which said minor is engaged."

Appellant urges that the exception in the clause of said ordinance, "or where the presence of said minor in said place or places is connected with, and required by, some legitimate business, trade, profession or occupation in which said minor is engaged," encompasses only employment activities.

Respondent's answer to this argument is that if the words "legitimate business" are interpreted to have the broad meaning of "legitimate activity" the entire argument as to the restrictive effect of the statute must fail. In support, thereof, they argue that Webster's New International Dictionary (2d Ed. 1950) defines the word "business" in part to be "the quality or state of being busy," and since "busy" is defined in part as "engaged in some action on which one is intent; actively at work; occupied with serious affairs; not idle or at leisure; * * * active," that therefore construing the word "business" as used in the ordinance to have the usual and ordinary meaning, "permits an interpretation which gives full validity to the legislative intent while at the same time indicating a reasonable flexibility of conduct on the part of the minor." Respondent then concludes its argument with the comment: "An explanation of his presence late at night which shows a legitimate activity or reason would be a complete defense to the charge of violating the ordinance while preserving the spirit of the legislative intent."

Even if we were to assume the validity of respondent's argument that "legitimate business" as used in the ordinance must be interpreted to mean "legitimate activity," there is the further element not considered by respondent that the minor's presence also must be "required." In other words, even if it be said that presence at a high school or college basketball game, football game, dance, a theater or church was a "legitimate activity," certainly it would not be required. There could be little question that the minor's presence at such affair would be wholly voluntary, and no question at all that the successful prosecution of the affair or activity required his presence.

[1] It would appear that the words "legitimate business" as used in the ordinance must be read with the words which follow: "trade, profession or occupation in which said minor is engaged," and when so read it is quite apparent that they refer to employment. Even if this were not true and the interpretation of respondent was accepted, we would then be confronted with the obvious vagueness of the term "legitimate activity," and another constitutional question would be posed.

[2] The rule is too well established to warrant citation of authority that a municipality, under its inherent police power, may enact legislation which may interfere with the personal liberties of its citizens and impose penalties for the violation thereof where the general welfare, public health and safety demand such enactment; but this rule is always subject to the rule of reasonableness in relation to the objects to be attained.

It is interesting to note that the parties have cited only two purely curfew ordinance cases; one, Ex parte McCarver, 39 Tex.Cr.R. 448, 46 S.W. 936, 42 L.R.A. 587, which is referred to as "the first decision of a court of last resort on the question involved" in the footnote to 42 L.R.A. 587. The second is the case of People v. Walton, 70 Cal.App.2d Supp. 862, 161 P.2d 498, decided by the appellate department of the Los Angeles County Superior Court.

The McCarver case concerned a prohibition against minors under the age of 21 years being on the streets later than 15 minutes after the ringing of the curfew

bell in the Baptist Church at 8:45 p. m. in the city of Graham, Texas, except if in the company of their parents or in search of the services of a physician. The ordinance was held unreasonable and void. The court specifically noted that the numerous reasons which were called to mind only served to bring into question the reasonableness of the law and concluded that it was an undue invasion of the liberty of the citizens of Graham.

In the Walton case, the prohibition was against a minor " 'who remains, or loiters' " upon a public street or in a public place. The court there specifically noted that the provision in question was aimed at " * * * preventing such minors from tarrying and staying unnecessarily upon the streets and public places, and does not restrict those minors who are using or are on such streets or places while actually in the process of going to or from places of business or amusement or otherwise." 70 Cal.App.2d Supp. at page 866, 161 P.2d at page 500. Obviously this was a far different situation from what is presented in the case before us.

Respondent, while placing reliance upon the Walton case, attacks the antiquity of the McCarver case and the reasoning therein as being out of step with modern authorities, but no other cases are cited to sustain the argument.

The McCarver case, however, antiquated as it may be, would seem to be much closer to the instant case than the Walton case. Here, as in the Texas case, the prohibition would not apply to a minor in the company of his parents. But while going for a doctor would have been valid in Texas, it would not have been in the present case; and while employment which would require a minor's presence on a street in Chico at night would be excepted in that ordinance, it would not have been under the Texas statute. And as regards the Walton case, it should be noted that the Los Angeles city ordinance had none of the broad restrictive provisions of either the McCarver or the present case.

[3, 4] Although the question presented was not the same—the ordinance related to dancing and the playing of dance music in homes as well as in public places—we believe the court in the case of In re Hall, 50 Cal.App. 786, 195 P. 975, 976, ably stated the general rule applicable to cases such as the present where a statute is attacked as being unconstitutional in that it unduly and unreasonably interferes with personal rights. We have therefore chosen to quote at length from that decision. There it was held:

"It is for the law-making body to determine when an exigency exists for the exercise of the police power, but what are the subjects of its exercise is clearly a judicial question. The exercise of legislative discretion is not subject to review by the courts when measures adopted by the legislative department are calculated to protect the public health and secure the public comfort, safety, or welfare; but the measures so adopted must have some relation to the ends thus specified. The law-making body of a municipality has no power, under the guise of police regulation, arbitrarily to invade the personal rights and personal liberty of the individual citizen. Its determination upon this question is not final or conclusive. If it pass an ordinance ostensibly in the exercise of the police power, but which in fact interferes unnecessarily with the personal liberty of the citizen, the courts have a right to examine the law and see whether it relates to the objects which the exercise of the police power is designed to secure, and whether it is appropriate for the promotion of such objects. When the police power is exercised for the purpose of prohibiting a lawful amusement or regulating the manner in which it may be carried on or enjoyed, the law-making body is not the exclusive judge as to what is a reasonable and just restraint upon the constitutional right of the citizen to enjoy his personal rights and use his own property in his own way. The general right of every person to enjoy his own property and engage in any lawful and innocent amusement therein, and to do so in his own way, pro-

vided he does not encroach upon the rights of others, cannot be taken away from him by legislative enactment or municipal ordinance."

The court in that decision then went on so say:

"There is no certain test whereby the reasonableness of a police measure may be definitely measured in any given case. It is a matter resting in human judgment. So the line between what is reasonable and what is not, marking the bounds of the constitutional authority of the legislative department, is one often difficult of ascertainment, rendering it necessary, in all doubtful cases, for the judiciary to defer to the wisdom of the law-making body. But when the boundary has been plainly passed, the duty of the court to repel the encroachment and so uphold the Constitution is absolute. It has no discretion in the matter. 'Reasonableness' is not synonymous with 'expediency.' Matters of expediency are wholly for legislative cognizance; while reasonableness is subject to judicial inquiry. As applied to a law, 'reasonableness' is manifestly not what extremists upon the one side or the other would deem fit and fair."

[5, 6] Measured by the rule expressed in the Hall case, the conclusion appears inescapable that the ordinance in question is invalid. There can be no question but that the purpose and intent in the enacement was the same as in the Walton case—a better control of juveniles during the late hours of the night. But to accomplish that purpose the ordinance completely prohibits all minors actually going to or coming from, or being at night classes, library study, games, dances or other school activities, church functions or the theater, to cite but a few examples. True, the ordinance would preclude aimless loitering by minors in public places during the hours set forth, but it would also make unlawful many other activities by minors which otherwise would be entirely lawful. Paraphrasing the conclusion of the court in the Hall case, the general right of every person to enjoy and engage in lawful and innocent activity while subject to reasonable restriction cannot be completely taken away under the guise of police regulation. Any regulation to the contrary will be stricken down as an arbitrary invasion of the inherent personal rights and liberties of all citizens. Thus, since it cannot be said that prohibition against the mere presence of a minor on a street or in a public place between the designated hours for a purpose other than required by his business, or unless accompanied by a parent or legal guardian, has any real or substantial relationship to the primary purpose of the statute, it therefore constitutes an unlawful invasion of personal rights and liberties, and for that reason is unconstitutional.

[7] We find no merit in respondent's further argument in support of the order that if appellant "* * * is held to answer * * * trial and appeal * * * will provide him with a plain, speedy and adequate remedy," or "* * * if he is imprisoned, he will have the added remedy of habeas corpus to test the validity of the ordinance and the legality of his being held." We know of no rule which would compel appellant to stand trial upon a complaint based on a void statute with the possibility of conviction of contributing to the delinquency of a minor and a fine of $1,000 or imprisonment in the county jail for two years, or both, and not be able to raise a question as to the constitutionality of ordinances under which he was compelled to go to trial until after his conviction. An unconstitutional statute goes to the very jurisdiction of the court, and hence may be attacked at any stage of the proceedings.

The order is reversed.

VAN DYKE, P. J., and SCHOTTKY, J., concur.

148 Cal.App.2d 426

The PEOPLE of the State of California, Plaintiff and Respondent,

v.

James Corbett WALTERS, Jr., Defendant and Appellant.

Cr. 1135.

District Court of Appeal, Fourth District, California.

Feb. 8, 1957.

Prosecution for unlawful possession of marijuana. The Superior Court, Riverside County, O. K. Morton, J., entered judgment of conviction. The defendant appealed from judgment of conviction, order denying defendant probation and order denying motion for new trial. The District Court of Appeal, Mussell, J., held that where defendant and his wife consented to search of their apartment, cigarette containing marijuana and twig of marijuana found by police officers was not obtained by unlawful search and seizure and items were properly admitted in evidence.

Judgment and order denying new trial affirmed.

1. Criminal Law ⇐1023(12), 1134(10)

Order denying probation is not an order from which an appeal may be taken but order is reviewable on appeal from judgment of conviction. West's Ann.Pen. Code, § 1237.

2. Criminal Law ⇐395
Searches and Seizures ⇐7(27)

Where police officers knocked on door of apartment and were invited to enter by defendant's wife with both defendant and wife consenting to search of apartment by police cigarette containing marijuana and small twig of marijuana found by police were not obtained by unlawful search and seizure and were admissible in prosecution of defendant for unlawful possession of marijuana. West's Ann. Health & Safety Code, § 11500.

3. Criminal Law ⇐736(1)

Whether an apparent consent to search the property was voluntarily given or was in submission to express or implied assertion of authority by law enforcement officers is question of fact to be determined in light of all the circumstances.

4. Searches and Seizures ⇐7(27)

Where defendant consented to search of apartment by police officers who found marijuana seed in a suede jacket and arrested defendant, further search which revealed cigarette containing marijuana and twig of marijuana was proper.

5. Arrest ⇐71

It was immaterial to the lawfulness of a search and seizure whether search was initiated before rather than after the arrest, where officers had reasonable cause to arrest the defendant.

6. Criminal Law ⇐409

To prove a prima facie case of unlawful possession of marijuana, as proper predicate for receipt in evidence of admissions by defendant, it was only necessary to show reasonable probability of the unlawful possession of marijuana by a person and defendant's connection with the marijuana need not be proven. West's Ann. Health & Safety Code, § 11500.

7. Poisons ⇐9

Evidence sustained conviction of defendant on charge of unlawful possession of marijuana. West's Ann. Health & Safety Code, § 11500.

8. Criminal Law ⇐1159(6)

Jury verdict supported by circumstantial evidence will not be set aside.

9. Criminal Law ⇐823(2)

In prosecution for unlawful possession of marijuana, instruction on question of possession was not objectionable as indicating court's belief in guilt of defendant, especially in view of instruction that jury had duty to exercise same independence of judgment in weighing court's comments as jury was entitled to exercise in weighing testimony of witnesses and arguments of counsel.

10. Criminal Law ⇐982

Where record established that probation officer's report was considered by the

court, denial of probation was not an abuse of discretion.

11. Criminal Law ⇐982

Granting and revocation of probation are within the sound discretion of the trial court.

Harmon C. Brown, Riverside, for appellant.

Edmund G. Brown, Atty. Gen., Norman H. Sokolow and Benjamin E. King, Deputy Attys. Gen., for respondent.

MUSSELL, Justice.

[1] Defendant was accused of having violated Health and Safety Code, § 11500, a felony, in that on or about June 7, 1956, in the county of Riverside, he did wilfully and unlawfully have in his possession a narcotic commonly known as marijuana. It was further alleged in the information that on or about April 28, 1953, he had been found guilty of a violation of the said section of the Health and Safety Code. Defendant entered a plea of not guilty and admitted the prior conviction. A jury trial resulted in a verdict finding him guilty as charged. His application for probation was denied and he was sentenced to State's prison. He appeals from the order of the court denying probation, the judgment of conviction and the order denying his motion for a new trial. Since an order denying probation is not an order specified in section 1237 of the Penal Code from which an appeal may be taken, and is an order made before judgment was pronounced, the order is reviewable on an appeal from the judgment and the attempted appeal from the order will be dismissed. People v. Robinson, 43 Cal.2d 143, 145, 271 P.2d 872.

On June 7, 1956, at about 4:00 a. m., officers Willis, Brooks and Mawn called at an apartment in Riverside occupied by the defendant's wife. They knocked at the door and Mrs. Walters answered. The officers asked her if Mr. Walters (the defendant) was in and upon receiving an affirmative answer, they stated they would like to talk to him. Mrs. Walters then told them to "come on in", and the officers entered. Officer Willis testified in this connection as follows:

"Q. What took place then after you went inside?

"A. Sgt. Brooks in my presence asked Mrs. Walters if he could look around the apartment—that we had reason to believe that there might be some narcotics in the apartment, and she stated it was all right to look around—that there wasn't anything in the apartment. And at that time Sgt. Brooks asked the defendant if he had any narcotics on him, or in the apartment, and he said he did not have. Sgt. Brooks asked him if he didn't have any narcotics in the apartment that he would certainly have no objection to us looking around. He said, 'You are here. You might as well look around.' "

Officer Mawn testified as follows:

"A. Yes. Sgt. Brooks knocked at the door and Mrs. Walters answered it. She was asked if James Walters was in the house. She answered, 'Yes.' We asked if we could see James. She said to come in. All three of us entered the house. When we got into the house, Jim was starting to get dressed.

"The Court: By 'Jim' you mean—

"A. Mr. Walters. And Sgt. Brooks asked his wife if there was any narcotics in the house. She answered, 'No.' He asked Mr. Walters if there was any narcotics in the house and he answered 'No.' Sgt. Brooks asked, 'Do you mind if we search the place?'

"Mrs. Walters answered, 'No,' and Mr. Walters said, 'Well, as well as you are in here, you might as well.' At that time all three of us started searching the apartment. Lt. Willis found the suede jacket in the closet with the seed in the pocket. Sgt. Brooks found the twig under the cushion on the sofa. Then Lt. Willis found the cigarette in the ash tray."

The apartment contained a kitchen, a large room with a bed and couch, a clothes closet and a bathroom. Officer Willis found several articles of men's clothing in the closet, a suede jacket, trousers and shirts. When asked if some of these articles of clothing were his, the defendant stated they were. He further stated that he was still married to Mrs. Walters; that he had been separated from her and from time to time he would go back and stay with her, and that he was staying with her that night. Officer Willis found a seed in the pocket of the suede jacket and when asked what the article was, the defendant stated that it looked like a marijuana seed to him; that the coat was not his, that it belonged to another individual. Referring to the seed, he said, "That probably belongs to my friend, Roger Gevrez." Defendant also stated that there were no other narcotics on the premises; that any additional narcotics found on the premises would belong to him and to no one else, and not to his wife. Further search under a pillow on the couch in the living room revealed a small one-half inch long stem with some green leafy substance on it. The defendant stated it looked like marijuana to him and when asked if it belonged to him, stated that it "could be"; that he had smoked marijuana in the apartment a week or ten days prior to that date. Officer Willis also found a partially smoked cigarette in an ash tray in the apartment and, upon examining it, found that it contained a green leafy substance. When asked what the substance was, the defendant said, "My God, it is marijuana. This is too much and it looks like you got me. I accept responsibility for anything found here." The defendant was then placed under arrest and the articles found by the officers were placed in an envelope. Before leaving the apartment, officer Willis asked the defendant if he was sure that all the evidence found there belonged to him, to which the defendant replied "Yes, it doesn't belong to my wife. It belongs to me." The articles found by the officers were delivered to a chemist and he found and testified that they contained marijuana leaves.

The defendant testified that he was in his wife's apartment approximately forty minutes before the officers arrived and was in bed when they came; that "they said they wanted to talk to me and that they had arrested two of my friends, Paul Chase and Roger Gevrez, earlier. Would I mind to a search of the house and I said, "Well, as far as I am concerned, I don't. It is not my house"; that he told officer Willis that the seed found in the jacket was not his and that he knew nothing about the leafy substance found under the pillow on the sofa or the cigarette found in the ash tray.

Roger Gevrez testified that on January 5, 1956, he had rolled and smoked a marijuana cigarette while sitting on the sofa in the apartment.

Mrs. Walters testified that she and the defendant separated about February 7, 1956; that she rented the apartment; that the defendant came there occasionally and and sometimes would stay all night; that she could not say for sure whether the defendant ever brought marijuana to the apartment.

[2] The officers had no search warrant or warrant of arrest when they entered the apartment occupied by the defendant or when they searched the premises. Defendant contends that the trial court committed prejudicial error in admitting into evidence exhibits one and two (the cigarette removed from the ash tray and the small twig found on the sofa or couch.) This contention is based on the claim that said exhibits were obtained in violation of the constitutional guarantees against unlawful search and seizure, thus coming within the exclusionary rule as stated in People v. Cahan, 44 Cal.2d 434, 282 P.2d 905. We find no merit in this contention. The record shows that when the officers knocked on the door of the apartment and stated to Mrs. Walters that they would like to come in and talk to the defendant, she stated that the defendant was inside and to "come on in";

that after the officers entered, Sgt. Brooks asked if he could look around; that they had reason to believe there might be some narcotics in the apartment; that Mrs. Walters said it was all right to look around, that there wasn't anything in the apartment; that when the defendant was asked if he had any narcotics on him or in the apartment he replied in the negative and when asked whether they minded if the place were searched, Mrs. Walters responded "No", and defendant said, "You are here. You might as well look around." It is apparent from this testimony that both the defendant and his wife freely and expressly consented to the search of the apartment.

[3] In People v. Burke, 47 Cal.2d 45, 301 P.2d 241, 243, the court said:

> "It was not unreasonable for the officers, without any show of force or coercion, to call upon the suspected defendant at his home, or to ask him questions, or to accept defendant's statement, 'No, go ahead,' in answer to the inquiry, 'You don't mind then if we search your apartment do you?' Under the circumstances here, as under those in People v. Michael, 1955, 45 Cal.2d 751, 754, 290 P.2d 852, a holding that as a matter of law defendant acted because of an unlawful assertion of authority by the officers would be unjustified. (See also People v. Martin, 1955, 45 Cal.2d 755, 761, 290 P.2d 855.)"

It was there further held that whether in a particular case an apparent consent was in fact voluntarily given or was in submission to an express or implied assertion of authority, is a question of fact to be determined in the light of all the circumstances.

In People v. Winston, 46 Cal.2d 151, 162, 293 P.2d 40, 46, the court said:

> "While the Cahan case held that evidence obtained by police officers in violation of federal and state constitutional prohibitions 'against *unreasonable* search and seizure is inadmissible,' it did 'not purport to inhibit the right of law enforcement officers to conduct a *reasonable* search or seizure incident to a valid arrest.' People v. Coleman, 134 Cal.App.2d 594, 599, 286 P.2d 582, 585. It is further said in the Coleman case, 134 Cal.App.2d at pages 599–600, 286 P.2d at page 586: 'It is well settled that a search without a warrant is valid where it is incident to a lawful arrest, if it is reasonable and made in good faith; and that a seizure, during such a search, of evidence related to the crime is permissible.'" (Citations.)

[4, 5] In the instant case the evidence supports the conclusion that defendant was arrested after the marijuana seed was discovered in the suede jacket and that further search was proper as an incident to the lawful arrest of the defendant. The defendant had previously agreed to sell a pound of marijuana to officer Willis and the officers had reasonable grounds for believing that the defendant possessed narcotics. For that reason they asked to be permitted to talk to him. If the officers had reasonable cause to arrest the defendant it was immaterial whether the search was initiated before or after the arrest. People v. Stewart, 144 Cal.App.2d 555, 301 P.2d 301.

[6–8] Defendant next contends that "The court erred in denying defendant's motion to strike from the evidence the admissions of the defendant on the ground the prosecution had failed to prove the corpus delicti independently of these admissions." This contention is likewise without merit. To prove a prima facie case of the corpus delicti all that was necessary was to show a reasonable probability of the unlawful possession of marijuana by a person and it was not necessary to prove defendant's connection with the marijuana in order to establish the essential elements necessary to prove the corpus delicti. People v. Cuellar, 110 Cal.App.2d 273, 276, 242 P.2d 694. Moreover, the sufficiency of the evidence rested solely

with the jury and there being circumstantial evidence to support the conclusion reached in the court below, it cannot be here set aside. People v. Newland, 15 Cal. 2d 678, 681, 104 P.2d 778.

[9] Finally, it is argued that the court erred in its further instruction to the jury on the question of possession. In this connection the record shows that, in response to a request by the jury for further instruction on the question of possession, the court read the instructions theretofore given as to the elements of possession of a narcotic and knowledge of the article possessed, and also stated as follows:

> "The Court will further instruct the Jury that from the evidence, in the court's analysis of same, there is no question but what the Defendant knew what marijuana was; also, that he knew that marijuana had been smoked in the apartment.
>
> "The Court will further instruct you that as far as the evidence shows, Defendant and Mrs. Walters were legally married, and had not been legally separated. He was there at her invitation in the apartment rented by her and had been there on fairly frequent occasions; therefor—, the Court's analysis of that evidence would be that there were certain community property rights there, so that anything in the apartment was under the joint control and possession of both defendant and Mrs. Walters."

We find no prejudicial error in the quoted instruction. We do not construe the statement of the court as indicating belief that the defendant was guilty of the offense charged. It was quite obvious that the defendant knew what marijuana was and that it had been smoked in the apartment. There was no contention otherwise. The evidence offered by the defendant established that he and Mrs. Walters were legally married and that he was there, at her invitation, on frequent occasions. Certainly, these remarks were not to be interpreted as statements of a belief in the guilt of the defendant. The further remark by the trial court that anything in the apartment was under the joint control and possession of both, the defendant and Mrs. Walters, did not amount to prejudicial error. Moreover, the court instructed the jury that if it appeared that any remarks of his expressed an opinion concerning the significance or effect of any evidence, nevertheless it was the duty of the jury to exercise the same independence of judgment in weighing his comments as they are entitled to exercise in weighing the testimony of the witnesses and the arguments of counsel. The court further instructed the jury as follows:

> "You will keep in mind that you are the exclusive judges of the credibility of the witnesses and of all questions of fact submitted to you. Such authority as the trial judge has to express his personal thought on any of these matters is confined to the sole purpose of aiding you in arriving at a verdict, and may not be used, and is not used in this case, to impose his will upon you or to compel a verdict."

We find no prejudicial error in the criticized instructions.

[10, 11] The record herein shows that the probation officer's report was considered by the court and probation was denied. Probation is not a matter of right; it is an act of clemency, the granting and revocation of which are within the sound discretion of the trial court. People v. Jennings, 129 Cal.App.2d 120, 123, 276 P.2d 124. No abuse of discretion appears in the order denying probation and the attempted appeal therefrom is dismissed.

The judgment and order denying a new trial are affirmed.

BARNARD, P. J., and GRIFFIN, J., concur.

Matter of the ESTATE of Corrine W. BARBER, Deceased.

Nettie E. WAGNER, Administratrix With the Will Annexed of the Estate of Corrine W. Barber, Deceased, Respondent,

v.

FIRST CHURCH OF CHRIST SCIENTIST at Laguna Beach, Appellant.*

Civ. 5556.

District Court of Appeal, Fourth District, California.

Feb. 7, 1957.

Rehearing Denied March 5, 1957.

Hearing Granted April 2, 1957.

Probate proceeding by administratrix for interpretation of will, instructions, settlement of first and final account, and a decree of distribution. The Superior Court, Orange County, Robert Garner, J., entered order sought, and church, which was a legatee, appealed. The District Court of Appeal, Mussell, J., held that, where will had been executed more than six months prior to death of testatrix who left no spouse, child, grandchild, or parent, Probate Code provision restricting bequests to charitable and benevolent organizations was not applicable to limit bequest made to named church.

Orders reversed in part and affirmed in part.

1. Wills ⇐13(1)

Where will had been executed more than six months prior to death of testatrix who left no spouse, child, grandchild, or parent, Probate Code provision restricting bequests to charitable and benevolent orgaizations was not applicable to limit bequest made to named church. West's Ann. Prob.Code, §§ 41, 43.

2. Descent and Distribution ⇐71(7)

Where, in probate proceeding, administratrix sought determination of interests of parties under statute limiting gifts to charities, church, as a legatee, could appeal decree determining heirship even though church had not set forth a statement of interests, had not contested rights of other claimants, and had not moved for a new trial or relief from the decree. West's Ann.Prob.Code, §§ 41, 43, 588, 1080, 1240; West's Ann.Code Civ.Proc., § 473; West's Ann.Rules on Appeal, rule 1.

3. Descent and Distribution ⇐71(7)

Right of appeal lies from order determining heirship. West's Ann.Prob.Code, § 1240.

4. Appeal and Error ⇐193(9)

Where material and incurable defects exist in a cause of action and appear on face of the record, reviewing courts will not generally refuse to recognize such ground of appeal, even if the objection was not made in the court below.

5. Descent and Distribution ⇐71(7)

In probate proceeding, clerk's failure, if any, to give proper notices of appeal as prescribed in the Rules on Appeal would not effect legatee's right of appeal from order determining heirship. West's Ann. Rules on Appeal, rule 1.

Frank S. Fitts, Laguna Beach, for appellant.

Stanley M. Arndt, Los Angeles, for respondent.

MUSSELL, Justice.

Corrine W. Barber died testate in the state of Oregon on March 31, 1955. Her will, which was executed on December 30, 1950, disposed of real and personal property in Oregon and California and was admitted to probate in Oregon on April 13, 1955.

Nettie E. Wagner, one of the devisees named in the will, filed a petition in the Superior Court of Orange county, California, for the probate of a foreign will and on June 24, 1955, obtained an order admitting the will to probate. Letters of administration with the will annexed were then issued to her. Paragraph three of the will is as follows:

> *"Third:* I hereby give and bequeath unto my sister, Nettie E. Wagner, for her use and benefit as long as she

* Opinion vacated 315 P.2d 317.

may live, the real property that I now own, or may hereafter own, in Laguna Beach in the State of California. That upon the death of my sister, Nettie E. Wagner, I hereby give and devise the said real property now owned by me, or may hereafter own, in Laguna Beach, California, to be sold by the said Christian Science Church of Laguna Beach, California, and the proceeds from said sale to be used for a Christian Science Nursing Home in Orange County, California."

On February 29, 1956, the administratrix filed herein a petition for a decree determining interests in the estate under Probate Code, § 1080 and for instructions to administratrix under section 588 of said code. It was alleged in the petition, inter alia, that the deceased died more than thirty days after the execution of the will and left one or more heirs of the following categories, to wit: brother, sister, nephew and niece, surviving her, who, under the laws of succession of California "would have taken had the bequest in paragraph 'Third' of the will not been made to the Christian Church of Laguna Beach, California"; that the petitioner is in doubt as to the effect of section 41 of the Probate Code upon the portion of the legacies in paragraph "Third" of the will which leaves the remainder in the California real estate at Laguna Beach to said Christian Science Church of Laguna Beach, California; that the petitioner is in doubt as to how the estate should be distributed; that she is in doubt as to whether only the estate in California should be considered in determining the applicability of section 41 of the Probate Code and is in doubt as to what part of decedent's estate should be considered in determining a one-third of decedent's estate; that the deceased left surviving her no ancestors, spouses, descendant, and no brother or sister, or decedent of deceased brother or sister, other than the sisters, brother, nephews and nieces named therein; that the devisees and legatees named in the will are a brother, three sisters, a nephew, the Christian Science Church of Portland and the Christian Science Church of Laguna Beach, California. The prayer of the petition is that the court determine the interests of all parties under paragraph "Third" of the will and for instructions. Notice of the hearing on the petition was given by posting and by mail, and on March 29, 1956, Nettie E. Wagner, individually, Carlie Wagner, Jessie Cook and John A. Wagner (the sisters and a brother of the deceased) filed their "statements of interests" as provided for in section 1080 of the Probate Code. In these statements it was stated that they contended that only the tangible estate in California should be considered in determining the applicability of section 41 of the Probate Code; that the administration expenses of the California estate should be deducted in determining the one-third and that the administration expenses and the claims filed in Oregon or Washington estate probate should not be considered in determining the one-third unless the assets of those estates were also considered, and that assuming that a portion of the legacy to the Laguna church is not valid that that invalid portion would go under paragraph six of the will to the persons therein named.

No statement of interest was filed on behalf of the First Church of Christ Scientists of Laguna Beach, California, a corporation, appellant herein, and on April 12, 1956, the probate court entered its order interpreting the will and instructing the administratrix. In this order the court decreed in part as follows:

"Under Section 41 of the Probate Code of California, no estate, real or personal, may be bequeathed to said Christian Science Church of Laguna Beach, California, in excess of one-third of decedent's estate, as against said brother, sisters, nephews and niece."

It was further decreed that in determining the applicability of said section and the amount of said one-third of the estate, only

the tangible estate in California should be considered. The court thus limited the interest of appellant to an amount equivalent to one-third of the net California estate.

On May 16, 1956, the administratrix filed her first and final account, report and petition for allowance of fees and for distribution of the estate. This petition was noticed for hearing by posting and by mail, and on June 7, 1956, the court entered its order settling the first and final account and report, fixing the fees and decreeing a distribution of the estate. In this order and decree the court distributed to Nettie E. Wagner a life estate in the Laguna Beach property and the net income accruing from the date of decedent's death and distributed to appellant herein an undivided .41796 interest in the remainder of said Laguna Beach realty after the said life estate.

On June 11, 1956, appellant filed a notice of appeal from the order of April 12, 1956, interpreting the will and instructing the administratrix with the will annexed, and on July 27, 1956, appellant filed a notice of appeal from the order filed June 7, 1956, settling the first and final account and report of administratrix and decree of distribution. There is no dispute as to the distribution of the estate other than that made of the property described in the third paragraph of the will.

Appellant contends that the decision of the court was predicated upon section 41 of the Probate Code without consideration of section 43 of said code; that the will, as admitted to probate, was executed more than six months prior to the date of death of the decedent; that she left no heirs surviving her within the classification of spouse, child, grandchild or parent and that the provisions of section 43 of the Probate Code are fully applicable.

Sections 41 and 43 of the Probate Code provide as follows:

"§ 41. Charitable and benevolent devises and bequests; restrictions

"No estate, real or personal, may be bequeathed or devised to any charitable or benevolent society or corporation, or to any person or persons in trust for charitable uses, by a testator who leaves a spouse, brother, sister, nephew, niece, descendant or ancestor surviving him, who, under the will, or the laws of succession, would otherwise have taken the property so bequeathed or devised, unless the will was duly executed at least 30 days before the death of the testator. If so executed at least 30 days before death, such devises and legacies shall be valid, but they may not collectively exceed one-third of the testator's estate as against his spouse, brother, sister, nephew, niece, descendant or ancestor, who would otherwise, as aforesaid, have taken the excess over one-third, and if they do, a pro rata deduction from such devises and legacies shall be made so as to reduce the aggregate thereof to one-third of the estate. All property bequeathed or devised contrary to the provisions of this section shall go to the spouse, brother, sister, nephew, niece, descendant or ancestor of the testator, if and to the extent that they would have taken said property as aforesaid but for such devises or legacies; otherwise the testator's estate shall go in accordance with his will and such devises and legacies shall be unaffected.

"Nothing herein contained is intended to, or shall be deemed or construed to vest any property devised or bequeathed to charity or in trust for a charitable use, in any person who is not a relative of the testator belonging to one of the classes mentioned herein, or in any such relative, unless and then only to the extent that such relative takes the same under a substitutional or residuary bequest or devise in the will or under the laws of succession because of the absence of other effective disposition in the will."

"§ 43. Exemption of certain donors from restrictions on testamentary dispositions

"Nothing in this article contained shall apply to bequests or devises made by will executed at least six months prior to the death of a testator who leaves no spouse, child, grandchild or parent, or when all of such heirs, by a writing executed at least six months prior to his death, shall have waived the restriction."

[1] The fact that decedent left no spouse, child, grandchild or parent and the further fact that the will involved was executed more than six months prior to the death of the testatrix are both facts which are alleged in the petition for the probate of the will and are not denied. It follows that the provisions of section 41 of the Probate Code are not applicable to limit the bequest to the Christian Science Church of Laguna Beach. The court erred in its order of April 12, 1956, interpreting the will and in its decree distributing to appellant only an undivided .41796 interest in the remainder of said Laguna Beach property, after the said life estate. In re Estate of Bunn, 33 Cal.2d 897, 900, 206 P.2d 635. Respondent Nettie Wagner argues that appellant presented no written statement to the court below and took no steps to contest the rights of the other claimants who did file the required statement of interest as required by section 1080 of the Code of Civil Procedure, and that, therefore, the decree determining heirship must be affirmed. We do not agree with this contention.

Section 1080 of the Probate Code reads in part as follows:

"When four months have elapsed after the first publication of notice to creditors, and a petition for final distribution has not been filed, * * * any person claiming to be an heir of the decedent or entitled to distribution of the estate or any part thereof may file a petition setting forth his claim * * * and praying that the court determine who are entitled to distribution of the estate. * * * Any person may appear and file a written statement setting forth his interest in the estate. No other pleadings are necessary and the allegations of each claimant shall be deemed to be denied by each of the other claimants to the extent that they conflict with any claim of the latter."

This section was discussed in In re Estate of Ward, 127 Cal.App.2d 207, 209, 273 P.2d 601, 602, and it is there said:

"The procedure outlined in the foregoing section is clear. It means exactly what it says; that any person claiming an interest in the estate adversely to the petitioner, in order to have a judicial determination thereof, must file a written statement setting forth his interest in the estate.

"Neither counsel has directed our attention to any authorities construing this section since its enactment in 1931. However, prior to the enactment of the present section of the Probate Code, section 1664 of the Code of Civil Procedure had provisions similar to those in the present section 1080 of the Probate Code, and the appellate courts of this state have held that in the absence of the filing of a document setting forth the facts constituting a party's claim to heirship he could not be heard to contest the right of another claimant. (Blythe v. Ayres, 102 Cal. 254, 260, 36 P. 522; O'Day v. Superior Court, 18 Cal.2d 540, 543, 116 P.2d 621.)"

[2, 3] In the instant case, the petition under said section 1080 was filed by the administratrix and not by the sisters and brother of the decedent. The administratrix alleged in her petition that she was in doubt as to the effect of section 41 of the Probate Code upon the provisions of the third paragraph of the will and the

prayer was that the court determine the interests of the said parties under said paragraph. All the facts showing the relationship of the parties to the decedent and the execution of the will were alleged therein and are not denied. There were no additional facts to be set forth or alleged by the appellant herein in a statement of its interests in the estate and there are no facts alleged in the statement of interest filed by the Wagners or Jessie Cook which are not set forth in the petition filed by the administratrix. Under the circumstances shown by the record, appellant had the right to presume that the court would interpret the will in accordance with its terms and the applicable statutes. A right of appeal lies from the order determining heirship, Probate Code, § 1240, and a timely appeal was filed. Appellant was not barred from questioning the interpretation placed on the will by the court because of a failure to set forth in a statement of interests its interpretation of sections 41 and 43 of the Probate Code.

[4] As is said in L. W. Blinn Lumber Co. v. American C. P. Co., 51 Cal.App. 479, 482, 197 P. 142, 143:

> "* * * [w]here material and incurable defects exist in a cause of action, and appear on the face of the record, courts of appeal will not generally refuse to recognize such ground of appeal, even if the objection was not made in the court below."

In the instant case, the appellant's right to appeal was not lost by the failure to file a motion for a new trial or for relief under section 473 of the Code of Civil Procedure. In Mattox v. Isley, 111 Cal. App.2d 774, 780, 245 P.2d 664, 668, it is said:

> "Although it is common practice for a dissatisfied litigant to urge errors of law as grounds for a new trial it is not compulsory that he do so but he may, instead, present them on appeal as grounds for reversal of the judgment. 2 Cal.Jur., sec. 103, p. 306; Massachusetts Bonding & Ins. Co. v. Los Angeles Ry. Co., 182 Cal. 781, 785, 190 P. 161."

[5] Respondent argues that this appeal must be dismissed because the interested adverse parties were not brought into it or made parties thereto. However, the notices of appeal herein are as prescribed in Rule 1 of the Rules on Appeal and the failure of the clerk, if any, to give proper notification did not affect appellant's right of appeal. The petition for determination of heirship was filed by the administratrix herein and as administratrix she was the representative of all the legatees and devisees. In re Estate of Lynn, 109 Cal.App.2d 468, 473, 240 P.2d 1001. While she states that her brief is the brief of Nettie E. Wagner as administratrix, it is filed as a respondent's brief and is in answer to appellant's opening brief. Under the circumstances, the motion to dismiss the appeal must be and is denied.

The orders appealed from are reversed insofar as they or either of them limit the remainder interest distributed to appellant to a .41796 interest thereof. Otherwise, said orders are affirmed.

BARNARD, P. J., and GRIFFIN, J., concur.

148 Cal.App.2d 198

The PEOPLE of the State of California, Plaintiff and Respondent,

v.

Raymond TRICHE, Defendant and Appellant.

Cr. 3237.

District Court of Appeal, First District, Division 2, California.

Feb. 1, 1957.

Defendant was convicted in the Superior Court, Alameda County, Donald K. Quayle, J., of unlawful possession of heroin, and he appealed. The District Court of Appeal held that parole officer, having reasonable cause to believe that parolee had breached his parole and was living in apartment with woman not his wife, had had authority to search apartment, and to communicate his discovery of narcotics therein to police officers responsible for enforcement of narcotics laws; and held that those officers in turn had had authority to arrest parolee and woman with whom he was living and to make incidental search of apartment.

Affirmed.

1. Arrest ⇐63(4), 71

Officer, who had received reliable information that persons known to have associated with narcotic users and narcotic dealers were in possession of heroin, had reasonable cause for arrest of such persons and incidental search which disclosed heroin.

2. Searches and Seizures ⇐7(10, 26)

Mere fact that parolee is married and is living with his wife will not prevent parole officer from searching premises without warrant when there is reasonable cause to believe that there has been a parole violation, and wife will then be in no position to complain of violation of her right of privacy; and the same is true where woman other than his wife is living with parolee.

3. Arrest ⇐63(4), 71

Searches and Seizures ⇐7(10)

Parole officer, having reasonable cause to believe that parolee had breached his parole and was living in apartment with woman not his wife, had authority to search apartment, and to communicate his discovery of narcotics therein to police officers responsible for enforcement of narcotics laws; and those officers in turn had authority to arrest parolee and woman with whom he was living and to make incidental search of apartment.

George Nye, Public Defender of Alameda County, Martin N. Pulich, Asst. Public Defender, Oakland, for appellant.

Edmund G. Brown, Atty. Gen. of California, Clarence A. Linn, Asst. Atty. Gen., Arlo E. Smith, Deputy Atty. Gen., for respondent.

PER CURIAM.

Appellant, together with his codefendant Rose Tregre, was found guilty by the court, a jury hearing being waived, of violation of section 11500 of the Health and Safety Code in that on September 27, 1955 they unlawfully had in their possession some heroin. He had admitted three prior convictions, of which two were for violation of section 11500, supra. His motion for a new trial was denied and he was sentenced to San Quentin, the judgment to run concurrently with other terms, if any, to which he had been sentenced. He appeals from the order denying the motion for a new trial and from the judgment of conviction.

[1–3] Over the objection of the defendants, the court at the trial admitted into evidence four bindles of heroin seized in the search of an apartment at 714—32nd Street in Oakland, and also a statement voluntarily given to police officers and signed by appellant in which he admitted that the apartment had been rented by the defendants together, that they had lived there together for about 12 days, that they

had bought the heroin together (they disagree as to whose money was used for the purchase) that both had used part of it, that they had put the remainder into bindles, that he had placed the bindles in the closet where they were found and that they belonged to both of them. Appellant's objection was based on the contention that both the signed admissions and the proof of the corpus delicti were the result of and vitiated by an illegal search. The overruling of this objection constitutes the only grievance on appeal.

The foundation laid by the People for the admittance of said evidence was to the following effect: On September 27, 1955 at 11:30 a. m. Officer Ingram of the Oakland Police Department, Special Services Division, received a telephone call from a reliable informant, who was known to him and had given him reliable information before, but whose name he refused to divulge, that he had seen four bindles of heroin in a closet at 714—32nd Street in a rear apartment in which Rose Tregre and Ray Triche were living. The officer had stopped Rose Tregre a number of times on the street and in examining her arms had found puncture marks and scars like those of narcotic users; he also knew that she associated with narcotic users and narcotic dealers. He had known Triche since 1950 when Triche was arrested for investigation of narcotics. He associated Triche with the narcotic traffic and had stopped him also a number of times and checked his arms. After receiving the above information the officer, together with a second one, without procuring a search warrant, went to the address given him. The informant also came there, repeated his information and indicated the apartment to which he had referred. The officers waited in the community bathroom near the apartment and when Rose Tregre came from outside and entered the apartment they arrested her, searched the closet and found and seized the bindles.

In itself the information of the known reliable informer of which the officer had good past experience, together with the circumstances regarding the suspects known to the officer which indicated probability of the correctness of the information given, constituted reasonable cause for the arrest and for the search, incident to the arrest, of the place where the arrest was made. Willson v. Superior Court, 46 Cal.2d 291, 294–295, 294 P.2d 36; See Aitken v. White, 93 Cal.App.2d 134, 145, 208 P.2d 788. However, appellant both in the court below and on this appeal took the position that the arrest, the search and all the evidence introduced were vitiated by the fact that the unnamed informant was himself a peace officer of the State of California, who obtained the information transmitted to the arresting officer by means of an allegedly illegal search without a warrant of the apartment of defendants in their absence. Defendants produced as a witness for the defense Gunnar Gunheim, a parole officer of the State of California, who testified in substance that appellant was one of his parolees and that on the morning of September 27, 1955, he informed the Oakland Police Department of having seen 4 bindles of heroin in the apartment at 714—32nd Street after he had searched it that morning without a warrant in his capacity as parole officer of appellant, under the following circumstances: Appellant was on parole for a narcotics violation and for robbery. He had given to the witness, as his home address, a number on 57th or 59th Street, which the witness had on file. On September 21, 1955, he saw appellant driving a car (for which he had no permission). He followed the car until it stopped in front of the 32nd Street apartment. Questioned, Triche explained that the car belonged to Mr. and Mrs. Tregre who were living there. Triche introduced the officer in the apartment to Rose Tregre, who at the request of the officer produced papers showing that the car belonged to her and her husband. The tenor of the conversation was that she and her husband were living there. Triche's driving the car in connection with the requirements of his parole was discussed. Thereafter the officer checked on Rose

Tregre with the police and obtained the information that her husband was not around but was either in jail or out of town. He also obtained the rumor that appellant was living at the apartment and information, mainly from the police, that he was using narcotics. The officer therefore had him under surveillance for parole violation because of the above circumstances among which was the association with people of bad reputation like Rose Tregre. On the morning of September 27th he went to the apartment on 32nd Street which in his opinion was the residence of appellant. He asked the landlady if Ray Triche was home and she said, "You mean the couple living in the end apartment". She said she thought they were not home. After identifying himself as parole officer, he asked her if she would open the door of the apartment, which she did, using a key. The officer then entered the apartment, found in the closet the four bindles wrapped in foil, which he replaced. He left the apartment and phoned the Police Department and on his return conferred with Officer Ingram, but did not stay until the arrest of Rose Tregre. He summoned appellant by telephone to report to him the next morning, and then took him to the Vice Squad where appellant was held for investigation of parole violation.

The question whether the search by the parole officer was illegal is largely governed by the special character of the relation between such officer and his parolee, ably analyzed in the recent case of People v. Denne, 141 Cal.App.2d 499, 507–510, 297 P.2d 451. It was there held that the granting of parole does not change the status of a parolee as a prisoner. He is in penal custody in a prison without bars, subject to the rules and regulations for the conduct of paroled convicts to be enforced by the parole officer. For the protection of the community as to whose security the parolee constitutes a calculated risk, the parole officer exercises an ubiquitous supervision over him, including broad visitatorial powers. Having constructive custody of his prisoner at all times, there is nothing unreasonable in a parole officer's search of the prisoner's premises where he has reasonable cause to believe that the parole has been breached. It is unnecessary for a parole officer to apply for a warrant to arrest a parolee, who is already his prisoner and who is at all times in custodia legis. In the case before us there was reasonable cause to believe that Triche had breached his parole and the search of the premises where he admittedly lived and acted in violation of his parole was under the above rule no invasion of his constitutional right to be free from unreasonable searches or seizures.

All the above is not seriously disputed by appellant, but it is his contention that the search by the parole officer without a warrant from which the evidence resulted was, as to Rose Tregre, to whom the parolee-parole officer relation did not apply, unreasonable both because the premises searched were also her premises and because the parole officer at the time of the search had allegedly no knowledge that the premises were those of his parolee. It is said that the officer did not know that his parolee was on the premises in a relation which gave him control and not as a mere visitor or guest. Appellant then argues that he can urge exclusion of the evidence which is the product of illegal action of a peace officer of the state, even if his own rights have not been violated because the rationale of the exclusionary rule, to deter law enforcement officers from obtaining evidence in a lawless manner, equally applies. People v. Martin, 45 Cal.2d 755, 759–761, 290 P.2d 855. The alleged violation of the rights of the codefendant Tregre distinguishes this case from the Denne case, supra.

We need not decide in general how far the right of a parole officer extends to search premises which are not under the exclusive control of his parolee or to which the relation of his parolee is not known with certainty. In this case the action of the parole officer in this respect was not of the reprehensible character which requires the deterrent of exclusion of the evidence

resulting from his search. Here, the defendants, although not married, actually lived together in the apartment which they had rented as if they were a married couple. We have no doubt that the fact that a parolee is married and is living with his wife will not prevent the parole officer from searching his premises without a warrant when there is reasonable cause to believe that he has violated his parole; the wife will then be in no position to complain of violation of her right of privacy, which because of her living with a parolee subject to special rules of supervision must be to some extent restricted in the public interest. We see no reason why the same should not apply to the woman who lives with a parolee as if they were a married couple, without such actually being the case.

The fact that the parole officer lacked grounds for certainty as to the relation of the defendants and their joint occupancy of the apartment cannot change the above conclusion. A requirement of absolutely certain knowledge in advance as to all factual circumstances of importance in relation to an intended arrest or search would unduly hamper the necessary activity of peace officers. In People v. Gorg, 45 Cal.2d 776, 783, 291 P.2d 469, it was held that where officers had in good faith with the consent and at the request of the home owner conducted a search of a room which a student suspected of possession of narcotics occupied in the home in exchange for doing the gardening, evidence so obtained could not be excluded merely because the officers may have made a reasonable mistake as to the extent of the owner's authority to consent to the search of a room which may have been that of a tenant, a servant, or a guest. In the present case it is certain that the officer did not even make a mistake in assuming that appellant was living in the apartment in concubinage with the woman as tenants. He had reasonable cause for this assumption after the landlady in answer to his question whether Ray Triche was at home had said: "You mean the couple living in the end apartment." We hold that the search by the parole officer was not illegal.

When in his lawful search the parole officer discovered evidence of the crime for which the defendants were tried, he was under no duty to ignore it, though the search was made for the investigation of parole violation, and he acted correctly in communicating his discovery to the police officers responsible for the enforcement of narcotics laws. Cf. People v. Roberts, 47 Cal.2d 374, 303 P.2d 721. Their subsequent search was not vitiated by any illegality.

Judgment and order affirmed.



148 Cal.App.2d 294

Rose M. PAWLAK and Anthony F. Pawlak, Plaintiffs, Respondents, and Cross-Appellants,

v.

John COX, Richard Cox, California Motel Investments, a co-partnership, Dan Lahey (sued as Doe I), Doe II, Doe III and Doe IV, Defendants.

Dan Lahey, Defendant, Appellant, and Cross-Respondent.

Civ. 21748.

District Court of Appeal, Second District, Division 1, California.

Feb. 5, 1957.

Action to recover a portion of commissions earned by licensed real estate broker as result of sales of property to prospective purchasers introduced to broker by plaintiffs. The Superior Court, Los Angeles County, McIntyre Faries, J., granted non-suit as to two causes of action and entered judgment for plaintiffs on the remaining two causes of action, and both sides appealed. The District Court of Appeal, Doran, J., held, inter alia, that evidence, on issue as to plaintiff's right to recover on two of causes notwithstanding their being unlicensed persons, sustained finding that plaintiffs

had not performed any function for which a license was required but had merely, as required by their agreement with broker, introduced prospective purchaser to broker and performed such acts as were necessary to keep contact between parties and make introduction effective.

Affirmed.

1. Brokers ⇐86(1)

In action to recover portion of commission earned by licensed real estate broker as result of sale of property to prospective purchaser introduced to broker by plaintiffs, evidence, on issue as to plaintiffs' right to recover notwithstanding their being unlicensed persons, sustained finding that plaintiffs had not performed any function for which a license was required but had merely, as required by their agreement with the broker, introduced prospective purchaser to broker and performed such acts as were necessary to keep contact between parties and make introduction effective. West's Ann. Bus. & Prof.Code, §§ 10130–10132.

2. Brokers ⇐42

Notwithstanding alleged agreement by broker to pay percentage of commissions earned to plaintiffs for introducing prospective purchaser, there could be no recovery by plaintiffs, who were unlicensed persons, where they had induced broker to procure listing of property, had advised prospective purchaser that it was a "good deal" and had given prospective purchaser advice as to how to proceed in further negotiations if their first offer was rejected. West's Ann.Bus. & Prof.Code, § 10130 et seq.

3. Costs ⇐32(3)

In action to recover portion of commissions earned by licensed real estate broker as result of sales of property to prospective purchasers introduced to broker by plaintiffs, it was within discretion of trial judge, who granted non-suit as to two causes of action and rendered judgment for plaintiffs on remaining two causes, to provide that each party should pay its own costs.

Block, Toler, Bulloch & Biggerstaff, Lloyd A. Bulloch, Compton, for defendants-appellants, and cross-respondents.

McCutchen, Black, Harnagle & Greene, Los Angeles, for plaintiffs-respondents, and cross-appellants.

DORAN, Justice.

As recited in defendant-appellant Lahey's brief, "Respondents, husband and wife, unlicensed persons under California Business and Professions Code sections 10130, 10131, 10132 regulating real estate brokers and salesmen, brought action against appellant, a licensed real estate broker, to recover a percentage of commissions earned by appellant in two separate real estate transactions. In each of the two transactions respondents' contentions were that they became entitled to said compensation by reason of their agreement with appellant to introduce to him prospective purchasers of real property, improved with motels. It was stipulated to that actual sales had occurred and that appellant had earned his commissions.

"The first and second causes of action are based upon the sale of motel property to Mr. and Mrs. Jacob Grieshaber, which transaction shall, for convenience, be referred to herein, as the Grieshaber transaction. The third and fourth causes of action are based upon the sale of motel property to Mr. and Mrs. Frank Wolf, which transaction shall be referred to herein as the Wolf transaction.

"Appellant answered the complaint and denied the making of the agreement which is the basis of respondents' complaint."

The trial court granted a nonsuit as to the first and second causes of action, involving the Grieshaber transaction just mentioned, and entered a judgment for plaintiffs against the defendant Dan Lahey in the sum of $2,000 plus interest as to

the third and fourth causes of action involving a so-called Frank Wolf transaction. The defendant Lahey has appealed therefrom.

Plaintiffs Pawlak have filed a cross-appeal from that portion of the judgment granting a nonsuit as to the Grieshaber transaction relied upon in the first and second causes of action, and providing that each party shall bear its own costs.

In respect to the third and fourth causes of action relating to the Wolf transaction, the trial court found:

I.

"On or about July 28, 1954 defendants offered to pay plaintiffs a sum equal to 40% of any commission received by defendants in connection with the sale of a motel to a certain Mr. Wolf if plaintiffs would introduce defendants or one of them to said Wolf and if said Wolf in fact purchased a motel.

II.

"On or about July 29, 1954 the foregoing offer was repeated by defendants.

III.

"On or about August 2, 1954 plaintiffs, with the intention of accepting the aforesaid offer of defendants, introduced said Mr. Wolf to defendants.

IV.

"On or about August 10, 1954 said Mr. Wolf in fact purchased a motel through defendants.

V.

"On or about August 17, 1954 defendants received as commission on the sale of the motel to Mr. Wolf the sum of $5,000.00.

VI.

"Defendants refused to pay the plaintiffs a sum equal to 40% of $5,000.00 or any sum at all.

VII.

"Defendants John Cox and Richard Cox are, and at all times herein were, the agents of Dan Lahey and had the authority to make the offers herein mentioned and at all times acted solely in their capacity as agents of said Dan Lahey."

In plaintiff-respondent Pawlaks' brief it is said that, "Appellant (Lahey) does not assert that the evidence was insufficient to support the findings of the trial court. Therefore, the facts as found by the trial court and as set forth above must be accepted in reviewing the correctness of the judgment rendered in regard to this transaction."

[1] It is argued on the Lahey appeal that, "the trial court committed reversible error in failing to include in its findings, respecting the third and fourth causes of action, a finding of the illegality of the transaction which the evidence clearly revealed."

Plaintiffs-respondents Pawlak point out that,

"It was not necessary that the plaintiffs be licensed as real estate brokers or salesmen in order to recover pursuant to the contract relating to the Wolf transaction. It is clear that plaintiffs performed no function at any state of the proceeding other than that of introducing Mr. Wolf to the defendants and performing such acts as were necessary to keep the contact between the parties and to make effective the introduction of the parties. Plaintiffs in no way participated in any of the negotiations between Mr. and Mrs. Wolf and the sellers of any motel and did not otherwise, in any way, perform any function for which a license as a real estate broker or salesman is required. The contract involved in the Wolf transaction is substantially on all fours with that in Shaffer v. Beinhorn, 1923, 190 Cal. 569, 213 P. 960. There, defendant real estate broker agreed to pay to plaintiffs two-thirds of his commission on the sale of a certain ranch if plaintiffs would find anyone interested in purchasing the same or would introduce defendant to said person and if defendant was able to negotiate a sale of said ranch to such person. Rely-

ing on said agreement, plaintiffs produced a prospective purchaser, defendant negotiated the sale of said ranch to said prospective purchaser, and defendant received his commission therefor. The court held that the agreement to pay the agreed portion of commission for plaintiffs' services was not illegal in that no license was required for the performance of said acts or to secure the promised compensation therefor.

"Crofoot v. Spivak, 3rd Dist., 1952, 113 Cal.App.2d 146, 248 P.2d 45, also supports the position of plaintiffs in this case and makes it clear that the Shaffer case is applicable to Chapter 3 of Part I of Division 4 of the Business and Professions Code in its present form.

See, also: Allen v. Vanderbeck, 1st Dist., 1933, 132 Cal.App. 242, 245–246, 22 P.2d 561; McKenna v. Edwards, 1st Dist., 1937, 19 Cal.App.2d 327, 65 P.2d 810; Freeman v. Jergins, 2d Dist., 1954, 125 Cal.App.2d 536, 271 P.2d 210; and Palmer v. Wahler, 3rd Dist., 1955, 133 Cal.App. 2d 705, 285 P.2d 8.

"It is thus apparent that the findings of fact made by the trial court are amply supported by the evidence; that the conclusions of law drawn therefrom are correct; that the court's action in awarding judgment in favor of plaintiffs and against defendant Dan Lahey in the sum of $2,000 plus interest from August 17, 1954, was entirely correct; and that the judgment must be affirmed in that respect."

The record supports plaintiffs-respondents' argument as above noted.

[2] The contentions made on the plaintiffs' cross-appeal complaining of the trial court's action in granting a nonsuit as to the first and second causes of action, relating to the Grieshaber transaction, and denying plaintiffs any compensation for introducing the Grieshabers to defendant brokers, and providing that each party should bear its own costs, cannot be upheld.

As set forth in the answering brief of defendant-cross-respondent, "The two transactions took place as part of the same dealings and must be considered together in determining the actual agreements and purposes of the parties. * * * The distinguishing feature of the Grieshaber transaction is that Cross-Appellants not only had the purchasers in mind (Mr. and Mrs. Grieshaber) and assisted in the dealings, but also had the motel in mind that in the opinion of Cross-Appellants (which opinion proved correct) was exactly tailored to meet the desires of the Grieshabers. * * * However, unfortunately Cross-Appellants had no proper license to take advantage of these circumstances and earn a commission. * * * Thereafter Cross-Appellants (Pawlak) contacted Cross-Respondent (Lahey) gave him full particulars regarding the location and terms respecting the Olympic (motel), but at this time withheld the names of the Grieshabers. Thus through the agency of Cross-Appellants, Cross-Respondent procured a listing of the Olympic and thereafter met the Grieshabers."

"Thereafter, before the transaction was completed Cross-Appellants advised the Grieshabers that the Olympic was a 'good deal' * * * and gave the Grieshabers advice as to how to further proceed in the negotiations if their first offer was rejected. * * * the trial court correctly concluded that Cross-Appellants were dealing unlawfully. They (Pawlaks) were not here merely assisting in the sale, but they actually did everything necessary to complete the sale."

[3] Under the record as herein presented, no reversible error has been made manifest either in respect to the nonsuit, or in reference to the provision as to costs, the latter being a matter resting within the discretion of the trial court.

The judgment is affirmed.

WHITE, P. J., and FOURT, J., concur.

148 Cal.App.2d 319

Matter of the ESTATE of George Martin ADAMS, also known as George M. Adams, also known as George Adams, Deceased.

Robert W. HELD, Contestant and Appellant,

v.

Walter J. HELD, Petitioner and Respondent,

Elizabeth Adams Strahan and Francis M. Adams, Heirs-at-Law and Respondents.

Civ. 21927.

District Court of Appeal, Second District, Division 2, California.

Feb. 6, 1957.

Hearing Denied April 2, 1957.

Proceedings in the matter of a decedent's estate. The Superior Court, Los Angeles County, Clyde C. Triplett, J., decreed that distribution should be made under a particular paragraph of will, and an appeal was taken. The District Court of Appeal, Moore, P. J., held that decedent's estate would be eventual beneficiary of lump sum payable under Social Security Act to defray costs of burial of decedent, and held that accordingly, such sum would be includible in the "appraised inventory value" of decedent's estate, for purposes of will making distribution dependent upon "appraised inventory value".

Reversed with directions.

1. Executors and Administrators ⇐46

Proceeds of insurance policy, upon life of decedent, payable directly to third person beneficiary are not properly includible in decedent's estate; but estate has interest in such insurance and must include its value to extent that proceeds are payable to or for benefit of estate.

2. Executors and Administrators ⇐214

Decedent's estate is liable for "reasonable" burial expenses; and $228.90 was not an unreasonable charge for interment services.

3. Executors and Administrators ⇐38

The word "estate", when used in connection with probate proceedings, encompasses totality of assets and liabilities of decedent, including all manner of property, real and personal, choate or inchoate, corporeal or incorporeal.

See publication Words and Phrases, for other judicial constructions and definitions of "Estate".

4. Wills ⇐656

Decedent's estate would be eventual beneficiary of lump sum payable under Social Security Act to defray costs of burial of decedent, and, accordingly, such sum would be includible in the "appraised inventory value" of decedent's estate, for purposes of will making distribution of decedent's estate dependent upon the "appraised inventory value" thereof. Social Security Act, § 202(i) as amended 42 U.S.C.A. § 402(i); West's Ann.Prob. Code, § 950.

See publication Words and Phrases, for other judicial constructions and definitions of "Appraised Inventory Value".

Lawler, Felix & Hall, R. F. Outcault, Jr., Los Angeles, for appellant.

Zeman, Hertzberg & Schekman, by Harrison W. Hertzberg Los Angeles, for respondents.

MOORE, Presiding Justice.

George Martin Adams deceased February 19, 1955. Petitioner Walter J. Held was duly qualified as the executor of decedent's estate. Upon a trial of the executor's petition for a determination of "the rights of all persons to said estate and all interests therein and determine to whom distribution of said estate should be made" the court below entered its decree that decedent left a will "that distribution of the estate shall be under the provisions of paragraph Seventh of said will." Whereupon the decree ordered that the estate was to be distributed to Elizabeth Adams Strahan and Francis Adams, children of decedent, share and share alike.

The controversy at the trial was, whether the provisions of Article Sixth or those of Article Seventh should control the dis-

tribution of the estate. Because the court ordered distribution to be made to the persons named in Article Seventh Robert Held, named alternate legatee in Article Sixth, demands reversal of the decree on the ground that by virtue of the contents of Article Sixth, the entirety of the estate belongs to him.

The two articles in dispute are as follows:

"Sixth: Provided that the appraised inventory value of my estate shall at the time of my death be less than Fifteen Thousand Dollars, then all of the provisions set forth in paragraph Fifth, (a), (b), and (c), above, shall be of no effect, and my said estate shall, after the payments of debts and expenses of administration, be distributed as follows:

"(a) To Millie Held, my sister-in-law, now residing at 915 [sic] Oxford Street, Berkeley, California, Five Thousand ($5,000.00) Dollars;

"Provided, that should the said Millie Held predecease me, then said Five Thousand ($5,000.00) Dollars shall go to her son, Robert Held, by right of representation.

"(b) The residue of said estate, after the payment of the aforesaid sum of Five Thousand ($5,000.00) Dollars, shall be distributed in equal shares to the following persons:

"Elizabeth Adams Strahan, now residing at 2861 Club Drive, Los Angeles, California, my daughter.

"Francis Merrill Adams, now residing at 4042 Brighton Avenue, Los Angeles, California, my son.

"Seventh: Provided that the appraised inventory value of my estate shall at the time of my death be five Thousand ($5,000,00) Dollars or less, then all of the provisions set forth in paragraph Fifth (a), (b), and (c), and in paragraph Sixth (a), and (b), above, shall be of no effect, and my estate shall, after the payment of debts and expenses, be distributed as follows:

"(a) To Millie Held, my sister-in-law, now residing at 9115 Oxford Street Berkeley, California, all of my cash and stocks except Fifty ($50.00) Dollars each to my son and daughter, Francis Merrill Adams and Elizabeth Adams Strahan.

"I desire this to be done, because anything I have, I feel belonged to my wife Nina."

Millie Held predeceased decedent. It follows that if Article Sixth should prevail, Robert Held is entitled to $5,000 by right of representation as the alternate beneficiary to his mother, Millie, by virtue of the fact that the appraised inventory value of the estate at the date of Mr. Adams' death was less than $15,000 and more than $5,000. But if Article Seventh is applied, the gift to Millie must lapse and the property be distributed entirely to decedent's children, part as legacies bequeathed by the will: the balance by virtue of their rights of intestate succession. The entirety of the estate when Mr. Adams deceased was appraised at $4,818.89 and that sum is recited in the inventory. However, at the same time his estate was entitled to a lump sum benefit from the Social Security Administration to defray costs of burial to wit, $228.90. Had such sum been added to the inventory, the value thereof would have exceeded $5,047 which would have required the will to be governed by Article Sixth.

But the trial court, upon a review of the will alone, determined that the insurance should not be included in the inventory and upon such construction distributed the estate to decedent's children to the exclusion of Robert Held.

[1–4] This presents for decision the question whether the *proceeds of an insurance policy which are to be payable only insofar as necessary to re-imburse the party paying the expense of burying the insured are properly includible in the "appraised inventory value" of the insured's estate computed at the time of his death?*

The insurance "policy" here is the Old Age and Survivors Insurance benefit provided in Title 42 of the United States Code Annotated, § 402(i). That section author-

izes payment of a lump sum death benefit to the widow of a qualified insured; but if, as here, there exists no surviving spouse, three times the insured's primary insurance or $255, whichever is the smaller, shall be paid "to any person or persons, equitably entitled thereto, to the extent and in the proportions that he or they shall have paid the expenses of burial" of the decedent. The son and daughter of Mr. Adams paid the initial expenses of his burial, re-imbursed themselves from the estate, and the executor in turn applied for and received the benefits authorized by section 402(i), *supra*.

While the proceeds of an insurance policy upon the life of a deceased payable directly to a third person beneficiary are not properly includible in the decedent's estate, Estate of Welfer, 110 Cal.App.2d 262, 265, 242 P.2d 655; Turner v. Metropolitan Life Ins. Co., 56 Cal.App.2d 862, 865, 133 P.2d 859, the estate has an interest in such insurance and must include its value to the extent that the proceeds are payable to or for the benefit of the estate. In re Estate of Ward, 127 Cal.App. 347, 358 et seq., 15 P.2d 901; 20 Cal.Jur.2d, § 433, p. 635. The lump sum from the Social Security Administration was payable to some person "equitably entitled" to the extent that he had borne the expense of burying the deceased. Since the estate stands primarily liable for decedent's reasonable funeral and burial expenses, Prob.Code, § 950; Golden Gate Undertaking Co. v. Taylor, 168 Cal. 94, 99, 141 P. 922, 52 L.R.A.,N.S., 1152; In re Estate of Kemmerrer, 114 Cal.App.2d 810, 813, 251 P.2d 345, 35 A.L.R.2d 1393, the lump sum payment under section 402(i) could be made only to a creditor of the estate, someone subrogated to the rights of the estate, or the estate itself. In any event, payment would operate to discharge an obligation primarily owed by the estate. When a debtor's obligation is paid by a third party, the debtor's assets have been enlarged to the extent of the discharge. Old Colony Trust Co. v. Com'r, 279 U.S. 716, 49 S.Ct. 499, 73 L.Ed. 918; United States v. Boston & Maine R. Co., 279 U.S. 732, 49 S.Ct. 505, 73 L.Ed. 929. While the last-cited cases deal with Federal income taxation, they amply illustrate the economics involved. Respondent urges that mere re-imbursement cannot be enhancement of assets. In other words, if the estate is valued at $4,800, then pays out $250 and is re-imbursed, the assets are still worth $4,800. Of course, the fallacy with this reasoning is that the estate would have required $5,050 worth of assets to have paid the debt without re-imbursement and yet retained $4,800 to distribute. Thus, inasmuch as the estate must be the eventual beneficiary of the Social Security insurance payment, the right to that payment (the "policy") is essentially an asset of the estate at the time of the decedent's demise. The word "estate" when used in connection with probate proceedings encompasses the totality of the assets and liabilities of the decedent, including all manner of property, real and personal, choate or inchoate, corporeal or incorporeal. In re Estate of Glassford, 114 Cal.App.2d 181, 189–190, 249 P.2d 908, 34 A.L.R.2d 1259.

No reason exists in this case to attempt to apply any presumptions as to the intent of the decedent—for example, testacy against intestacy, blood relations against strangers, or the recital of the decedent that all his property in truth belonged to his wife. Mr. Adams prescribed a definite rule by which to determine which clause of his will should apply. There is no ambiguity. The only question presenting any difficulty relates to how much his estate was in fact worth on the day of his death. What was the value of the inventory on that day and before the funeral expenses had been actually incurred? Also, what was the value then of a legal commitment to meet burial expenses? The cases are clear that the burial expenses chargeable to the estate are those "reasonable" in view of the manner in which the decedent lived, his station in society and the condition of his estate. In re Estate of Kemmerrer, supra, 114 Cal.App.2d 810, 813, 251 P.2d 345; In re Estate of Dennis, 110 Cal.App. 2d 667, 670, 243 P.2d 579. It cannot be

said that $228.90 was an unreasonable charge for the interment services rendered to the executor.

From the record it is beyond dispute that the obligation of the Social Security Administration was the lump sum $228.90; that the inventoried value without such lump sum was $4,818.89; that by including the $228.90 in the inventory, the appraised inventory value is $5,047.79 which is more that $5,000 (paragraph Seventh) and by the terms of paragraph Sixth is payable to Robert Held.

The decree is reversed with instructions to order the executor to pay and distribute the total assets of decedent's estate to Robert Held.

FOX and ASHBURN, JJ., concur.



148 Cal.App.2d 187

The PEOPLE of the State of California, Plaintiff and Respondent,

v.

Wayne LANCASTER and George McNorwood, Defendants and Appellants.

Cr. 3223.

District Court of Appeal, First District, Division 2, California.

Feb. 1, 1957.

Hearing Denied March 27, 1957.

Defendants were convicted of robbery. The Superior Court, County of Alameda, Chris B. Fox, J., entered judgment, and defendants appealed from judgments and order denying their motion for new trial. The District Court of Appeal held, in part, that fact that defendants the night before near the same cafe had lured another man to a secluded place under the pretext of doing something for him, and there took his money from him, using a knife to restrain him, would tend to show common scheme or plan according to which defendants operated, and would be admissible in evidence in prosecution for robbery of victim by knife following night, though defendants denied use of knife or force in previous night's crime, and though previous night's activity had resulted only in petty theft conviction.

Judgment and order affirmed.

1. Criminal Law ⇐372(1)

Though as a general rule evidence of collateral independent crimes is not admissible in a criminal prosecution, there are well recognized exceptions permitting admission of evidence of other crimes, for example, where it helps to disclose a common plan or scheme.

2. Criminal Law ⇐369(2)

Though extreme caution should be used not to admit evidence in criminal case which might prejudice minds of jurors, without carrying with it proper evidence of particular guilt, when proof of one crime tends logically, naturally and by reasonable inference to prove any fact material in trial of another, such proof is admissible and fact that it may tend to prejudice defendant in minds of jurors is not ground for its exclusion.

3. Criminal Law ⇐372(1)

That defendant has been acquitted of previous charge does not require exclusion of evidence regarding it for purpose of showing common plan or design, though force of evidence may be thereby weakened.

4. Criminal Law ⇐372(1)

That defendants the night before near the same cafe had lured another man to a secluded place under the pretext of doing something for him, and there took his money from him, using a knife to restrain him, would tend to show common plan or scheme according to which defendants operated, and would be admissible in evidence in prosecution for robbery of victim by knife following night, though defendants denied use of knife in previous night's crime, and though pre-

vious night's activity had resulted only in petty theft conviction.

5. Criminal Law ⇐1037(1)

Use by prosecutor in argument to jury of evidence as to similar offense to attack character of defendants accused of robbery and their credibility, was not misconduct, where no assignment of misconduct in this respect was made in court below, and defendants had testified in their own behalf that taking of money from this previous victim was a "con game".

6. Criminal Law ⇐1171(1)

Statement by prosecutor in robbery prosecution that defendant "tells you he has held up" person involved in alleged similar offense committed by defendants previous night, was not prejudicial, though defendant had expressly denied use of force in this previous crime, where distinction between confidence game and robbery had been treated before jury so explicitly that no prejudice could have resulted from mistake.

7. Criminal Law ⇐1171(3)

Statement by prosecutor in closing argument, after glossing over fact that there had been no lineup, that police had used pictures, was not prejudicial, where discussion could only have aided defense by calling further attention to little regard provided in case for correct identification, and, upon objection that there had been no testimony of pictures, prosecutor apologized and said that judge would instruct to disregard argument.

8. Criminal Law ⇐719(3)

Prosecutor did not improperly inject his own opinion about identity of defendants as robbers into argument, where statement that there was no question of identity might well have related to previous comment concerning whether jury would know whether heavily whiskered man at night wore mustache.

9. Criminal Law ⇐1153(1)

Matter of relevancy of evidence in criminal case is left largely to the discretion of the trial court.

10. Criminal Law ⇐1043(2)

Objection to question on cross-examination asked state witness, who had testified that he had preferred charges against defendants in previous case, whether he had charged them with robbery, was properly sustained, in absence of explanation of relevancy of question, which, on appeal, defendants convicted of robbery claimed would have tended to confirm fact that no force had been used against this person, who was their previous night's victim.

11. Criminal Law ⇐418(1)

Where only possible purpose of testimony of defendant's mother, concerning what her son told her when he came to her home about whom he had come down with, and in discussing people, was to corroborate defendant's testimony that on bus he had traveled with certain person, testimony was hearsay concerning self-serving statements of defendant, and properly excluded in robbery prosecution involving question of alibi.

12. Criminal Law ⇐1172(6)

Where defendants convicted of robbery did not point out any manner in which instruction, even if there was no evidence to which it was applicable, could have misled jury, and after considering all evidence, court could see no such possibility, giving of instruction was not prejudicial.

13. Criminal Law ⇐814(17)

Giving of general instruction on circumstantial evidence, defining presumptions and inferences, was proper, despite contention that no circumstantial evidence was involved in case, since presumption of innocence is always involved, and alibi and similar offenses, which were involved, are matters of inferential evidence.

14. Criminal Law ⇐788

Instructions to effect that neither prosecution nor defense is required to produce all persons who might have some knowledge of matters involved in case or all objects or documents referred to, and that jury had no right to speculate as to what

any witness not called might testify if called, were proper, as applicable to consideration of fact of absence of knife allegedly used as weapon in robbery, and of absence of person who had allegedly accompanied prosecuting witness to cafe in which they had met defendants.

Joseph L. Bortin, San Francisco, for appellants.

Edmund G. Brown, Atty. Gen., Clarence A. Linn, Asst. Atty. Gen., Victor Griffith, Deputy Atty. Gen., for respondent.

PER CURIAM.

Lancaster and McNorwood were accused by an information of robbery in that on August 20, 1955, they robbed Tom Montoya of $100 more or less. They stood mute on arraignment and the court ordered a plea of not guilty entered. They each admitted later a prior conviction alleged in the information, to wit: Lancaster for a second degree robbery committed in Los Angeles in 1947 and McNorwood for a petty theft committed in 1954 in Alameda County. They were by a jury found guilty as charged, the degree of robbery was fixed at first degree, their motion for a new trial was denied and they were sentenced to San Quentin. They appeal from the judgments and the order denying their motion for a new trial.

Montoya testified in part as follows:

On Friday, August 19, 1955 he finished work at the Pacific Can Company at midnight and with his pay in his wallet first had some Mexican food in a cafe on 83d Street in Oakland and then with two acquaintances drove to Singer's Cafe on 7th Street in West Oakland in the car of one of the two, Martinez. They did not arrive at Singer's Cafe until 2:00 a. m. of August 20th. After the three men had ordered coffee defendant Lancaster offered to sell Montoya half a pint of whiskey. Montoya bought it and paid for it outside and went back to the table where he sat with his acquaintances. After some twenty minutes defendant McNorwood came to the table and offered to sell Montoya a half pint of whiskey. Montoya had not known either of the defendants before. He went outside with McNorwood to get the half pint. McNorwood took him around the corner to a car lot in back of Singer's place and told him to wait. In a few minutes McNorwood came back and said that he had gotten another half and asked whether Montoya wanted to buy that too. Montoya agreed to buy it if McNorwood got it. McNorwood went to a car, came back to Montoya, held a knife to his stomach and said this is a stickup. Montoya tried to prevent him from cutting him, but was struck on the side of the head by another man of whom he had only a very quick glance, but of which he had a pretty sure impression that it was the man who sold him the first half pint, defendant Lancaster. He could, however, not positively swear to it. Montoya fell down. He saw McNorwood take his wallet. He passed out. When he came to he was bleeding and wounded and his money, his $116 pay and more, was gone. After the police had been warned he went home by taxi and from there the police took him to a hospital where he received seven stitches. He did not see the defendants again until the preliminary hearing of their case before the magistrate on October 18, 1955. He did not see them in any line-up and it does not appear that he identified them in any way prior to the preliminary hearing. He testified that he could not tell whether Lancaster had a mustache, because he looked as if he hadn't shaved for quite some time. He testified that McNorwood had no mustache. There was other evidence that both had mustaches, including testimony to that effect by police inspector Zweigle, who arrested Lancaster on August 20, 1955 and McNorwood on August 21, 1955, for another offense committed by them in the early hours of August 19, 1955 (as to which evidence was admitted in this case as a similar offense). There were several minor conflicts in the testimony of Montoya, both in different parts of his testimony at the trial itself, and as com-

pared to his testimony at the preliminary hearing. They relate to details of the road followed in going to Singer's, the price which was asked for the half pints of whiskey and which he paid for the first one, and the number of times McNorwood went to a car before threatening him with a knife. He was not sure of the name of the third man who went with him to John Singer's and called him Cavelli (The name of the man who was heard as a rebuttal witness for the People was Esquibel). He was an inaccurate and confused witness, partly because he proved not to know what was the left and what was the right.

After a hearing in chambers the trial judge permitted the proof of a similar offense committed by defendants in the early morning hours of the 19th (24 hours before the offense now before us), over objection of defendants, based on a dissimilarity in that in the prior case they pretended to procure a woman for the victim and in this case whiskey. The testimony of Joe DeAguero, the victim of the similar offense, was in substance as follows.

On August 19, 1955 at approximately 3:00 a. m. he was sitting alone in his car parked outside John Singer's. McNorwood came up to the car and asked him if he was looking for a woman. When DeAguero said yes, McNorwood told him that he would take him to the place where he would get some. After having gone to into John Singer's to make a telephone call, he told DeAguero that everything was fixed, got into the car and directed DeAguero to an apartment house on Campbell Street. Inside he brought DeAguero to a washroom on the second floor where Lancaster came to them. Lancaster said that he would go and see if any woman was available. When he came back he said they would be ready in a little while; the price would be $10 and he asked to have it. When DeAguero had pulled a $10 bill from his wallet, Lancaster asked to see it because he thought it was phoney. DeAguero refused but Lancaster grabbed the bill and the wallet. In the struggle for the wallet it was torn. Lancaster said he was going to check it. He went downstairs and came back with the wallet. DeAguero's papers were in it but when he asked for his money, Lancaster pulled a knife and held it against DeAguero's side. He left giving the knife to McNorwood who then held it against DeAguero but soon also left, closing the door on DeAguero. The evidence further shows that when defendants were arrested for said offense they first denied any connection with it, but afterwards pleaded guilty to petty theft, Lancaster being sentenced to 120 days in jail, McNorwood obtaining probation.

Both Lancaster and McNorwood testified in their defense and denied any knowledge of the robbery committed on Montoya and their presence near John Singer's restaurant in the night from Friday, August 19th to Saturday, August 20, 1955. They admitted that they took DeAguero's money but testified that they did it without any violence in a confidence game. In the apartment house where McNorwood brought DeAguero, Lancaster, in accordance with a plan quickly agreed upon and known to both, played the manager, took the $10 for the girl and took the rest of his money under the pretext of checking it with the landlady for protection, contendedly with full agreement of DeAguero. The use of a knife and all use of force they denied. They split the $90 they obtained from him. Later in the night they both went to McNorwood's room in the American Hotel, where they stayed until about 2:00 p. m. of said Friday, August 19th.

McNorwood gave the following story of his further activities. With his share of the loot he redeemed his jacket from one pawn shop and his trousers from another. He returned to the hotel, put on those clothes, went out for a haircut, back for a shower and shave, left his old clothes with a cleaner, at John Singer's met a girl that worked there, and at 8:20 p. m. of the 19th took a bus intending to go to

his mother's home. On another bus to which he transferred for that purpose he met Mrs. Minnie Seamore. McNorwood and his mother, Idonie McNorwood, both testified that he arrived at his mother's apartment on 36th Street at or before 9:00 p. m. When he heard that his sister who had lived there had moved, he asked to stay there overnight. They talked until midnight, then McNorwood went to bed in the bedroom next to his mother's and did not leave until 8:30 or 9:00 a. m. Saturday morning, August 20th. The mother testified that she could not sleep at midnight but walked the floor and sometimes went into the room where her son was asleep to look out of the window. She did not go to bed until 3:30 or 4:00. Both testified that the next morning she prepared his breakfast and gave him 40 or 50 cents to go to San Francisco to register at the Union to try to get on a boat. She also introduced him to Eddie Simmons who lived in the apartment opposite hers. McNorwood further testified that the $45 of DeAguero had been spent. He pawned his jacket again and as it was too late to register went instead to the Broadway Theater where he watched a picture, "The Silver Chalice", sitting through it twice. To the police he had said that he did not go to San Francisco because the money his mother gave him was insufficient. Eddie Simmons corroborated having met McNorwood that Saturday morning between 8:00 and 10:00. Minnie Seamore remembered having met McNorwood on the streetcar line in question when coming from her work. She knew that it was in the latter part of August before the 20th on which she left for Los Angeles, but she did not know whether it was on the 19th or the 17th or 18th.

Lancaster testified that when he left McNorwood at the American Hotel on the 19th at 2:00 p. m. he went to a bar where he stayed until dark, then went home, took a shower and fell asleep on his bed. He was still home when he was arrested the next morning at 10:00 a. m.

In rebuttal Jose Esquibel testified that he was in John Singer's bar with Montoya and Martinez. He was with them part of the time. He saw McNorwood walking around there. He didn't see him come to the table. He told Montoya that the price asked for the whiskey was too high. He does not remember having seen Lancaster there. The manager of the Broadway Theater, in which McNorwood said he had seen "The Silver Chalice" twice on August 20th, testified that that picture did not play there at that time, but had played there on August 7th and 8th.

The appeal is not based on insufficiency of the evidence as it is conceded that the identification of the defendants at the trial was sufficient to sustain the verdict. It is, however, urged that the uncertainty of the testimony of Montoya and the suggestive fact that he saw the defendants at the preliminary hearing before having identified them are grounds for considering all errors pointed out by appellants as prejudicial and resulting in the conviction.

[1–4] It is primarily urged that it was error to admit the evidence of the "similar" offense of the preceding night, which according to appellants was not similar but a confidence game without violence, a circumstance allegedly confirmed by their convictions of petty theft for that offense. We do not agree. Although as a general rule evidence of collateral independent crimes is not admissible in a criminal prosecution, there are well recognized exceptions permitting the admission of evidence of other crimes, e. g., where it helps to disclose a common plan or scheme. Extreme caution should be used not to admit evidence which might prejudice the minds of the jurors, without carrying with it proper evidence of the particular guilt. People v. Albertson, 23 Cal.2d 550, 576–577, 145 P.2d 7. But when the proof of one crime tends logically, naturally and by reasonable inference to prove any fact material in the trial of another, such proof is admissible, and the fact that it may tend to prejudice the defendant in the minds

of the jurors is no ground for its exclusion. People v. Peete, 28 Cal.2d 306, 315, 169 P.2d 924. In this case evidence that defendants the night before near the same cafe lured another man to a secluded place under the pretext of doing something for him, and there took his money from him, using a knife to restrain him, tends to show a common scheme or plan according to which defendants operated. Their denial of the use of a knife, or of force in general, explicitly testified to by DeAguero can cause a conflict in the evidence but cannot affect its admissibility. The same applies to the conviction of petty theft only. Defendants often by agreement with the prosecution plead guilty to a minor offense rather than a greater of which they could be accused. The conviction of the lesser offense at most goes to the weight of the evidence and not to its admissibility. Even the fact that the defendant has been acquitted of the previous charge does not require exclusion of evidence regarding it for the purpose of showing common plan or design, "although the force of the evidence may be thereby weakened." People v. Fox, 126 Cal.App. 2d 560, 569, 272 P.2d 832, 838. The evidence showing prior cooperation of Lancaster and McNorwood in crime tends also to strengthen the uncertain identification of Lancaster as the man who struck Montoya and was therefore material and admissible. See People v. Ferdinand, 194 Cal. 555, 561, 229 P. 341.

[5, 6] Appellants also complain of the allegedly too extensive use made by the prosecutor in his argument to the jury of the evidence as to the similar offense to attack the character of the defendants and their credibility, which alleged use they designate as misconduct on appeal. No assignment of misconduct in this respect was made in the court below. Appellants testified in their own behalf that the taking of the money from DeAguero was a "con game". It does not seem improper for the prosecution to point out that con men are not the most credible witnesses. Less correct seems the prosecutor's statement regarding Lancaster: "He tells you he has held up Mr. DeAguero," which might mean that Lancaster had admitted robbing DeAguero, whereas he had expressly denied the use of force. However, with respect to the offense against DeAguero the distinction between a confidence game and a robbery had been treated before the jury so explicitly that no prejudice can have resulted from this mistake.

[7] It is contended that the prosecutor deliberately misstated the evidence in his closing argument when after glossing over the fact that there had been no lineup, he started to assert that the police had used pictures. When the public defender interrupted that there had been no testimony of pictures, the prosecutor apologized and said that the judge would instruct to disregard. Thereafter the defense did not move for an admonition and the court did not give any, obviously thinking that such was unnecessary after the apology of the prosecutor. The discussion can only have aided the defense by calling further attention to the little safeguard provided in this case for a correct identification, and there seems hardly any probability that the prosecutor acted deliberately. The mistake is no ground for reversal.

[8] Appellants' contention that the prosecutor improperly injected his own opinion about the identity of the defendants as the robbers into his argument is based on the omission of several sentences spoken by the prosecutor between his statement that the identity was the question to decide and his later statement "* * * Frankly, to my mind, there is no question." The omitted sentences related to the question of defendants having mustaches, without Montoya knowing it. His statement that there is no question may well have related to the following part of a sentence which preceded it "but I ask you if you were down at John Singer's in the middle of the night, and as he testified, one of them was heavily whiskered, would you know whether one of them had a mustache or

not?" Understandably, there was no assignment of misconduct or request for admonition. We find no reversible misconduct.

[9, 10] Appellants next predicate error on two rulings sustaining objections to questions by their counsel. An objection as incompetent, irrelevant and immaterial was sustained, when after DeAguero under cross-examination had testified that he had preferred charges against defendants, their counsel asked: "Did you charge them with robbery?" When the objection was made counsel did not explain in any way the relevancy or materiality of the question under what exact name the victim of the similar offense preferred charges. On appeal the relevancy and materiality is explained on the ground that a negative answer would tend to confirm the position of defendants that no force had been used against DeAguero. However, said ground was then not evident without explanation, because it was not known yet that defendants would testify that although they took DeAguero's money they did it in a confidence game without use of force. (There had been no opening statement for the defense and at the hearing in chambers concerning the similar offense there had been no denial of use of force.) We hold that in the absence of such explanation which was available to defendants, but not to the court, appellants cannot urge this ground for the first time on appeal. In re Estate of Carpenter, 127 Cal. 582, 586, 60 P. 162; In re Estate of Parkinson, 190 Cal. 475, 477, 213 P. 259; Hession v. City & County of San Francisco, 122 Cal. App.2d 592, 605, 265 P.2d 542. We are aware of the rule that no offer of proof is necessary in order to obtain a review of rulings on cross-examination, because questions on cross-examination are largely exploratory. Tossman v. Newman, 37 Cal.2d 522, 525, 233 P.2d 1. However, here the question was not exploratory but served a purpose known to the defense but not explained to the court. The matter of relevancy must be left largely to the discretion of the trial court. In re Estate of Carpenter, supra; People v. Craig, 111 Cal. 460, 466, 44 P. 186. If considering the data available to the trial court its exclusion of a question as irrelevant or immaterial is not an abuse of discretion, the appellant cannot for the first time on appeal attack the discretion on grounds which he could have proffered in the trial court but did not disclose. A contrary rule would enable a party secretly to reserve a means of reversal in case the judgment went against him.

[11] During the direct examination of McNorwood's mother as a witness for the defense objection on the ground of hearsay was sustained to testimony concerning what her son told her when he came to her home about whom he came down with and in discussing people. The admissibility was defended on the ground that the conversation was not offered for the truth of what defendant said but to show what topics were discussed. Evidently, what topics were discussed in general has no relevancy or materiality for defendant's case (Proof of alibi). The only possible purpose of the testimony was to corroborate McNorwood's testimony that on the bus he had traveled with Mrs. Minnie Seamore. Used for that purpose the testimony was hearsay concerning self-serving statements of defendant McNorwood and as such was correctly excluded. People v. Kalkman, 72 Cal. 212, 215, 13 P. 500; People v. Rodley, 131 Cal. 240, 255, 63 P. 351. This is not a case where the making of the statement alone is material irrespective of its truth.

Finally, appellants designate errors in instructions. It is said that an instruction that a statement made by a defendant outside of the trial may be an admission and which further defines an admission constitutes error, because there was no evidence of any extrajudicial statement of either defendant in the record which could be considered an admission. This may well be so. "But an instruction, erroneous or correct, which relates to matters as to which there is no evidence will not justify

a reversal unless it has misled the jury to the prejudice of the appellant." Mehollin v. Ysuchiyama, 11 Cal.2d 53, 57, 77 P.2d 855, 857; and see Nelson v. Porterville U. H. School Dist., 117 Cal.App.2d 96, 99, 254 P.2d 945.

[12] Appellants do not point out any manner in which this instruction, even if there was no evidence to which it was applicable, could have misled the jury and after considering all the evidence we see no such possibility.

[13] Appellants complain of a general instruction on circumstantial evidence defining presumptions and inferences, taken literally from Caljic No. 25, contending that no circumstantial evidence was involved in the case. The contention is wholly without merit. The presumption of innocence is involved in every criminal case and alibi and similar offenses are matters of inferential evidence.

[14] The last two instructions complained of seem harmless. The first of the two, Caljic No. 23, is to the effect that neither the prosecution nor the defense is required to produce all persons who might have some knowledge of matters involved in the case or all objects or documents referred to. The second reads "You have no right to speculate as to what any witness * * * any person not called as a witness might testify to if called * * *". It is contended that said instructions erroneously prevented the jury from considering the conspicuous absence of vital corroborative evidence, such as the knife referred to as used in the robberies. The instruction Caljic No. 23 was held harmless in People v. Powell, 83 Cal.App. 62, 67–68, 256 P. 561, although it is said that it might well be omitted unless required by the circumstances of the case. It seems intended to prevent false inferences like the one proposed by appellants, that the fact that no knife was produced caused a conflict with the express testimony of the victims as to the use of a knife, although the defendants were not apprehended at the time or the place of either of the offenses. The second above instruction logically follows from the first and is in line with the general prohibition of mere speculation by a jury. The only person known to have been present but not produced as a witness was Montoya's acquaintance Martinez. There is no basis for any inference as to the reason for his absence or the contents of his testimony if he had been produced. There is no error or prejudice in excluding speculation in that respect.

There being no reversible error the judgment and order must be affirmed.

Judgment and order affirmed.

47 Cal.2d 907

SUNSET SECURITIES COMPANY (a Corporation), Plaintiff, Cross-Defendant and Appellant,

v.

COWARD–McCANN, Inc. (a Corporation), Defendant, Cross-Complainant and Respondent.

L. A. 23823.

Supreme Court of California.
In Bank.
Feb. 15, 1957.

Action concerning construction and effect of a written agreement under which defendant corporation licensed plaintiff corporation's corporate predecessor in interest to make, copyright, sell and exhibit a motion picture based on a novel copyrighted by defendant corporation. Defendant filed a cross-complaint to determine its title to motion picture and other rights in the novel. From a summary judgment of the Superior Court, Los Angeles County, John J. Ford, J., for defendant on the cross-complaint, plaintiff appealed. The Supreme Court, Shenk, J., held that provision of agreement that all rights in and to property granted should revert to defendant ten years after date of agreement, unless licensee elected to pay defendant specified additional sum, embraced all such rights enumerated in granting clause, including right to copyright motion picture film, so that all such rights reverted to defendant on failure of licensee or plaintiff to exercise such option and pay sum specified before expiration of prescribed period.

Judgment affirmed.

Opinion, 297 P.2d 137, vacated.

1. Contracts ⇐143

Every provision of contract should be examined to determine meaning thereof and parties' intention. West's Ann.Civ. Code, § 1641.

2. Contracts ⇐143

The meaning of words in contract must be determined, not from consideration of words alone, but from reading of entire contract.

3. Copyrights ⇐50

A provision of written agreement that all rights in and to property therein granted by corporation to another corporation should revert to first corporation ten years after date of agreement, unless other corporation elected to pay first corporation specified additional sum, embraced all rights enumerated in clause granting such other corporation sole and exclusive rights to make, copyright, sell and exhibit motion picture based on novel copyrighted by first corporation, so that all such rights reverted thereto on failure of other corporation or its assignee to exercise such option and pay specified sum before expiration of prescribed period.

4. Contracts ⇐152

The meaning of word in contract must be considered in context in which employed.

5. Copyrights ⇐50

Parties to written agreement whereby a corporation granted another corporation sole and exclusive rights to make, copyright, sell and exhibit motion picture based on novel copyrighted by first corporation, did not intend to limit scope of clause providing that all rights in and to property granted should revert to grantor ten years after date of agreement, unless grantee elected to pay grantor specified additional sum, by restricted interpretation of word "revert" as including only rights in existence at time of agreement, so as to exclude rights in motion picture or copyright thereon, but intended that all rights derived from rights conferred by granting clause should pass to grantor, if option was not exercised.

Samuel B. Stewart, San Francisco, Huga A. Steinmeyer, W. H. Taylor, Jr., and Walter S. Peake, Los Angeles, for appellant.

Sheppard, Mullin, Richter, Balthis & Hampton; Gordon F. Hampton and Frank Simpson, III, Los Angeles, for respondent.

Butler, Jablow & Weisman, Greenbaum, Wolff & Ernst, Harriet F. Pilpel, Mimi Obstler, Hays, St. John, Abramson & Heilbron and Irwin Karp, New York City, as amici curiae on behalf of respondent.

SHENK, Justice.

The plaintiff appeals from a summary judgment entered on a cross complaint which determined in the defendant's favor its title to motion picture and other rights in the novel "Prelude to Night", subject to certain existing rights reserved to the plaintiff by a written agreement.

In 1944, all rights to the novel "Prelude to Night" were conveyed to the defendant by its author, Dayton Stoddart. In 1945, the defendant copyrighted the novel. In 1946, the defendant entered into a written agreement with American International Picture Corporation under which American International was licensed to make, copyright, sell and exhibit a motion picture based on the novel. Ten years from the making of the agreement, all rights granted thereunder were to revert to the defendant unless the purchaser exercised an option to buy those rights upon payment of an additional $25,000.

The controversy relates to the construction and effect of the written agreement entered into between the defendant and American International Picture Corporation, the plaintiff's predecessor in interest. The defendant contends that unless the plaintiff at the expiration of ten years exercised its option the copyright, license to exhibit and perform the motion picture, and other rights in and to the motion picture granted by the agreement would revert to the defendant. Although the defendant originally asserted title to the existing copies of the film through operation of the agreement that contention has been abandoned.

The agreement provided in its pertinent parts: "First: The Owner [defendant] does hereby give, grant, convey and assign unto the purchaser [plaintiff's predecessor in interest], its successors, licensees and assigns, for a term of ten (10) years from and after the date hereof, the following rights in and to the property:

"(a) The sole and exclusive motion picture rights and motion picture copyright throughout the world in and to said property.

"(b) The sole and exclusive right, throughout the world, to mechanically produce, reproduce and license the reproduction of spoken words taken from and/or based upon the text or theme of said Property on records, films or other devices * * * all or a part of the text, theme and/or dialogue contained in said property.

"(c) The sole and exclusive right to make, produce, adapt, sell, lease, rent, exhibit, perform and generally deal in and with and to copyright motion picture, and televised motion picture adaptations or versions of said Property * * * and to register and obtain copyright therein, throughout the world.

"(d) To include musical accompaniments in any such version of the property * *

"(e) The right throughout the world to broadcast by means of radio * * * or by any processes analogous thereto, all or any portion * * * of said property or of the motion picture or televised motion picture version or versions thereof * *.

"Second: The Owner hereby grants to the Purchaser the right to publish and copyright, or cause to be published and copyrighted in the name of Purchaser or its nominee * * * synopses, abridged and/or revised versions of the Property * * *.

"Third: * * * Owner * * * reserves unto itself, for the term hereinabove specified, all other rights in and to the Property not expressly conveyed and granted to Purchaser herein * * *.

"Eighth: [The so-called reversion of rights clause] In full consideration of the rights herein assigned and granted to the

Purchaser by the Owner, the Purchaser agrees to pay to the Owner the total sum of $10,000 upon the execution hereof, receipt of which sum is hereby acknowledged by the Owner. It is expressly agreed that upon the expiration of ten (10) years from and after the date of this agreement, all of the rights in and to the Property herein granted to Purchaser shall automatically revert to Owner unless Purchaser shall elect to pay to Owner on or before the expiration of said period of ten years, an additional sum of $25,000 in which event Purchaser shall acquire, absolutely and in perpetuity, all rights in and to the Property herein granted. It is within the contemplation of this agreement that the rights herein granted to Purchaser shall be for a limited term of ten (10) years and that Purchaser, at its option, shall have the right to acquire said rights forever upon the payment of said additional consideration to Owner for the expiration of said designated period.

"Ninth: This agreement shall bind and inure to the benefit of the parties hereto * * * and the rights herein granted may be freely assigned in whole or in part by the Purchaser, its successors and assigns."

The parties agree that the question on appeal turns on the construction of the written agreement above set forth. The question is: Does the reversion of rights provided for in the eighth paragraph include the right to the copyright of the film and all other rights enumerated in the first paragraph?

[1, 2] The plaintiff contends that the only rights which would pass to the defendant upon the termination of the agreement are rights "in and to the Property", and that "Property" is narrowly defined by the agreement which includes the following statement: "* * * the Owner represents and warrants that Dayton Stoddart is the author of an original literary composition entitled Prelude to Night, hereinafter referred to as the Property. * *" The plaintiff argues that the copyright on the novel and the copyright on the motion picture are separate and distinct rights. Thus, the plaintiff concludes, the copyright on the motion picture cannot pass to the defendant by the operation of the agreement because the copyright is not "Property" within the meaning of the reversion clause. It is beyond question that every provision of a contract should be examined to determine the meaning and intention of the parties. Section 1641, Civil Code; Jones v. Pollock, 34 Cal.2d 863, 866, 215 P.2d 733; Lemm v. Stillwater Land & Cattle Co., 217 Cal. 474, 480, 19 P.2d 785. Similarly, the meaning of words contained in a contract is to be determined not from a consideration of the words alone but from a reading of the entire contract. Moore v. Wood, 26 Cal.2d 621, 630, 160 P.2d 772; Pringle v. Wilson, 156 Cal. 313, 318, 104 P. 316, 24 L.R.A.,N.S., 1090.

[3] It is apparent that the reversionary clause in paragraph eight purports to pass to the owner greater rights than those which would pass if "Property" were restricted to the literary composition alone. A reading of the granting clause together with the reversionary clause supports this conclusion. The granting clause does not purport to pass to the purchaser "the Property" alone but also, as the first paragraph shows, extensive rights relating to the exploitation of the novel for motion picture purposes. The phraseology of the granting clause is significant. There the owner grants, conveys and assigns to the purchaser for a limited term "the following rights in and to the Property." Then follows the enumeration of rights much more inclusive than the right to the literary composition alone. Turning to the so-called reversionary clause of paragraph eight, the parties agreed therein that unless the option were exercised, all of the "* * * rights in and to the Property herein granted * * *" would automatically revert. The identity of the language which grants particular rights with that which provides for reversion jus-

tifies the conclusion drawn by the trial court that the reversionary clause was intended by the parties to embrace the matters set forth in the granting clause. The parties contemplated that the rights "in and to the property" enumerated in the granting clause should pass to the purchaser by operation of the agreement. It is equally certain that they intended that all of the rights "in and to the Property", as defined and enumerated in the granting clause should revert by operation of the agreement upon the failure of the purchaser or his assignee to exercise the option. The option had not been exercised, and the $25,000 had not been paid.

[4, 5] The plaintiff contends that the word "revert" as it is used in paragraph eight has a limited meaning and that it cannot include rights not in existence at the time of the agreement. Because neither the motion picture nor the copyright on the motion picture was in existence at the time of the grant, the plaintiff argues that they could not "revert" to the defendant. Again, the meaning of the verb "revert" is to be considered in the context in which it is employed. Pringle v. Wilson, supra, 156 Cal. 313, 318, 104 P. 316. The eighth paragraph provides in effect that upon nonexercise of the option, *all* of the rights derived from such granting clause shall revert. Moreover, the same paragraph provides that the "rights herein granted" were for a limited period and that the purchaser obtained in addition only a "right to acquire said rights forever" upon the payment of the additional consideration. Thus the granting clause gave limited and existing rights to the purchaser and other provisions settled the interests of the parties in and to rights to be perfected under the agreement. In this context it is clear that the parties did not intend to limit the scope of the reversionary clause by a restricted interpretation of the word "revert." On the contrary it appears that they intended by the eighth paragraph of the agreement that all rights derived from those conferred by the first paragraph should pass to the owner if the option was not exercised. The trial court's conclusion to that effect was therefore correct.

The judgment is affirmed.

GIBSON, C. J., and CARTER, TRAYNOR, SCHAUER and SPENCE, JJ., concur.



148 Cal.App.2d 15

Louis DAMIANI, Appellant,

v.

Harry ALBERT et al., Respondents.

L. A. 24364.

Supreme Court of California.

In Bank.

Feb. 15, 1957.

Rehearing Denied March 13, 1957.

Application was made for writ of mandate to compel respondents to reinstate petitioner to a position he had formerly held as deputy sheriff of county. The Superior Court, Los Angeles County, Bayard Rhone, J., entered judgment denying the application, and the petitioner appealed. The Supreme Court, McComb, J., held that evidence sustained findings that petitioner filed a false report, which he knew to be false, charging that his superior officer was intoxicated while serving as a uniformed officer at junior high school dance, and that petitioner violated rules of the sheriff's office requiring that official communications be sent through chain of command.

Judgment affirmed.

Opinion, 301 P.2d 36, vacated.

1. Mandamus ⇐168(4)

On application for writ of mandate to compel respondents to reinstate petitioner to position he had formerly held

as deputy sheriff of county, evidence sustained finding that petitioner filed a false report, which he knew to be false, charging that his superior officer was intoxicated when serving as uniformed member at junior high school dance.

2. Mandamus ⇐172

On application for writ of mandate to review an order of a local quasi-judicial body, trial court does not have right to judge intrinsic value of evidence or to weigh it, and power of court is confined to question whether there was substantial evidence before commission to support its findings.

3. Mandamus ⇐168(4)

On application for writ of mandate to compel respondents to reinstate petitioner to position he had formerly held as deputy sheriff of county, evidence sustained finding that petitioner violated the rules of the sheriff's office requiring that official communications be sent through the chain of command.

4. Appeal and Error ⇐169

Point not urged in trial court could not be urged for first time on appeal.

5. Officers ⇐72(1)

Where deputy sheriff was discharged, on ground that he filed a false report stating that his superior officer was intoxicated while serving as a uniformed officer, and on ground that he violated rules of the sheriff's office requiring that official communications be sent through chain of command, and he requested a hearing before County Civil Service Commission, commission properly received and considered, in connection with question of severity of sentence to be given on main charge, that deputy sheriff had previously been suspended for violation of rules and regulations of the sheriff's office.

Herbert W. Simmons, Jr., Rosalind G. Bates and Roland S. Bates, Los Angeles, for appellant.

Harold W. Kennedy, County Counsel and Andrew O. Porter, Deputy County Counsel, Los Angeles, for respondents.

McCOMB, Justice.

From a judgment denying his application for a writ of mandate to compel respondents to reinstate him to a position he had formerly held as deputy sheriff of Los Angeles County, petitioner * appeals.

Facts: Petitioner, a deputy sheriff of Los Angeles County, was charged with filing a report he knew to be false stating that his superior officer, Sgt. Mallette, was intoxicated when serving as a uniformed officer at a junior highschool dance on October 15, 1954. It was also charged that he violated rules of the sheriff's office requiring official communications to be sent through the "chain of command," that he had previously been suspended twice for disciplinary reasons.

Petitioner was accordingly discharged for cause on November 18, 1954. He requested a hearing before respondent County Civil Service Commission, which, after a formal hearing, sustained the discharge. He then petitioned the superior court for a writ of mandate, which was denied.

Questions: First. *Was there substantial evidence to sustain the findings of the commission and the trial court that petitioner (a) filed a false report, which he knew to be false, charging that his superior officer was intoxicated when serving as a uniformed officer at a junior high-school dance on October 15, 1954, and (b) violated the rules of the sheriff's office requiring that official communications be sent through the chain of command?*

[1, 2] *Yes.* On an application for a writ of mandate to review an order of a local quasi-judicial body such as the commission in the present case, the trial court does not have the right to judge the intrinsic value of the evidence or to weigh it. The power of the court is confined to whether there was substantial evidence

* Appellant is referred to herein as petitioner.

before the commission to support its findings. (Fascination, Inc., v. Hoover, 39 Cal.2d 260, 264 [2], 246 P.2d 656; Bank of America etc., v. Mundo, 37 Cal.2d 1, 5 [3], [4, 5] 229 P.2d 345; Nishkian v. City of Long Beach, 103 Cal.App.2d 749, 751 [2], 230 P.2d 156; Cantrell v. Board of Supervisors, 87 Cal.App.2d 471, 475 [2], 197 P.2d 218.)

Applying the foregoing rule to the facts of the present case, the record discloses that:

(a) Petitioner filed a written report stating that his superior officer, Sgt. Mallette, was intoxicated when serving as a uniformed officer at a junior highschool dance on October 15, 1954, between 8 and 9 p. m., that his speech was thick and his gait unsteady. Sgt. Mallette denied drinking any alcoholic beverage on the night in question, and testified he had not seen petitioner at the dance or after leaving the police station at 8 p. m. This testimony was corroborated by Officer William A. Weberg, who was petitioner's partner in the same radio car with him on the night in question from 7 p. m. to midnight. He testified that when he saw Sgt. Mallette at the station at 8 o'clock he appeared to be perfectly normal and that neither he nor petitioner saw the sergeant between 8 p. m. and 12 p. m. that night.

The principal of the highschool testified that he talked with the sergeant between 8 and 9 p. m. on the night in question and he observed no evidence of his having used liquor, that his speech was normal, and that he walked in his usual alert manner.

On the witness stand, petitioner directly contradicted his own report by admitting that Sgt. Mallette's speech was not thick and that his gait was not unsteady.

(b) Section 1205 of the Manual of Policy and Ethics of the Sheriff's Department reads: "All official communications of the Department, whether moving downward, or requests, information, suggestions, or complaints moving upward, shall be confined to official channels. Each link in the chain of command shall be respected in this regard. It shall be the responsibility of each echelon to forward communications to the next higher echelon with his approval, disapproval or recommendations."

Capt. Mullison, the officer in charge of the reserves, testified that petitioner accosted him in the hall at the sheriff's station and gave him information relative to the actions of one of the members of his group. In fact, Capt. Pascoe was in charge of the station and was petitioner's immediate commanding officer. He testified that he had never given petitioner permission to communicate with Capt. Mullison; that the proper way was for communications to go through the deputy to the sergeant and from the sergeant in turn to the captain; and that it was not regular or proper for a deputy to communicate directly with Capt. Mullison.

[3] Clearly, this and other evidence which was received support the findings of respondent commission and of the trial court. No useful purpose would be served by detailing other testimony which supports the questioned findings, and we therefore refrain from further discussion of the evidence. (Thatch v. Livingston, 13 Cal. App.2d 202, 203, 56 P.2d 549.)

Petitioner contends in his brief that section 1205 of the Manual of Policy and Ethics does not apply to communications "with the emergency reserve." There is no merit in this contention for the reason that it does not appear whether Capt. Mullison was a regular deputy sheriff or in the reserve and assigned to supervise the reserves. It is evident that following the chain of command for official communications was covered by section 1205, which says "*all* official communications of the *department*" shall follow the chain of command.

[4] Clearly, petitioner made a communication "of the department" and therefore he should have followed the chain of command. In any event, the point may not be considered here for the reason that it was neither raised before the commission nor in the trial court. The general rule is here

applicable that points not urged in the trial court may not be urged for the first time on appeal.

Second: *Did respondent commission err in receiving evidence that petitioner had been previously suspended for violation of the rules and regulations of the sheriff's office, to wit, on November 2, 1951, for five days, and on May 1, 1952, for thirty days?*

[5] *No.* While such evidence standing alone might not be sufficient to support disciplinary action, it was properly received and considered in connection with the question of the severity of the sentence to be given on the main charge. Petitioner was not prejudiced by such evidence for the reason that opposed to it commendable letters from the sheriff were also admitted and read for the consideration of the commission.

Petitioner was not discharged for having been suspended on previous occasions, but the fact of these suspensions was properly considered on the question of whether the facts alleged in the main charge were sufficient to justify a discharge. Obviously, a third violation of rules might well justify a discharge when the same conduct would not be sufficient to justify a discharge where there had been no previous disciplinary action.

The matter is well stated by petitioner's counsel in discussing the letters of commendation presented on behalf of petitioner when he said, "I think they come within the same area of relevancy that suspensions come in. They form a part of the personnel record and in considering whether or not the man should be discharged, the sheriff said he considered the man's record, and in considering the man's record he would certainly have to consider things that are a part of the record and this is certainly part of it. The question is whether or not he received any citations or commendations from the sheriff."

The judgment is affirmed.

GIBSON, C. J., and SHENK, CARTER, TRAYNOR and SPENCE, JJ., concur.

SI COLLINS, d/b/a SI Collins & Associates, and Irwin Lachman, Plaintiffs and Appellants,

v.

VICKTER MANOR, Inc., a corporation, Joseph Engle, and Abe Vickter, Defendants and Respondents.

L. A. 23974.

Supreme Court of California,

In Bank.

Feb. 8, 1957.

Action by licensed realty brokers against corporate vendor and vendor's officers for brokers' commission and for officers' alleged wrongful interference with contractual relations between brokers and vendor. The Superior Court, Los Angeles County, LeRoy Dawson, J., entered judgment of dismissal after sustaining demurrer, and brokers appealed. The Supreme Court, Schauer, J., held that complaint was sufficient to state cause of action against the vendor and that question whether officers were privileged to cause corporation to discontinue its relation with brokers was matter of defense to be decided by resolution of factual issues involved, and therefore, sustaining of general demurrer was error.

Judgment reversed, and cause remanded with directions.

Opinion, 300 P.2d 90, vacated.

1. Appeal and Error ⇐917(1)

Patent inconsistencies in deposit receipt as to amounts of purchase price and commission to be due realty brokers were to be resolved, for purpose of testing decision sustaining demurrer of corporate vendor and vendor's officers in action by brokers for the commission, in accordance with direct averments of the complaint which set forth alleged amounts of the purchase price and commission.

2. Brokers ⇐82(1)

Complaint, which alleged that vendor had employed plaintiffs, as realty brokers,

to procure a purchaser, that plaintiffs had procured a purchaser ready, able, and willing to buy on terms expressed in deposit receipt, which appeared to be sufficient as signed memorandum of vendor's agreement to pay plaintiffs a commission, and that vendor breached its agreement, stated cause of action against vendor. West's Ann.Civ. Code, § 1624, subd. 5; West's Ann.Code Civ.Proc., § 1973, subd. 5.

3. Brokers ⇐60

Where brokers procured purchaser ready, able, and willing to buy on terms expressed in deposit receipt, which constituted a signed memorandum of vendor's agreement to pay brokers a commission, and vendor breached its agreement to pay the commission, brokers' right to the commission was not defeated by parties' failure to consummate the sale.

4. Brokers ⇐54

To be entitled to commission for sale of realty, broker must, pursuant to his contract and within time specified, find a purchaser ready, able, and willing to buy on terms and conditions specified in the contract of employment, or, if exact terms are not specified in his contract, upon terms satisfactory and acceptable to his employer.

5. Brokers ⇐63(1)

Where, from facts alleged in complaint, it could be inferred, under the established liberal rules of construction, that realty brokers and buyer did everything required of them, and that consummation of sale was prevented solely by arbitrary refusal of vendor and its officers to proceed, vendor and its officers could not use their own remissness to defeat brokers' recovery of commission which vendor agreed to pay them. West's Ann.Code Civ. Proc., § 452.

6. Contracts ⇐10(5)

If provision that purchaser was to be satisfied with soil compaction report and was to approve contour and filing maps was contained in an otherwise enforceable contract to buy and sell realty, purchaser's obligation would not be illusory.

7. Contracts ⇐282

Ordinarily contractual provision for performance to the satisfaction of one party calls for performance satisfactory to a reasonable person.

8. Contracts ⇐282

Where question is whether an agreed performance will satisfy requirement of commercial value or quality or operative fitness or mechanical utility, the party to whom such performance is tendered is not to evade liability, justified in claiming, arbitrarily, unreasonably, or capriciously, that he is not satisfied.

9. Vendor and Purchaser ⇐79

Where deposit receipt, given in connection with agreement to buy and sell realty, stated that soil compaction report, with which purchaser was to be satisfied, was to be one from a reliable testing firm such as firm named, and further provided that purchaser was to approve the contour and filing maps, reasonable standard would be required for the report and maps, and purchaser could not evade liability by arbitrary rejection thereof.

10. Torts ⇐12

One who, without legal justification, intentionally induces a third person not to perform a contract with another is liable to such other for the ensuing damage.

11. Torts ⇐26(1), 28

Where, in action by realty brokers against vendor and vendor's officers, vendors alleged a valid contract and an intentional, unjustified interference by officers, question whether officers were privileged to so interfere was matter of defense to be decided by resolution of factual issues involved.

Frye & Yudelson, Collman E. Yudelson and Lawrence E. Silverton, North Hollywood, for appellants.

Peter B. Rice and Sam Lipson, Los Angeles, for respondents.

SCHAUER, Justice.

Plaintiffs appeal from a judgment of dismissal entered after defendants' demurrer to the second amended complaint was sustained without leave to amend. Plaintiffs, licensed real estate brokers, seek to recover a brokers' commission from defendant corporation and damages from the individual defendants for asserted wrongful interference with the contractual relations between plaintiffs and defendant corporation. We have concluded that under the established rules as to construction of pleadings the complaint states causes of action against both the corporation and the individual defendants, and that the "ambiguities" listed in the special demurrer cannot support the above described order.[1]

Each of the first four counts of the complaint (which plaintiffs refer to as separate causes of action) attempts to state substantially the same cause of action against defendant corporation for a brokers' commission of $3,000. The material allegations of these four counts may be summarized as follows:

[1] On or about October 20, 1954, defendant corporation orally employed plaintiffs to procure a purchaser for described real property owned by the corporation and agreed to pay plaintiffs a commission of $3,000 for their services. Plaintiffs obtained a buyer, Grayson, who agreed to pay $65,000 for the property. Grayson and defendant corporation executed a so-called deposit receipt; a copy of the deposit receipt is attached to and made a part of the complaint. The document is signed by plaintiffs as well as the prospective buyer and seller; it recites that plaintiffs received from Grayson a deposit on account of purchase of the described property, on stated terms, "Purchase price to be $61,750.00." At the bottom of the document appears the following:

> "We, the undersigned [seller], approve and agree to the foregoing, and agree to pay said broker a real estate commission of $3087.50.
> "65000.00.....to seller – 3000.00 comm.[2]
> Vickter Manor, Inc.
> Abe Vickter (secy.)
> Seller"

> We, the undersigned [buyer], agree to purchase the above described property for the price and terms outlined above.
>
> Purchaser Leonard Grayson"

Significant "terms outlined above" in the receipt are (1) "Seller to furnish satisfactory soil compaction report on each bldg site from a reliable testing firm such as D. D. Warren Co." and (2) "Final contour map and filing map subject to buyers approval." Plaintiffs aver that these "conditions were subsequent to the formation of a valid contract for the sale of the above described real property, but were precedent to the Buyer's duty to pay the purchase price." In connection with these terms it is to be noted that the transaction evidenced by the deposit receipt was the proposed sale of unim-

1. On appeal defendants do not discuss the matters raised by special demurrer.

2. Although there are patent inconsistencies in the deposit receipt as to the amounts of purchase price and commission, they are to be resolved, for the purpose of testing the decision on demurrer, in accord with the direct averments of the complaint that the contract price was $65,000 and the agreed commission was $3,000. (See Richards v. Farmers' etc. Bank (1908), 7 Cal.App. 387, 395, 94 P. 393 ["where a pleaded instrument is, because of the uncertainty of the language in which it is expressed, susceptible of more than one construction * * *, the construction of the party pleading it should be accepted [for the purpose of decision on demurrer], if such construction be reasonable"].) Defendants do not claim that the inconsistencies of the figures are ground for either general or special demurrer.

proved property for the apparently contemplated purpose of subdivision, improvement, and resale.

The complaint further alleges that Grayson, the purchaser procured by plaintiffs, "was ready, willing and able to purchase the said real property on the terms and conditions imposed by the said Defendant corporation"; that Grayson, by entering into an escrow on October 26, 1954, as contemplated by the deposit receipt,[3] accepted in writing the oral offer to sell made by defendant corporation, and was at all times "ready, willing and able to complete the purchase" of the property; that the corporation, however, prevented the buyer's performance "by failing to deposit the necessary papers in the said escrow; by failing to furnish any soil compaction report; by failing to furnish any contour map or filing map for the buyer's approval; and by giving written notice of withdrawal from said escrow on or about November 19, 1954"; that plaintiffs "have duly performed all of the conditions of said contract on their part to be performed" but defendant corporation has refused to pay plaintiffs their earned commission of $3,000, and that the total sum remains unpaid.

Plaintiffs also attempt to state causes of action against defendant Engle (fifth "cause of action") and against defendant Vickter (sixth "cause of action") for $3,000 damages caused by interference of the respective individual defendants with the contractual relations between plaintiffs and the corporation. These "causes of action" repeat the substance of the allegations of the counts against the corporation and add the following averments: Engle, Vickter, and one Lipson were the officers and directors of defendant corporation and "beneficial owners" of its property; no stock of the corporation was ever issued. While the above mentioned escrow was still open, Engle and Vickter, with full knowledge of plaintiffs' contract with the corporation, "wrongfully, intentionally, and without justification," prevented the corporation from depositing in the escrow "those documents necessary in order to close said escrow." The individual defendants did this to prevent closing of the escrow and to permit the corporation and themselves to profit by a sale to others. Engle, president and managing officer of the corporation, had power, on behalf of the corporation, either to complete the sale or to prevent its completion, and he, joined by Vickter, caused the corporation to send written notice of withdrawal from escrow on or about November 19, 1954.

[2, 3] The allegations of the complaint, with the incorporated deposit receipt, sufficiently state the following cause of action against defendant corporation: The corporation employed plaintiffs to procure a purchaser; plaintiffs procured a purchaser ready, able, and willing to buy on terms sufficiently expressed in the deposit receipt; the corporation "approve[d] and agree[d] to" those terms; the deposit receipt appears to satisfy the statute of frauds as a written and signed memorandum of the corporation's agreement to pay plaintiffs $3,000 for their services (Civ. Code, § 1624, par. 5; Code Civ.Proc., § 1973, par. 5); the corporation breached its agreement to pay plaintiffs' commission. The right of the brokers to their commission is not, on the facts here alleged, defeated by the failure of the parties to consummate the transaction. (See Meyer v. Selggio (1947), 80 Cal.App.2d 161, 164 [4], 181 P.2d 690.)

[4] Defendants rely on Lawrence Block Co. v. Palston (1954), 123 Cal.App.2d 300, 305–306, 266 P.2d 856. It is there correctly determined that "To entitle a broker to a commission for a sale of real property it must be established that in pursuance of his contract and within the time specified therein, he found a purchaser ready, able, and willing to buy on the terms and conditions

3. The deposit receipt refers several times to an "escrow," and provides that "this contract shall be considered a part of the escrow and will not be superseded by the escrow without the written consent of the agents herein."

specified in the contract of employment, or, if the exact terms are not specified in his contract, upon terms satisfactory and acceptable to his employer." However, defendants assert, the only right of plaintiffs to recover a commission grows out of the written deposit receipt between the buyer and seller, and therefore the following statement in the Block Company case is controlling: "Where the only agreement to pay a broker a commission is contained in the contract between his principal and the customer, the broker's right to compensation is dependent upon performance of that contract." But this statement does not indiscriminately control every three-party writing signed by the broker, his principal, and the customer. Such a three-party writing may unequivocally specify, or where uncertain may be construed or shown by extrinsic evidence to mean, that the broker has fully performed the duties of his employment and earned his commission by having obtained a buyer ready, able, and willing to proceed with a purchase in accord with those terms of the writing which define the seller's offer—the offer for which the seller employed the broker to produce a qualified acceptor. Where the deposit receipt is subject to such interpretation, recovery of the commission is not prima facie precluded by those decisions which refuse to allow recovery because the broker did not fully perform the terms of his contract. Manifestly a different case is presented if by the terms of the employment contract the broker's right to commission is expressly, or by established implication, made dependent upon the consummation of a contract between his principal and the prospective customer. (See Lawrence Block Co. v. Palston (1954), supra, 123 Cal.App.2d 300, 266 P.2d 856; Frederick v. Curtright (1955), 137 Cal.App.2d 610, 614–615, 290 P.2d 875; Ridgway v. Chase (1954), 122 Cal.App.2d 840, 847, 850 [8], 265 P.2d 603; Love v. Gulyas (1948), 87 Cal.App.2d 608, 613, 197 P.2d 405.)

[5] Even if we assume that the agreement between plaintiffs brokers and defendant corporation can properly be construed to mean that plaintiffs were not to receive their commission until consummation of a final agreement between the corporation and the buyer, the judgment appealed from cannot be affirmed. The order sustaining the general demurrer is untenable because the complaint alleges (and the demurrer admits) facts from which, under the established liberal rules of construction (see Code Civ.Proc., § 452; Faulkner v. Cal. Toll Bridge Authority (1953), 40 Cal.2d 317, 328 [5], 253 P.2d 659; Mix v. Yoakum (1927), 200 Cal. 681, 687 [11], 254 P. 557), we must infer that plaintiffs and the buyer did everything which the agreement required of them and that consummation was prevented solely by the arbitrary refusal of defendant corporation and its officers to proceed with the transaction. In these circumstances, the defendants will not be allowed to take advantage of their own remissness to defeat plaintiff's recovery. (See Coulter v. Howard (1927), 203 Cal. 17, 23 [3], 262 P. 751; Richardson v. Walter Land Co. (1953), 118 Cal.App.2d 459, 464 [4], 258 P.2d 42.)

Defendants additionally argue that the complaint fails to state any cause of action because, they say, the deposit receipt is not an enforceable contract between buyer and seller but rather gives the buyer the unilateral right, in his uncontrolled discretion, to refuse to buy if he is not satisfied as to soil compaction report and maps (see provisions of deposit receipt quoted 306 P.2d 785). This argument is neither controlling nor correct. As already indicated, plaintiffs' right to a commission is not necessarily dependent upon even the execution of a binding contract of purchase and sale. With particular reference to defendants' argument, the right to a commission is not (on the record here) dependent upon Grayson's being satisfied with the soil compaction report which the corporation agrees to furnish or upon Grayson's approval of the "contour map and filing map."

[6–9] Furthermore, if the provisions as to soil compaction report and maps were

contained in an otherwise enforceable contract to buy and sell, those provisions would not make the buyer's obligation illusory; the buyer could not withdraw from the contract at his pleasure. (Cf. Shortell v. Evans-Ferguson Corp. (1929), 98 Cal.App. 650, 659 et seq. [5, 6], 277 P. 519; 12 Cal. Jur.2d 317, § 114.) A contractual provision for performance to the satisfaction of one of the parties ordinarily calls for such performance as would be satisfactory to a reasonable person. (Thomas Haverty Co. v. Jones (1921), 185 Cal. 285, 296 [7], 197 P. 105. If acceptance or rejection of the soil compaction report and maps were dependent on the buyer's uncontrolled caprice, then he would be the sole judge of his own satisfaction and could withdraw from the contract without regard to the reasonableness of his decision. (Tiffany v. Pacific Sewer Pipe Co. (1919), 180 Cal. 700, 702–704, 182 P. 428, 6 A.L.R. 1493.) But where the question is whether an agreed performance will satisfy a requirement of commercial value or quality, operative fitness or mechanical utility, the party to whom such performance is tendered is not justified in claiming arbitrarily, unreasonably, or capriciously that he is not satisfied, in order to evade liability. (Thomas Haverty Co. v. Jones (1921), supra, 185 Cal. 285, 296 [7], 197 P. 105; Tiffany v. Pacific Sewer Pipe Co. (1919), supra, 180 Cal. 700, 702–704 [1], 182 P. 428; Melton v. Story (1931), 113 Cal.App. 609, 613, 298 P. 1032.) A standard for the soil compaction report is stated in the deposit receipt (a report "from a reliable testing firm such as D. D. Warren Co."), and from the receipt as a whole it could be determined that the report and maps should meet reasonable standards for the commercial purpose of subdivision. In these circumstances, the buyer could not evade liability by mere arbitrary rejection of the report and maps.

[10] As hereinabove stated, counts five and six undertake to plead causes of action against the individual defendants Engle and Vickter for the tort described (in Speegle v. Board of Fire Underwriters (1946), 29 Cal.2d 34, 39 [2], 172 P.2d 867) as "Intentional and unjustifiable interference with contractual relations." It is established that one who, without legal justification, intentionally induces a third person not to perform a contract with another, is liable to the other for the ensuing damage. (Imperial Ice Co. v. Rossier (1941), 18 Cal.2d 33, 35 [1], 112 P.2d 631.)

[11] Plaintiffs have alleged the existence of a valid contract and an intentional unjustified interference with it by the individual defendants which caused defendant corporation to breach such contract to plaintiffs' damage. Whether or not Engle and Vickter were privileged to cause the corporation to discontinue its relations with plaintiffs, in the belief that such a course of action was in the best interests of the corporation, is a matter of defense, to be decided by a resolution of the factual issues presumptively involved. Their right, if any, to such privilege, does not affirmatively appear on the face of the complaint.

For the reasons above stated, the judgment is reversed and the cause remanded with directions to overrule the general demurrer and entertain further proceedings not inconsistent with the views hereinabove expressed.

GIBSON, C. J., and SHENK, CARTER, TRAYNOR, SPENCE and McCOMB, JJ., concur.

47 Cal.2d 852

H. J. WILSON, Plaintiff and Appellant,

v.

Charles Henry BEVILLE et al., Defendants.

The City of Los Angeles, a Municipal Corporation, Defendant and Respondent.

L. A. 23692.

Supreme Court of California,
In Bank.
Feb. 8, 1957.
As Modified on Denial of Rehearing
March 7, 1957.

Action to quiet title to certain land and for ejectment. The Superior Court, Los Angeles County, LeRoy Dawson, J., entered judgment adverse to plaintiff and he appealed. The Supreme Court, Carter, J., held that where city failed to join lienholder under a municipal improvement bond, in condemnation proceeding for portion of a certain parcel of land, and paid its award to fee owner rather than depositing it in court, lien on such parcel remained unimpaired, and under doctrine of inverse condemnation, plaintiff who acquired title through purchaser at lien foreclosure sale was entitled to compensation for taking of a portion of such property.

Judgment affirmed in part and reversed in part.

Shenk and Spence, JJ., dissented.

Opinion Cal.App., 290 P.2d 70, vacated.

1. Eminent Domain ⇐152(1)

When a condemnation award is placed on deposit in court, a municipal improvement bond lien attaches to the award and is removed from the condemned land. West's Ann.Code Civ.Proc., § 1252.

2. Easements ⇐6
Eminent Domain ⇐268

Where a city's condemnation proceeding was not effective to protect city's title as against a municipal improvement bond lienholder, but city devoted the property to a public use since 1932, such fact precluded successor to lienholder from gaining possession and vested city with an easement over portion of such property which had been so devoted.

3. Eminent Domain ⇐152(1), 270

Where city failed to join lienholder under a municipal improvement bond in condemnation proceeding for portion of a certain parcel of land, and paid its award to fee owner rather than depositing it in court, lien on such parcel remained unimpaired, and under doctrine of inverse condemnation, plaintiff who acquired title through purchaser at lien foreclosure sale was entitled to compensation for taking of a portion of such property. West's Ann. Code Civ.Proc., §§ 1244, subd. 2, 1245.3, 1248, subds. 1, 8, 1252; West's Ann.Const. art. 1, § 14; West's Ann.Streets & High. Code, §§ 4000–4443, 5000–6794.

4. Eminent Domain ⇐277

A plaintiff who acquired title to any parcel of land through a purchaser at a municipal improvement bond lien foreclosure sale was not required to file a claim with the city in order to be entitled to compensation for his land taken under municipal power of eminent domain since charter provisions requiring a written claim for any money or damages asserted to be due from city to be filed with city clerk within six months after occurrence from which claim arose have no application to claims for compensation under inverse condemnation proceedings. West's Ann.Streets & High.Code, §§ 4000–4443, 5000–6794.

5. Municipal Corporations ⇐79

Where liability is imposed by statute, method or regulation of enforcement of liability such as claim filing and limitation of action is not a municipal affair controllable by city charter. West's Ann.Const., art. 1, § 14.

6. Eminent Domain ⇐169

Municipal charter provisions requiring that a written claim for damages asserted to be due from a city be filed with city clerk within six months after occurrence from which claim arose do not apply to a conventional eminent domain proceeding.

7. Eminent Domain ⇐79

Mere fact that a plaintiff who acquired title to a certain parcel of land through a purchaser at a municipal improvement bond lien foreclosure sale, and his predecessors, had notice of improvement proceedings for which assessment which resulted in the lien was levied, and made no objection, did not estop plaintiff from claiming compensation for the taking.

Guerin & Guerin and John J. Guerin, Los Angeles, for appellant.

Roger Arnebergh, City Atty., Peyton H. Moore, Jr., Chief Deputy City Atty., and Spencer L. Halverson, Deputy City Atty., Los Angeles, for respondent.

CARTER, Justice.

Plaintiff appeals from a judgment declaring that he is the owner of a certain parcel of land subject to the defendant city's easement for street purposes. He brought the action to quiet title to the land and for ejectment. He claims title by virtue of a city treasurer's deed issued to his predecessor in interest pursuant to a foreclosure sale following the default in payment of a street improvement bond issued under the Improvement Act of 1911 (now Sts. & Hy.Code, §§ 5000–6794).

The assessment resulting in this bond was recorded on November 23, 1927. The bond was issued on December 28, 1927, to the Municipal Bond Company. On November 25, 1927, the defendant city commenced a condemnation proceeding under the Street Opening Act of 1903 (Sts. & Hy. Code, §§ 4000–4443) in which it acquired an easement for street purposes across a part of the land upon which the improvement bond constituted a lien. Neither the owner of that lien nor any holder of the bond was joined as a party to the condemnation proceeding. Final judgment of condemnation was entered on July 23, 1931, and the record owner of the portion condemned was awarded and paid the sum of $5,376.20. The city took possession of the condemned property on January 22, 1932, forthwith devoted it to public use as a part of a city street, and has continued to devote it to the same use.

Meanwhile, on October 19, 1938, a certificate of treasurer's sale of the property in question was issued to one Al Schuh. The certificate was transferred to Betty Wilson, and on August 23, 1950, a treasurer's deed was issued to her. She quitclaimed to the plaintiff on April 12, 1951, and he filed this action on the following day. No portion of the assessment or bond has been paid.

The plaintiff contends that his title to the property is not subject to any city easement, but that even if the city has acquired an easement over the property, the doctrine of inverse condemnation entitles him to compensation for at least the value of the lien at the time the easement was acquired.

The city claims that the 1927 condemnation proceeding established an easement over the property valid as against the plaintiff. It argues that the lien of the improvement bond was transferred to the award in the condemnation proceeding despite the failure to join the lienholder, and that the lienholder's remedy was to appear and assert his rights in the condemnation proceeding or to collect the amount of the bond from the person who received the award—the then owner of the fee.

[1] Where a condemnation award is placed on deposit in court the lien attaches to the award and is removed from the condemned land. However, where, as here, the award has been paid to the owner of the fee, the rights of a lienholder who has not been joined as a party to the condemnation proceeding have not been clearly defined in this state.

Generally the statutes regulating eminent domain procedure make it evident that the lienholder's interest should be protected in some manner. Thibido v. United States, 9 Cir., 187 F.2d 249, 255–257; see Code Civ. Proc., § 1244, subd. 2, § 1245.3, § 1248, subds. 1, 8, § 1252. The city did not choose to protect the lienholder by depositing the award into court as authorized by section 1252 of the Code of Civil Procedure. It did

not deduct the amount of the lien from the award, as authorized by subdivision 8 of section 1248 of the Code of Civil Procedure. The interest of the lienholder in the property was a matter of record. Although the city was apparently required to make him a party to the condemnation proceeding (see Code Civ.Proc., § 1244, subd. 2; see, also, Code Civ.Proc., § 1245.3), it did not do so, but under the 1903 act only notice must be given (Sts. & Hy.Code, §§ 4209–4211). From a consideration of all of the factors involved, it appears that the failure to join the lienholder in the 1927 condemnation proceeding left his lien unimpaired. (In accord, see Thibido v. United States, supra, 9th Cir., 187 F.2d 249; Municipal Securities Corp. v. Kansas City, 195 Mo.App. 464, 193 S.W. 880; State v. Missouri Pac. Ry. Co., 75 Neb. 4, 105 P. 983; Ehlers v. Chicago, B. & Q. R. Co., 118 Neb. 477, 225 N.W. 468.

[2] Although the 1927 condemnation proceeding was not effective to perfect the city's title as against the plaintiff, the city has devoted the property to a public use since 1932. This fact precludes the plaintiff from gaining possession and thereby disrupting the public use—it vests the city with an easement. Hillside Water Co. v. City of Los Angeles, 10 Cal.2d 677, 76 P.2d 681; Hossom v. City of Long Beach, 83 Cal.App.2d 745, 189 P.2d 787; Chilberg v. City of Los Angeles, 54 Cal.App.2d 99, 128 P.2d 693.

[3, 4] The plaintiff's contention that the doctrine of inverse condemnation entitles him to compensation for the taking of a part of his interest in the property is correct. Hillside Water Co. v. City of Los Angeles, supra; 17 Cal.Jur.2d, Eminent Domain, § 7, pp. 585–86; 18 Cal.Jur.2d, Eminent Domain, § 374, pp. 95–96. However, defendant contends that plaintiff's claim for compensation is lost by his failure to file a claim with the city as required by sections 363 and 376 of the city charter. Those sections require that a written claim for any money or damages asserted to be due from the city be filed with the city clerk within six months after the occurrence from which the claim arose. No claim of any kind unless plaintiff's complaint be so considered was ever filed by plaintiff. It is unnecessary to decide whether the plaintiff's claim arose in 1932 when the property was devoted to a public use, in 1950 upon the issuance of the treasurer's deed, or at some time between these two dates. The trial court found that no claim was filed by the plaintiff or his predecessors in interest, and this action was commenced more than six months after the treasurer's deed was issued, but as will be seen, it was not necessary for plaintiff to file a claim under the charter; the charter provisions have no application to claims for compensation under inverse condemnation.

Plaintiff was not required to file a claim with the city in order to be entitled to compensation for his land taken under the power of eminent domain. The claim filing requirements of the Los Angeles Charter (L.A.Charter, §§ 363, 376) cannot apply to a claim for compensation when a taking is by eminent domain because it is not a municipal affair; it is a matter of statewide concern and may be regulated only by the state Legislature, such as, the statutes of limitation. Even if the charter may legislate on the subject the provisions are not applicable to a claim for compensation for property taken by eminent domain.

[5] It has been held repeatedly that where liability is imposed by statute [1] the method or regulation of the enforcement of the liability such as claim filing and limitation of actions is not a municipal affair controllable by city charter. Wilkes v. City, etc., of San Francisco, 44 Cal.App.2d 393, 112 P.2d 759; Helbach v. City of Long Beach, 50 Cal.App.2d 242, 123 P.2d 62; Eastlick v. City of Los Angeles, 29 Cal.2d 661, 177 P.2d 558, 170 A.L.R. 225.

For illustration, it is said in the Helbach case, 50 Cal.App.2d at page 246, 123 P.2d at page 65: "Respondent also urges, as before noted, that the erection and maintenance of the building was a purely munic-

1. Here it is imposed by the Constitution (Cal.Const. art. I, § 14).

ipal affair and that therefore the procedure, including limitation of time, for filing claims against the city arising out of its tortious acts or omissions in connection with such building is likewise exclusively of municipal concern and governed by its charter. Even if we assume respondent's premise her asserted conclusion does not follow. The opening and maintenance of public streets is typically a municipal affair * * * but liability for defective streets, *including the procedure for enforcing it, is a matter of general state concern* (Wilkes v. City, etc., of San Francisco, 1941, supra, 44 Cal.App.2d 393, 397, 112 P.2d 759; Douglass v. City of Los Angeles, 1935, supra, 5 Cal.2d 123, 128, 53 P.2d 353). * * * [I]f the building be a proprietary undertaking the city is liable for its torts regardless of the provisions of act 5619, supra (Deering's Gen.Laws, 1937, p. 2630; Stats.1923, p. 675) and if it be governmental in character liability is imposed by that act. In either case the liability for tort, *including procedure for its enforcement, is a matter of public concern.*" (Emphasis added.) In the Wilkes case the court said, 44 Cal.App.2d at page 395, 112 P.2d at page 761: "The right to recovery does not arise under charter provisions but under state law. The state has the power to prescribe the method of enforcing the claim. If the state fixes the period as ninety days within which such a claim may be filed, a municipality, even by charter provisions, may not ordain that the claim will not be recognized unless filed within a shorter period. No right of action is given by charter to seek damages against the City and County of San Francisco as the result of a defective or dangerous condition of a public highway. Such right exists only under the state law. The municipality may not curtail or abridge such right by providing that the claim shall be filed within eighty-nine days or one day. If it had the right to fix a period of sixty days it likewise has the power to change that period. The right to fix the time within which the claim may be filed is purely a legislative matter. Douglass v. City of Los Angeles, 5 Cal.2d 123, 53 P.2d 353; Wicklund v. Plymouth E. School Dist., 37 Cal.App.2d 252, 99 P.2d 314; Norton v. City of Pomona, 5 Cal.2d 54, 53 P.2d 952; Johnson v. City of Glendale, [12 Cal.App.2d 389, 55 P.2d 580] supra; Thompson v. County of Los Angeles, 140 Cal.App. 73, 35 P.2d 185; Kahrs v. County of Los Angeles, 28 Cal.App.2d 46, 82 P.2d 29; Strath v. City of Santa Rosa, 19 Cal.App. 2d 382, 65 P.2d 894; Spencer v. City of Calipatria, 9 Cal.App.2d 267, 49 P.2d 320; Young v. County of Ventura, 39 Cal.App. 2d 732, 104 P.2d 102; Kline v. San Francisco U. School Dist., 40 Cal.App.2d 174, 104 P.2d 661, 105 P.2d 362; Kelso v. Board of Education, 42 Cal.App.2d [415], 109 P.2d 29. If the soundness of the rule that the claim must be filed in accordance with the time limit provided in the statute rather than in the charter has been recognized by the courts of this state, as appears above, there can be no doubt that the same rule holds relative to the place of filing unless some good reason appears to the contrary." In the Eastlick case the court said: "[A] city, by adopting a charter, becomes independent of general laws *only* as to 'municipal affairs,' and that in matters of general statewide concern the general law is paramount * * * that the existence of a municipality's liability for the dangerous or defective condition of its streets is a matter of state concern * * that with regard to such a matter local regulations may be enforced only if they are not in conflict with the general law. * * * However, defendant contends that its charter provision as to itemization of damages is merely supplementary to the general law—an additional, not a contrary requirement—and therefore is valid. As authority for this position, defendant cites such cases as [citations]. But these cases concerned local prohibitory enactments adopted, in the municipality's exercise of the police power, in a field where the applicable state law contained language expressly indicating that the Legislature did not intend its regulations to be exclusive. * * * 'Whether the legislature

has undertaken to occupy exclusively a given field of legislation,' so that a local regulation imposing a higher standard of conduct with regard to the subject covered would necessarily be in conflict, 'is, we think, to be determined in every case upon an analysis of the statute and of the facts and circumstances upon which it was intended to operate.'" Emphasis added; Eastlick v. City of Los Angeles, supra, 29 Cal.2d 661, 665–666, 177 P.2d 558, 561. This is in line with the general rule that charter provisions cannot control in matters of statewide concern where the state has occupied the field. "Although the adoption of local rules supplementary to state law is proper under some circumstances, it is well settled that local regulation is invalid if it attempts to impose additional requirements in a field which is fully occupied by statute. * * * Eastlick v. City of Los Angeles, 29 Cal.2d 661, 666, 177 P.2d 558, 170 A.L.R. 225. Determination of the question whether the Legislature has undertaken to occupy exclusively a given field of legislation depends upon an analysis of the statute and a consideration of the facts and circumstances upon which it was intended to operate. Eastlick v. City of Los Angeles, supra, 29 Cal. 2d at page 666, 177 P.2d [at page] 558; Pipoly v. Benson, supra, 20 Cal.2d [366] at pages 372–375, 125 P.2d 482 [147 A.L.R. 515]; In re Iverson, 199 Cal. 582, 586–587, 250 P. 681; Ex parte Daniels, 183 Cal. 636, 642, 643, 192 P. 442, 21 A.L.R. 1172. Where the Legislature has adopted statutes governing a particular subject matter, its intent with regard to occupying the field to the exclusion of all local regulations is not to be measured alone by the language used but by the whole purpose and scope of the legislative scheme. Eastlick v. City of Los Angeles, supra, 29 Cal.2d at page 666, 177 P.2d 558 * * *." Tolman v. Underhill, 39 Cal.2d 708, 712, 249 P.2d 280, 282. And: "If, however, there is any conflict between charter provisions and the compensation sections of the Labor Code, the latter must prevail. Under power expressly granted to it by the Constitution, the Legislature has established a complete system of workmen's compensation which obviously is a subject of state-wide concern, and it is well settled that in such matters the general law is paramount. See Eastlick v. City of Los Angeles, 29 Cal.2d 661, 665–666, 668, 177 P.2d 558, 170 A.L.R. 225." Healy v. Industrial Acc. Comm., 41 Cal.2d 118, 122, 258 P.2d 1, 3. The exercise of the power of eminent domain is a matter of statewide concern, not a municipal affair, which cannot be abrogated by a municipality; it must be exercised in accordance with state law. Alexander v. Mitchell, 119 Cal.App. 2d 816, 260 P.2d 261; City & County of San Francisco v. Ross, 44 Cal.2d 52, 279 P.2d 529; Harden v. Superior Court, 44 Cal.2d 630, 284 P.2d 9.

The Legislature has fully occupied the field of eminent domain. The Constitution provides: "Private property shall not be taken or damaged for public use without just compensation having *first been made to, or paid into court for, the owner*, and no right of way * * * shall be appropriated to the use of any corporation, except a municipal corporation * * * until full compensation therefor *be first made in money or ascertained and paid into court for the owner* * * * provided, that in any proceeding in eminent domain brought by * * * a municipal corporation * * * the aforesaid * * * municipality * * * may take immediate possession and use of any right of way * * * required for a public use whether the fee thereof or an easement therefor be sought upon *first commencing eminent domain proceedings* according to law in a court of competent jurisdiction and thereupon giving such security in the way of money deposited as the court in which such proceedings are pending may direct, and in such amounts as the court may determine to be reasonably adequate to secure to the owner of the property sought to be taken immediate payment of just compensation for such taking and any damage incident thereto, including damages sustained by reason of an adjudication that there is no necessity for taking the property, as soon as

the same can be ascertained according to law." (Emphasis added; Calif.Const., art. I, § 14.) This provision is self-executing. Rose v. State of California, 19 Cal.2d 713, 123 P.2d 505. The Legislature has provided a complete and detailed system for exercising the right of eminent domain and assessing compensation. Code Civ.Proc., §§ 1237–1266.2.

Here the charter claims provisions are stringent statutes of limitations—procedural restrictions. Farrell v. County of Placer, 23 Cal.2d 624, 145 P.2d 570, 153 A.L.R. 323; Norton v. City of Pomona, 5 Cal.2d 54, 53 P.2d 952; Shea v. City of San Bernardino, 7 Cal.2d 688, 62 P.2d 365; Thompson v. County of Los Angeles, 140 Cal.App. 73, 35 P.2d 185; Rhoda v. County of Alameda, 134 Cal.App. 726, 26 P.2d 691; Rose v. State of California, supra, 19 Cal. 2d 713, 725, 123 P.2d 505, referring to Crescent Wharf & Warehouse Co. v. City of Los Angeles, 207 Cal. 430, 278 P. 1028. Such procedural matters are fully covered by the state statutes such as those on eminent domain, Code Civ.Proc. § 1237 et seq., and those on limiting the time within which actions may be brought. Code Civ. Proc. §§ 338(2), 318–325.[2] A city charter cannot give a shorter time, make more onerous the recovery of compensation, than the legislation has. As said in Eastlick v. City of Los Angeles, supra, 29 Cal.2d 661, 666, 177 P.2d 558, 562: "* * * a municipality may not curtail or abridge the rights so granted [right to recover for tort] *by specifying, through charter provision, a shorter time limitation* * * * *than the period fixed by the statute.*" (Emphasis added.) Assuming a charter may require the presentment of a claim, it cannot enact statutes of limitations. That is a matter of statewide concern. If the city may enact such legislation or charter provisions the land owner is denied equal protection of the laws for the state statute would fix the limitation where the condemner was a public utility but a different one would prevail where the condemner was a municipal corporation. There is no distinction between such condemnors. The city along with public utilities is made equally liable by the Constitution.

Crescent Wharf & Warehouse Co. v. Los Angeles, 207 Cal. 430, 278 P. 1028, fails to consider the above mentioned factors and should be overruled. The same applies to Young v. County of Ventura, 39 Cal.App.2d 732, 104 P.2d 102.

[6] On the second point it should be clear that the charter provisions do not apply to a conventional eminent domain proceeding. "Our attention has not been directed to any authority requiring the filing of a claim against a city in an action in condemnation brought by it. *The filing of such a claim is not necessary.*" Emphasis added; City of Fresno v. Hedstrom, 103 Cal.App.2d 453, 460, 229 P.2d 809, 813. In inverse condemnation the property owner is forced to prosecute proceedings otherwise he is remediless. Heimann v. City of Los Angeles, 30 Cal.2d 746, 185 P.2d

2. There may be some question which statute applies in inverse condemnation cases. It is said: "Which statutory period of limitations applies to an inverse condemnation suit does not appear to be definitely settled. In cases that classified the action as one in trespass, the 3-year period prescribed in § 338 subdivision (2) of the Code of Civil Procedure has been applied. There are cases, however, which distinguish between a mere trespass action and an action for damages because of the taking or damaging of private property under the power of eminent domain, and on this basis consider the 5-year period to be applicable. Thus, it has been held that since the riparian rights of an owner of real property are an inherent part of the land, and since the appropriation of water is therefore a detriment which must be distinguished from a mere trespass, an action on the theory that the defendant's appropriation of the plaintiff's riparian right to water constituted a taking and damaging of real property without compensation does not expire short of the 5 years necessary for the defendants to have acquired title to the water by adverse possession." (18 Cal.Jur.2d, Eminent Domain, § 382.) In any case the time within which recovery may be had is covered by state statute.

597. His action may be to recover the property and for preventive relief in that connection. Collier v. Merced Irr. Dist., 213 Cal. 554, 2 P.2d 790. It is thus not a demand for money within the charter provisions. It becomes so only because the city invokes the intervention of its public use as a defense to preventive relief and makes the property owner take compensation instead of his property. By wrongfully failing to follow the eminent domain procedure the city forces the property owner to take the initiative. It is still an eminent domain proceeding and claims are not necessary in such proceedings.

While the instant eminent domain proceedings were under the 1903 Street Opening Act, supra, even if it is assumed that those provisions in some respects control over the general provisions on eminent domain in the Code of Civil Procedure, the fact still remains that there is a complete system of state law for eminent domain proceedings.

[7] Defendant urges that plaintiff and his predecessors had notice of the improvement proceedings, for which an assessment was levied which resulted in the lien, for the establishment of the street and made no objection and is hence estopped and guilty of laches. We fail to see how the notice of the assessment proceedings affects the situation. Plaintiff relies upon the lien arising therefrom. There is no change of position in reliance on the inactivity of plaintiff's predecessors except the establishment and use of the street. This use excludes the remedy to obtain possession of the land but not for compensation for the taking (see authorities cited in the forepart of this opinion).

The judgment insofar as it determines that plaintiff is the owner of the property subject to the right of way for the street is affirmed but is reversed insofar as it determines that plaintiff is to take nothing by the action. Plaintiff shall recover costs.

TRAYNOR and SCHAUER, JJ., and DOOLING, J. pro tem., concur.

GIBSON, C. J., concurs in the judgment.

SHENK, Justice (dissenting).

I dissent.

In 1927 the City of Los Angeles, pursuant to street improvement proceedings under the Improvement Act of 1911, Stats. 1911, p. 730, now Sts. & Hy.Code, §§ 5000–6794, levied an assessment for benefits for street improvements on real property including Lot 195 Tract 6710. Assessments that were not paid went to bond, including the assessment on Lot 195 for $207.57, here involved. On December 28, 1927 the bond was acquired by the Municipal Bond Company. On November 25, 1927 the city commenced another street improvement proceeding pursuant to the Street Opening Act of 1903, Stats.1903, p. 386, Streets & High.Code, § 4000 et seq. This proceeding was authorized by Ordinance 58294 entitled "An ordinance ordering the laying out, opening and extending. * * *" of the streets named in the ordinance. By an order of condemnation pursuant to that proceeding the city acquired an easement for street purposes across a part of Lot 195 upon which the improvement bond constituted a lien. The owner of the bond lien was not made a party to that condemnation proceeding. The assessment represented by the bond was not paid and the bond was foreclosed. On October 19, 1938, a certificate of treasurer's sale was issued to the plaintiff's predecessor in interest who quitclaimed to the plaintiff on April 12, 1951. This action to quiet title was commenced the following day.

That the opening, widening and improvement of public streets within a chartered city is a municipal affair is the established law of this state, and there are no decisions to the contrary. Prior to 1896 municipal charters were subject to and controlled by general laws. By an amendment of section 6 of article XI of the Constitution in 1896 such charters continued to be subject to and controlled by general laws "except in municipal affairs." In the case of Byrne v. Drain, 1900, 127 Cal. 663, at p. 667, 60 P. 433, at page 434, this Court said: "That the matter of opening the streets of a municipality is a municipal affair is not disputable under the authorities. Sinton v. Ashbury, 41 Cal. [525] 531; People [ex rel. Bryant] v. Holladay, 93 Cal. 241, 29 P. 54 [27 Am.St.

Rep. 186]; Hellman v. Shoulters, 114 Cal. [136] 141, 44 P. 915, 45 P. 1057."

In the case of City of Los Angeles v. Central Trust Company of New York, 173 Cal. 323, at p. 327, 159 P. 1169, at page 1170, this Court stated: "The opening, laying out, and improving of streets within a city, and the regulation of the manner of their use, are matters of much greater concern to its inhabitants than to the people of the state at large, and they are clearly municipal affairs, the control of which has always been deemed within the proper scope of municipal powers. [Citations]"

In Blake v. City of Eureka, 201 Cal. 643, at pages 567–568, 258 P. 945, at page 952 it was said: "There can be no question that the improvement of the streets of the city is a municipal affair, and that where there is a conflict between the city charter and the general law in a merely municipal affair the provisions of the charter control. [Citing cases]"

The proceeding taken under the Street Improvement Act of 1911 by which the plaintiff's predecessor in interest acquired the lien on the property was such a street improvement proceeding and unquestionably a municipal affair. The subsequent proceeding under the Street Opening Act of 1903 was to acquire property for the improvement of a city street and was likewise unquestionably a municipal affair. If the holder of the bond lien had been made a party to the latter proceeding the amount now sought to be recovered by the plaintiff would have been paid in due course by assessment on lands benefited by the improvement or by funds otherwise under the control of the city.

The matter of presenting claims against the city for money or damages is likewise a municipal affair and the city by charter sections 363 and 376 has prescribed a reasonable time within which claims must be presented before suit may be brought thereon. In the case of Bancroft v. City of San Diego, 120 Cal. 432, 52 P. 712, the plaintiff owned property in the city fronting on a street which was damaged by reason of the changing of the street grade. This Court held that the damage was in a sense a taking of the property as contemplated by the Constitution. The plaintiff failed to present a claim for damages to the city within the six months prescribed by the city charter. The Court held that the action should be dismissed for failure to present the claim within the prescribed time. In Crescent Wharf & Warehouse Co. v. City of Los Angeles, 207 Cal. 430, 278 P. 1028, the Bancroft case was cited with approval. Among other cases also cited to support the holding of the Crescent Wharf case is Western Salt Co. v. City of San Diego, 181 Cal. 696, 186 P. 345, where it was held that there is no general law on the subject of the time when such a claim must be presented to the city and that a city charter so providing is constitutional. Those cases have never been overruled or criticized and there has been and is no authority in this state to the contrary until the holding of the majority in the present case.

Furthermore, the charter provision is controlling irrespective of whether it concerns a municipal affair if it is not inconsistent with state law and may even provide for matters of general concern when there is no state law on the subject. Esberg v. Badaracco, 202 Cal. 110, 116, 259 P. 730. Here the matter of filing a claim against the city such as here involved is not only a municipal affair, but there is no state law on the subject. The state has not, as the majority holds, occupied the field to the exclusion of inverse condemnation claim filing requirements in municipal charters. In fact, there is no state legislation whatsoever on the subject, and hereafter there will be no applicable charter provisions on the subject.

The majority rely on cases in which statutes specify the time for filing claims, such as cases arising under the Public Liability Act of 1923, to which Government Code section 53052 applies. As noted, there is no statute applicable to claims arising under the circumstances here presented. In Eastlick v. City of Los Angeles, 29 Cal.2d

661, 177 P.2d 558, 170 A.L.R. 225, a case where the Public Liability Act applied, the Court stated that a municipality may adopt a charter provision regulating the presentation of claims and the terms thereof are applicable to a cause of action against the city where "there is no general law upon the subject." [29 Cal.2d 661, 177 P.2d 563.] There is no general law on the subject of the time of filing of inverse condemnation claims and the provisions of sections 363 and 376 of the charter of the City of Los Angeles are fully applicable to the claim here involved.

I would affirm the judgment.

SPENCE, J., concurs.

Rehearing denied and opinion modified: SHENK and SPENCE, JJ., dissenting.

GIBSON, C. J., concurs in the opinion as modified.



47 Cal.2d 893

Virginia Bell TAYLOR, Charles R. Taylor, and Laurine R. Holibaugh, Plaintiffs,

v.

A. J. HAWKINSON, Defendant and Respondent.

Virginia Bell Taylor, Appellant.

L. A. 24279.

Supreme Court of California, In Bank.

Feb. 8, 1957.

Occupant, driver, and owner of first automobile brought action against driver of second automobile for injuries and property damage resulting from collision. The jury returned compromise verdicts for occupant, driver, and owner of first automobile. The occupant of first automobile was granted a new trial, because damages awarded her were insufficient, and judgment for driver and owner of first automobile became final. The Superior Court, Los Angeles County, Walter R. Evans, J., on new trial entered judgment on verdict for driver of second automobile, and occupant of first automobile appealed from judgment, jury verdict, and order denying her motion for judgment notwithstanding the verdict or for a new trial. The Supreme Court, Traynor, J., held that question of negligence was not res judicata by way of collateral estoppel on new trial.

Appeals from verdict and order denying motion for new trial dismissed, and judgment and order denying motion for judgment notwithstanding the verdict affirmed.

Carter, J., dissented.

Opinion, 298 P.2d 919, vacated.

1. Appeal and Error ⇐108, 109, 110, 123

On appeal by plaintiff from judgment, jury verdict, and order denying plaintiff's motion for judgment notwithstanding the verdict or for a new trial, Supreme Court would consider only the judgment and order denying the motion for judgment notwithstanding the verdict as appealable, and would dismiss the other appeals. West's Ann.Code Civ.Proc. § 963.

2. Judgment ⇐540

Where causes of action and parties are the same, a prior judgment is a complete bar in the second action.

3. Judgment ⇐634

Where causes of action are different, but the parties are the same, doctrine of res judicata applies so as to render conclusive matters, which were decided by the first judgment.

4. Judgment ⇐585(1), 720

A prior judgment operates as a bar against a second action on the same cause, but, in a later action on a different claim or cause of action, it operates as an estoppel or conclusive adjudication as to such issues in the second action as were actually litigated and determined in the first action.

5. New Trial ⇐172

Where occupant, driver, and owner of first automobile brought action against

driver of second automobile for injuries and property damage resulting from collision, and jury returned compromise verdicts for occupant, driver, and owner of first automobile, and occupant of first automobile was granted a new trial because damages awarded her were insufficient, and judgment for driver and owner of first automobile became final, question of negligence was not res judicata by way of collateral estoppel on the new trial.

N. E. Youngblood, Beverly Hills, and William R. Grant, Arcadia, for appellant.

Wyman & Finell and Saul Grayson, Beverly Hills, for respondent.

TRAYNOR, Justice.

[1] Virginia Taylor, hereinafter referred to as plaintiff, was injured when the car in which she was riding was struck from the rear by a car driven by defendant. The car was registered in the name of her husband and was being driven by a friend, Laurine Holibaugh. Plaintiff, her husband, and the driver brought an action for damages against defendant, and the jury returned verdicts of $65.00 for personal injuries suffered by the driver, $63.06 in favor of plaintiff's husband for damages to the car, and $371.94 for personal injuries suffered by plaintiff. Judgment was entered on the verdicts and plaintiff alone moved for a new trial on the ground that the damages were insufficient. Her motion was granted and thereafter the judgment in favor of her husband and the driver became final. On retrial plaintiff sought to limit the trial to the issue of damages on the ground that the judgment in favor of her husband and the driver was conclusive against defendant on the issue of liability. Over her objection the trial court submitted the issue of liability to the jury, which returned a verdict for defendant. Judgment was entered on the verdict, and plaintiff's motion for judgment notwithstanding the verdict or, in the alternative, for a new trial was denied. Plaintiff appeals from the judgment, jury verdict, and the order denying her motion for judgment notwithstanding the verdict or for a new trial. Since only the judgment and the order denying the motion for judgment notwithstanding the verdict are appealable, Code Civ.Proc. § 963, the other appeals are dismissed.

Plaintiff contends that this case is governed by the rule stated in Bernhard v. Bank of America, 19 Cal.2d 807, 813, 122 P.2d 892, 895, that "In determining the validity of a plea of res judicata three questions are pertinent: Was the issue decided in the prior adjudication identical with the one presented in the action in question? Was there a final judgment on the merits? Was the party against whom the plea is asserted a party or in privity with a party to the prior adjudication?" Moreover, she asserts that even if a requirement of mutuality of estoppel should be deemed essential in this case, it is met by the fact that she was in privity with her husband in his cause of action for damages to the car. Zaragosa v. Craven, 33 Cal.2d 315, 321, 202 P.2d 73, 6 A.L.R.2d 461. Defendant contends on the other hand, that even though the judgment in favor of the husband and the driver may be final for some purposes, since it was entered in the same action in which plaintiff's motion for a new trial was granted and since the issue of defendant's negligence was common to all parts of the first judgment, the part as to which a new trial was neither sought nor granted cannot be res judicata as to the issues set at large by the granting of plaintiff's motion for a new trial. See American Enterprise, Inc., v. Van Winkle, 39 Cal.2d 210, 218, 246 P.2d 935.

[2–4] It may be conceded that the judgment in favor of plaintiff's husband and the driver is now final, that their causes of action are merged therein, and that it constitutes a bar to any further prosecution of their original claims. As was pointed out in Sutphin v. Speik, 15 Cal.2d 195, 201–202, 99 P.2d 652, 655, 101 P.2d 497, the doctrine of res judicata has two aspects.

"First, where the causes of action and the parties are the same, a prior judgment is a complete bar in the second action. This is fundamental and is everywhere conceded.

"Second, where the causes of action are different but the parties are the same, the doctrine applies so as to render conclusive matters which were decided by the first judgment. As this court said in Todhunter v. Smith, 219 Cal. 690, 695, 28 P.2d 916, 918: 'A [prior] judgment operates as a bar against a second action upon the same cause, but, in a later action upon a different claim or cause of action, it operates as an estoppel or conclusive adjudication as to such issues in the second action as were actually litigated and determined in the first action.' "

In the present case, since plaintiff's cause of action is different from those of her husband and the driver, we are concerned with the second aspect stated above, and the question presented is whether defendant's liability was a matter decided or an issue that was actually litigated and determined within the meaning of the foregoing rule.

[5] There is ample evidence to support the trial court's implied finding that the verdicts following the first trial were compromise verdicts and that the jury did not determine the issue of liability. The damages awarded plaintiff were less than her special damages, and the parties concede that they were so inadequate that a new trial limited to the issue of damages would have been improper. See Rose v. Melody Lane, 39 Cal.2d 481, 489, 247 P.2d 335. Moreover, it is obvious that if the jury failed to determine the issue of liability in returning the verdict for plaintiff, it also failed to determine that issue in returning the verdicts for her husband and the driver. Accordingly, had defendant or plaintiff's husband and the driver moved for a new trial, it would have been granted, and their failure to do so was tantamount to accepting the jury's compromise as their own. See Leipert v. Honold, 39 Cal.2d 462, 470–471, 247 P.2d 324, 29 A.L.R.2d 1185. Regardless of the effectiveness of such a compromise in extinguishing the causes of action or in settling the rights directly involved therein, see Partridge v. Shepard, 71 Cal. 470, 475, 12 P. 480; Moore v. Schneider, 196 Cal. 380, 389, 238 P. 81; FitzGerald v. Terminal Development Co., 11 Cal.App.2d 126, 135–136, 53 P.2d 177, 55 P.2d 194, it does not constitute such a determination of the issues involved as to render them res judicata where distinct rights are sought to be litigated in a separate cause of action. United States v. International Building Co., 345 U.S. 502, 506, 73 S.Ct. 807, 97 L.Ed. 1182; Lawlor v. National Screen Service, 349 U.S. 322, 324, 327, 75 S.Ct. 865, 99 L.Ed. 1122; Burgess v. Consider H. Willetts, Inc., 311 Ky. 745, 225 S.W.2d 315, 317; Reeves v. Philadelphia Gas Works Co., 107 Pa.Super. 422, 164 A. 132, 134; Fruehauf Trailer Co. v. Gilmore, 10 Cir., 167 F.2d 324, 330; Marchant v. Buffalo General Hospital, 166 Misc. 234, 3 N.Y.S.2d 496, 498; see, Hall v. Coyle, 38 Cal.2d 543, 546, 241 P.2d 236; Stark v. Coker, 20 Cal.2d 839, 843, 129 P.2d 390; Restatement, Judgments, § 68. To hold otherwise would tend to defeat rather than to promote the objective of preventing vexatious litigation with its attendant expense both to the parties and the public. Defendant did not have his day in court during the first trial on the issue of liability, and plaintiff can now justify making that judgment binding upon him in her action only on the ground that he had an opportunity to attack it. He had done so, more rather than less litigation would have ensued, and plaintiff would have gained nothing. Defendant did not vex her by seeking a redetermination of an issue once decided, but sought and secured only the right to have the issue of liability determined once after plaintiff by securing a new trial on all issues had established the propriety thereof.

The judgment and the order denying the motion for judgment notwithstanding the verdict are affirmed.

GIBSON, C. J., and SHENK, SCHAUER, SPENCE, and McCOMB, JJ., concur.

CARTER, Justice.

I dissent.

I cannot agree that a judgment, which on its face determines the question of liability in a negligence action, is not res judicata on that issue by way of collateral estoppel in another action on the theory that the question of liability was not decided because the jury in the first action assertedly compromised on the issue of liability. Whatever way you cut it, the result reached by the majority is that an alleged compromise verdict (balancing liability against the amount of damages) is subject to *collateral* attack on that ground.

The facts are not involved and some legal points are clear and these are conceded by the majority. Three plaintiffs obtained judgments against defendant in an action in which his liability is based, by virtue of the pleadings, the instructions to the jury, the jury's verdict and the judgment itself, on the negligence of the defendant; that issue was necessarily involved, indeed, it was the only issue except the fact and amount of damages. One of the plaintiffs was granted a new trial, but as to the others, the judgment became final, and the trial court denied the plea of res judicata on the retrial as to the one plaintiff. There was a privity between the plaintiff obtaining the new trial and one of the other plaintiffs, her husband, see Zaragosa v. Craven, 33 Cal.2d 315, 202 P.2d 73, 6 A.L.R.2d 461, hence there can be no question that the judgment for the husband-plaintiff was res judicata. No point is made that these judgments for all three plaintiffs were given in the same action, and I take it the situation would be no different if they had been obtained in separate and different actions. The judgment for the plaintiff-husband was res judicata as it was based upon underlying pleadings which presented the issue of defendant's liability—his negligence; the jury was instructed on that issue; its verdict was general, thus deciding that issue; and the judgment was on the verdict and therefore decided that issue. We have, therefore, a clear case of the judgment being res judicata on the question of defendant's liability as to one—plaintiff-wife—who was in privity to the plaintiff-husband Zaragosa v. Craven, supra. In such a case we have a situation where under the doctrine of res judicata, the defendant is collaterally estopped to question the final determination that he was negligent. Yet the majority arrives at a different conclusion by reasoning that the verdict on which the judgment was based was a compromise (supposedly low damages because some jurors thought there should be no liability) which is true because the judgment as to plaintiff-wife, as to which a new trial was granted, was a compromise because the damages were lower than the amount of the special damages suffered and proved. It is then concluded that defendant and plaintiff-husband "accepted" the compromise verdict and thus, in effect, compromised the res judicata judgment; hence there is no collateral estoppel because a judgment based on a compromise does not give rise to such estoppel.

Accepting for the moment that reasoning and speaking to the legal proposition that a judgment based on a compromise settlement cannot give rise to a collateral estoppel, I find the law to be otherwise. It is the general rule that a judgment entered by consent or agreement is res judicata in the sense that it is a bar to another action on the same cause of action as distinguished from collateral estoppel. Partridge v. Shepard, 71 Cal. 470, 475, 12 P. 480; City of Oakland v. Oakland W. etc. Co., 162 Cal. 675, 686, 124 P. 251; Semple v. Wright, 32 Cal. 659; Crossman v. Davis, 79 Cal. 603, 21 P. 963; Moore v. Schneider, 196 Cal. 380, 238 P. 81; Neilsen v. Emerson, 119 Cal.App. 214, 6 P.2d 281; Guaranty L. Corp. v. Board of Supers., 22 Cal. App.2d 684, 71 P.2d 931; Patterson v. Spring Valley Water Co., 207 Cal. 739, 279 P. 1001; Goddard v. Security Title Ins. & Guar. Co., 14 Cal.2d 47, 55, 92 P.2d 804; Lamb v. Herndon, 97 Cal.App. 193,

275 P. 503; see, also, many cases cited Macheras v. Syrmopoulos, 319 Mass. 485, 66 N.E.2d 351, 2 A.L.R.2d 514. The court states in Partridge v. Shepard, supra, 71 Cal. 470, 475, 12 P. 480, 482: "It is objected to the judgment roll in Judson v. Molloy, that it was a 'consent judgment.' We know of no good reason why a judgment entered by consent of parties in a cause of which the court has jurisdiction of the subject-matter and of the parties, is less efficacious than if entered after a trial of the issues. It may be impeached like any other judicial record, by evidence of a want of jurisdiction in the court rendering it, by showing collusion between the parties, or by proof of fraud on the part of the party offering the record." *And the same is true where res judicata as collateral estoppel is involved.* See Partridge v. Shepard, supra, 71 Cal. 470, 12 P. 480; Semple v. Wright, supra, 32 Cal. 659; McCreery v. Fuller, 63 Cal. 30; Crossman v. Davis, supra, 79 Cal. 603, 21 P. 963; Helpling v. Helpling, 50 Cal.App. 676, 195 P. 715; FitzGerald v. Terminal Development Co., 11 Cal.App.2d 126, 53 P.2d 177, 55 P.2d 194. It is said in 2 A.L.R.2d 514, 543:

> "As a general proposition, where a question of fact essential to a judgment is actually litigated and determined thereby, the determination is conclusive between the parties and their privies in a subsequent action, even though such action involves a different cause of action. * * *
>
> "Except in cases involving tax liability for successive tax periods, it is well-settled that a *judgment by consent raises an estoppel in the same way as a judgment entered after contest,* and this has been recognized even by those courts which profess to adhere to the theory that a consent judgment or decree is, strictly speaking, not res judicata." (Emphasis added.)

The cases cited in the majority opinion are not to the contrary. Hall v. Coyle, 38 Cal.2d 543, 241 P.2d 236, and Stark v. Coker, 20 Cal.2d 839, 129 P.2d 390, the California cases, merely hold that an issue withheld from decision by the court is not res judicata or that an action on a compromise of a claim is not the same as an action on the claim. It is said in United States v. International Building Co., 345 U. S. 502, 506, 73 S.Ct. 807, 809, 97 L.Ed. 1182: "A judgment entered with the consent of the parties may involve a determination of questions of fact and law by the court. But unless a showing is made that that was the case, the judgment has no greater dignity, so far as collateral estoppel is concerned, than any judgment entered only as a compromise of the parties." Lawlor v. National Screen Service Corporation, 349 U.S. 322, 75 S.Ct. 865, 99 L.Ed. 1122, refused to apply res judicata because to do so would violate an important public policy, the United States anti-trust laws. Burgess v. Consider H. Willett, Inc., 311 Ky. 745, 225 S.W.2d 315, rejected the proposition that a consent judgment is res judicata, which as seen is squarely contrary to the law of this state and nearly all jurisdictions elsewhere. The same is true of Reeves v. Philadelphia Gas Works, 107 Pa.Super. 422, 164 A. 132, and Fruehauf Trailer Co. v. Gilmore, 10 Cir., 167 F.2d 324, and the International Building Company case. In Marchant v. Buffalo General Hospital, 166 Misc. 234, 3 N.Y.S.2d 496, the issue as to which estoppel by former judgment was sought was not decided by the former judgment. The decision of the majority is, therefore, contrary to the established law of this state.

In the foregoing discussion I have accepted the proposition that this was a consent judgment and pointed out that even as such it was res judicata, but it was not a consent judgment. There was no agreement, settlement or compromise except that which the majority imposes as a *matter of law* as distinguished from the voluntary understanding of the parties. The judgment urged as estoppel had been *entered.* It unquestionably decided the

issue of the defendant's liability. It was rendered after a contest in a trial and on the jury's verdict. The only consent feature that might arise is because defendant did not attack the judgment by appeal or otherwise. He permitted it to become *final.* Nothing occurred in the conduct of the parties nor in any communication between them that indicated an actual compromise or agreement to accept the jury's so-called compromise. The failure to appeal was nothing more than permitting the judgment to stand by default, the same as if no answer or contest had been made to the complaint and a default judgment was entered. As is said in Helpling v. Helpling, 50 Cal.App. 676, 682, 195 P. 715, 717: "The appellant's contention that the former judgment between the parties hereto did not render matters involved therein *res adjudicata,* for the reason that it was a consent judgment, is not borne out to the extent claimed by the appellant; for while it appears that the trial judge, in an informal interview with the parties, gave expression to some doubts as to the sufficiency of the evidence in the case, these doubts were not carried into the formal judgment, and it has been repeatedly held that the remarks of a trial judge made during the progress of the case, even though they amount to the giving of his reasons for his decision, become no part of the judgment, and cannot be held to control or alter its substance and effect. So far as the record herein discloses, the only matter embraced in said judgment, to which it was suggested that the parties give their consent, was that of the amount and duration of the separate maintenance to be allowed the plaintiff therein. As to all other matters involved in the case the judgment became *res adjudicata,* and hence properly relied upon by the respondent herein to defeat the present action." And in Harter v. King County, 11 Wash.2d 583, 119 P.2d 919, 923: "We think the very essence of a consent decree is that the parties thereto have entered voluntarily into a contract setting the dispute at rest, upon which contract the court has entered judgment conforming to the terms of the agreement, without putting the parties to the necessity of proof." There is here, therefore, no compromise, consent or settlement judgment. If it is a default judgment (it became final by default) then we apply the rule that a judgment by default is the basis of a plea of res judicata or collateral estoppel in a subsequent action involving the same matter, and such judgment is just as conclusive upon whatever is essential to support it as is a judgment after contest. Burtnett v. King, 33 Cal.2d 805, 810, 205 P.2d 657, 12 A.L.R.2d 333; Bohn v. Watson, 130 Cal.App.2d 24, 278 P.2d 454; O'Brien v. Appling, 133 Cal.App.2d 40, 283 P.2d 289; In re Estate of Williams, 36 Cal.2d 289, 292–293, 223 P.2d 248, 22 A.L.R.2d 716; Horton v. Horton, 18 Cal.2d 579, 116 P.2d 605; Fitzgerald v. Herzer, 78 Cal.App.2d 127, 177 P.2d 364; Morenhout v. Higuera, 32 Cal. 289; Hartson v. Shanklin, 57 Cal. 558; Hartson v. Shanklin, 58 Cal. 248; Maddux v. County Bank, 129 Cal. 665, 62 P. 264; Harvey v. Griffiths, 133 Cal.App. 17, 23, 23 P.2d 532; Kittridge v. Stevens, 16 Cal. 381; Brown v. Brown, 170 Cal. 1, 147 P. 1168; Brown v. Brown, 170 Cal. 8, 147 P. 1171; Wattson v. Dillon, 6 Cal.2d 33, 56 P.2d 220; San Gabriel Valley Bank v. Lake View Town Co., 7 Cal.Unrep. 266, 86 P. 727; Fry v. Baltimore Hotel Co., 80 Cal.App. 415, 252 P. 752; English v. English, 9 Cal.2d 358, 70 P.2d 625, 128 A.L.R. 472; 29 Cal.Jur.2d, Judgments, § 235.

We are left, then, with no agreement, compromise or settlement, with nothing more than a judgment whose roll on its face unquestionably decides the question of defendant's liability. Even assuming that that judgment was the result of a compromise by the jurors, it must create an estoppel—be res judicata—unless it may be ignored by reason of some legal ground on which it may be attacked. When such an attack is made in response to a plea of res judicata as to such a judgment, it is collat-

eral, Gagnon Co., Inc. v. Nevada Desert Inn, 45 Cal.2d 448, 289 P.2d 466, and the majority opinion cites no authority for collaterally attacking a judgment on the ground that the jury reached its verdict underlying the judgment by compromise. Indeed, the majority opinion admits a collateral attack is not available because it says a res judicata judgment is final and binding as between the immediate parties thereto. It is no answer to say that the judgment is not res judicata because being based on a compromise verdict the issue of liability was not determined. See, supra, quotation from Helpling v. Helpling, 50 Cal.App. 676, 682, 195 P. 715. If the jury did not decide that issue, it decided nothing, and the judgment entered on its verdict would not be binding on the parties thereto. To say it did not decide the issue is to ignore the pleadings, verdict and judgment, and to permit a collateral attack on the judgment which is not permitted.

If the majority opinion is permitted to stand, every judgment entered on a verdict in a personal injury action where the amount of the verdict is less than the special damages proved, will be void and subject to collateral attack even after it becomes final. In other words, there will be no judgment and the case will remain undetermined to the same extent as if the jury had failed to agree on either the issue of liability or damages. The foregoing conclusion must follow from the reasoning of the majority, as the judgment in favor of plaintiff-husband, which established defendant's liability for the injuries suffered by both husband and wife, became final, and must be res judicata unless it may be collaterally attacked. If it may be collaterally attacked, it is void, and the case, even as to plaintiff-husband, has not been determined. I am sure the majority would not consciously so hold.

I would, therefore, reverse the judgment and instruct the trial court to proceed to trial on the sole issue of the amount of damages suffered by Virginia.

148 Cal.App.2d 20

The PEOPLE of the State of California, Plaintiff and Respondent,

v.

Donald Michael FOOTE, Raymond De Forest Johnson, William E. Curtis, Defendants and Appellants.

Cr. 5855.

Supreme Court of California, In Bank.

Feb. 15, 1957.

Prosecution of three defendants for robbery in first degree and conspiracy to commit robbery. The Superior Court, San Diego County, John A. Hewicker, J., entered separate judgments of conviction as to each defendant and denied each defendant's motion for new trial and they appealed. The Supreme Court, Gibson, C. J., held that evidence sustained conviction of one defendant but convictions of other two codefendants must be reversed because of the erroneous admission of one defendant's recorded confession containing prejudicial hearsay statements concerning other defendants.

Affirmed in part and reversed in part.

Opinion, 299 P.2d 997, vacated.

1. Criminal Law ⇐531(3)

In prosecution for robbery in first degree and for conspiracy to commit robbery, there was substantial evidence to support determination that defendant's confession had been given voluntarily.

2. Criminal Law ⇐1186(4)

In prosecution for first-degree robbery and conspiracy to commit robbery, evidence of defendant's guilt was clearly established by other evidence and no miscarriage of justice resulted because of admission of recorded confession of defendant before deleting hearsay statements therefrom. West's Ann.Cal.Const. art. 6, § 4½.

3. Criminal Law ⇐1144(15)

Where jury is instructed that evidence is admitted only as to certain counts or as

to certain defendants, it will ordinarily be presumed that jury followed instructions and there was no prejudice.

4. Criminal Law ⇐422(1)

Where statements of a codefendant are admitted which are irrelevant or unnecessary in establishing a case against him and are extremely prejudicial and inadmissible hearsay as to a codefendant, they should be excluded from the evidence.

5. Criminal Law ⇐673(4), 1186(4)

In prosecution for robbery in first degree and conspiracy to commit robbery, prejudicial error was committed by trial court in admitting into evidence recorded confession of third codefendant which contained hearsay statements implicating other two defendants in various crimes and activities for which they were not on trial, notwithstanding fact that court instructed jury that confession was admissible only as against confessing defendant and not as against the other two defendants. West's Ann.Cal.Const. art. 6, § 4½.

Raymond De Forest Johnson, in pro. per.

Charles E. Karpinski, San Diego, under appointment by the Dist. Ct. of App., Richard E. Adams, San Diego, under appointment by the Supreme Ct., Edgar G. Langford, J. Perry Langford, J. Robert O'Connor, and Barton C. Sheela, Jr., San Diego, for appellants.

Edmund G. Brown, Atty. Gen., and Norman H. Sokolow, Deputy Atty. Gen., for respondent.

GIBSON, Chief Justice.

After a jury trial, defendants Foote, Johnson and Curtis were found guilty of robbery in the first degree and of conspiracy to commit robbery. Each defendant appeals separately from the judgment of conviction and from the order denying his motion for a new trial.

On July 31, 1955, near 10 p. m., two men, whose faces were masked by silk stockings, threatened the cashier of a drive-in movie theater with guns and took about $800 from him. About 15 minutes afterwards, and some three miles from the theater, two police officers who had heard of the robbery stopped a 1950 Mercury automobile which contained three men. The owner, Foote, stepped out of the car and walked over to the officers, who ordered the other two men to step out with their hands in view. Instead the car was put in gear and sped away. The officers fired several shots at the automobile and, after getting Foote into their car, attempted pursuit. They were unable to overtake the Mercury automobile, but they found it unoccupied a few minutes later near Foote's home. Several rolls of coin had been left in the car, and one of them was marked "St. Brigid's Church," the same marking as that on some of the rolls taken from the theater.

Several hours before commission of the crime, the three defendants were together at the Foote residence. Foote's mother testified that her son left about 9 p. m. but that she did not know if anyone left with him. Later that evening, she heard a car door slam and a man's voice, which seemed to come from the car, call something like "Terry, hurry up or I am going to leave you," and she saw Johnson come into the entry hall and then leave. A few minutes afterward the police officers arrived with her son.

Johnson was apprehended on August 29, 1955. At first he denied that he had any part in the robbery but later, during lengthy questioning by police officers, he confessed, saying that he and Foote held up the cashier while Curtis, who was "part of the operation," waited in the car. The purpose of the robbery, according to Johnson, was to obtain money to finance the smuggling of narcotics from Mexico. He admitted being with the other defendants in the automobile when it was stopped by the police officers and said that, after escaping from the officers, he and Curtis went to the Foote residence where he hid the two guns used in the robbery.

Unknown to Johnson, his statements to the police officers were recorded, and a portion of the recordings, lasting over four hours, was played to the jury. Before the recordings were offered in evidence defendants asked permission to review them. The court rejected the request but ordered the district attorney to delete any objectionable matter. Defendants were not permitted to make objections until after the recorded conversations were in evidence. They then made motions for mistrial which were denied. The jury was instructed, however, that the conversations were not binding on Foote and Curtis and were to be disregarded in considering the case against them.

Johnson repudiated the statements made in his confession which connected him with the robbery. He testified that he and Foote parted about 9 p. m., which was approximately an hour before the robbery was committed, and that he did not commit the robbery and was not in the automobile when it was stopped by the police. According to his testimony, he told the police officers that he robbed the theater because they promised that, if he made such a statement, his wife, who was then in jail, would not be prosecuted for having aided him to escape capture. The police officers testified that, although Johnson made numerous attempts to secure such an agreement, they repeatedly refused to deal with him, and their testimony is borne out by the recordings of the conversations.

Foote testified that he had been with Curtis and Johnson on the night of the robbery and that they were with him in the automobile when it was stopped by the police, but he denied that he participated in the robbery.

Curtis did not take the witness stand.

[1, 2] There is substantial evidence to support the determination that Johnson's confession was given voluntarily. He contends, however, that it was error to admit in evidence portions of the recordings containing statements pertaining to his parole violations, the desertion of his first wife, the asserted invalidity of his second marriage, his association with criminal characters and his use of narcotics. Some of these statements were inadmissible, but his guilt was clearly established by other evidence and we are of the opinion that no miscarriage of justice resulted as to him by reason of the admission of the erroneous evidence. (See Cal.Const., art. VI, § 4–½.)

The situation is quite different with respect to Foote and Curtis. The jury was permitted to hear the recorded statements by Johnson that Foote had narcotics in his home, that he sold them and used them and that his mother had believed that he was guilty of the robbery. There was also a statement by a police officer, which appears to be untrue, that Foote had pleaded guilty to a charge of smuggling narcotics. The recordings also contained statements by Johnson to the effect that Curtis used narcotics, committed "sneaky" crimes like burglary, enjoyed causing trouble between people to see them fight, had hoodlums intimidate Johnson's mother to keep Johnson quiet and had associated with Johnson in prison.

[3, 4] Where the jury is instructed that evidence is admitted only as to certain counts or as to certain defendants, it will ordinarily be presumed that the jury followed the instruction and that there was no prejudice. People v. Tarantino, 45 Cal.2d 590, 597, 290 P.2d 505, and cases cited; People v. Dabb, 32 Cal.2d 491, 499, 197 P.2d 1. Where, however, statements of a codefendant are admitted which are irrelevant or unnecessary in establishing a case against him and are extremely prejudicial and inadmissible hearsay as to a codefendant, they should be excluded from the evidence. People v. Zammora, 66 Cal.App.2d 166, 152 P.2d 180. In the Zammora case Mr. Justice White speaking for the court said, "Notwithstanding instructions of the court that such statements were not to be considered against code-

fendants named therein by the declarant, it is obvious, in the light of human experience, that the effect of such statements upon the jury would serve only to injure the cause of the co-defendant so accused and against whom such statements were concededly inadmissible. The multiplicity of such statements coupled with the number of defendants and the long duration of the trial could serve only to make more difficult the task of the jury in following the court's instructions not to consider such testimony save and except as to the defendants who made the statements. * * * We do not want to be understood as holding that any admission or confession made by the declarant in these statements was not admissible, but we do hold that it is not permissible to get before the jury damaging and prejudicial, but inadmissible evidence against a co-defendant, under the guise of introducing an admission or confession by someone else who has made a statement. The parts of such declarations containing accusatory and inadmissible statements against co-defendants should have been excluded, and only those parts containing admissions against interest or confessions by a declarant or which were properly admissible for purposes of impeachment should have been admitted. To hold otherwise, would be to make possible a conviction upon what is purely hearsay and inadmissible but extremely prejudicial evidence. Notwithstanding the admonitions of the court, the prejudicial statements are nevertheless before the jury and to hope that they might be forgotten by the jury in their deliberations is to belie human nature and challenge human experience." 66 Cal.App.2d at pages 211–212, 152 P.2d at page 203.

The parts of the recordings which were played to the jury lasted for more than four hours, and none of the matters complained of was a necessary part of Johnson's confession. Some of the statements, such as the police officer's assertion that Foote had pleaded guilty to smuggling narcotics, were not admissible in the case against Johnson. Likewise irrelevant as to Johnson were the statements that Curtis committed "sneaky" crimes like burglary, enjoyed causing trouble between people to see them fight, and had hoodlums intimidate Johnson's mother to keep him quiet.

[5] The accusations made by Johnson and the police were very prejudicial to Foote and Curtis, and it is extremely unlikely that in considering the case against them the jury could erase these inflammatory statements from their minds. Furthermore, the district attorney in his argument to the jury made no effort to distinguish the case against Johnson from that against Foote and Curtis in referring to the statements made by Johnson. Under these circumstances, the hearsay evidence undoubtedly weighed heavily against Foote and Curtis and may have been the determining factor which brought about their conviction. After reviewing the entire record, we must conclude that the admission of these statements resulted in a miscarriage of justice as to Foote and Curtis.

The judgment as to Johnson and the order denying him a new trial are affirmed. The judgments as to Foote and Curtis and the orders denying them a new trial are reversed.

SHENK, CARTER, TRAYNOR, SCHAUER, SPENCE and McCOMB, JJ., concur.

Francis W. HUDSON and Merle S. Hudson, his wife, Plaintiffs and Appellants,

v.

Thomas WEST and Pearl M. West, his wife, Defendants and Respondents.

Sac. 6438.

Supreme Court of California,

In Bank.

Feb. 7, 1957.

Action wherein plaintiffs sought to confirm their right to take water from ravine during irrigation season. From judgment rendered by the Superior Court, El Dorado County, Ralph McGee, J., assigned by chairman of judicial council, plaintiffs appealed. The Supreme Court, Traynor, J., held that since plaintiffs proved only that they were owners of land through which a natural watercourse ran but introduced no evidence to show that any of the land for which the water was claimed was within the watershed or to show that right to water had not been lost by severance, they failed to establish riparian character of land and were not entitled to any water as riparian owners.

Judgment affirmed as modified.

Schauer, Shenk, and McComb, JJ., dissented.

Opinion, 283 P.2d 53, vacated.

1. Quieting Title ⇐51

In suit to quiet title wherein defendant denies plaintiff's title and asserts title of his own, praying for affirmative relief, defendant's title may be properly quieted, though his pleading is not technically a cross-complaint.

2. Waters and Water Courses ⇐247(1)

One relying upon a riparian right to waters for irrigation must plead riparian character of his lands, quantity of water or proportion of stream to which he claims to be entitled as riparian owner, and location of his land with respect to land of other party.

3. Waters and Water Courses ⇐247(1)

In action to establish water rights for riparian lands, amount of irrigable riparian land is important only as evidence of amount of water to which riparian owner is reasonably entitled and is more properly a matter of proof than pleading.

4. Waters and Water Courses ⇐247(1)

In action wherein plaintiffs sought to establish water rights based upon riparian character of land, allegation that plaintiffs were entitled to take four inches of water from ravine during irrigation season was sufficient as to quantity of water, in absence of a special demurrer for uncertainty.

5. Pleading ⇐11

In action to establish water rights for irrigation riparian character of land may be pleaded by alleging existence of ultimate facts, which if proved would establish land as riparian.

6. Waters and Water Courses ⇐247(1)

One attempting to plead or prove riparian character of land by specific allegations must show that some part of lands is contiguous to stream or natural watercourse, that land for which water is claimed for irrigation is in watershed of stream, and that such land is part of smallest tract held under one title in chain of title leading to present owner so that riparian status has not been lost by severance.

7. Waters and Water Courses ⇐247(1)

In action wherein plaintiffs sought to establish irrigation water rights based on riparian character of land, plaintiff's pleadings were insufficient to allege such riparian character of land in that they failed to allege that land for which water was claimed was within watershed of watercourse and that riparian status had not been lost by severance.

8. Waters and Water Courses ⇐247(1)

Persons seeking irrigation water rights as riparian owners who proved only that they were owners of land through which a natural watercourse ran but who introduced

no evidence to show that any of the land for which the water was claimed was within the watershed or to show that right to water had not been lost by severance failed to establish riparian character of land and were not entitled to any water as riparian owners.

9. Judgment ⇐747(5)
Quieting Title ⇐52

Simple judgment in quiet title action that plaintiff take nothing by action and that defendant recover costs operates as estoppel upon plaintiff and determines title as between parties and protects defendants against any claim by plaintiff as fully as would affirmative defense in his favor.

10. Quieting Title ⇐10(1)

Party who would quiet title must prevail on strength of his own title and not on weakness of claims of an adversary.

11. Waters and Water Courses ⇐247(1)

Where subject of plaintiffs' unsuccessful action was right to take water during irrigation season and defendants asserted their own title thereto, judgment in favor of defendants providing that they were owners of all water flowing upon their land was too broad and would be modified to limit their right to use water to that flowing during irrigation season.

Bradford, Cross, Dahl & Hefner and Loren S. Dahl, Sacramento, for appellants.

Henry Holsinger, Gavin M. Craig and Hugh W. Ferrier, Sacramento, as amici curiae on behalf of appellants.

Hughes, Maul & Fogerty and Geoffrey A. Hughes, Placerville, for respondents.

TRAYNOR, Justice.

By this action plaintiffs sought to confirm their right to take four inches of water from Grub Ravine during the irrigation season and to enjoin defendants' interference with that right. Defendants denied plaintiffs' right to take water, alleged their own prescriptive right to take all the water flowing through their land in Grub Ravine, and prayed that their own right be quieted against the claims of plaintiffs. The trial court entered judgment providing that plaintiffs take nothing by their action, that defendants are the owners of all waters flowing on or upon their land, and that defendants' title to said water be quieted as against the claims of plaintiffs. Plaintiffs appeal.

It is contended on behalf of plaintiffs that they proved rights as riparian owners, that the evidence will not support a judgment that defendants have acquired a prescriptive right to take all the water flowing through defendants' land in Grub Ravine, and that in any event the judgment affirmatively quieting defendants' title is erroneous because defendants did not cross-complain. It is contended on behalf of defendants that plaintiffs not only did not properly allege but failed to prove a riparian right, that having failed to prove their own right to take water, plaintiffs may not complain of a judgment confirming defendants' water right, and that in any event the evidence is sufficient to support a judgment that defendants acquired a prescriptive right to take all the water flowing through their land in Grub Ravine during the irrigation season.

On appeal, counsel for the state Department of Public Works, Division of Water Resources, filed an amicus curiae brief in which they attack the judgment, contending that there is no evidence in this case that defendants complied with the statutory procedures concerning the appropriation of water, Water Code, §§ 1200–1801, and that without such compliance no prescriptive right to use water may be acquired in this state. The parties have not raised this issue, however, and the judgment quieting title in defendants prejudices no right of the state of California, for neither it nor the Department of Public Works was a party to this action. (See Water Code, § 1052.)

The Judgment is Not Erroneous Because of Defendants' Failure to Cross-Complain.

[1] If the judgment is otherwise proper, it is not erroneous because of defendants' failure to corss-complain. Defendants denied plaintiffs' right to take water, asserted their own water right, and prayed that their right be quieted against plaintiffs' claims. In a suit to quite title, when the defendant denies the plaintiff's title, asserts his own title, and prays for affirmative relief, the defendant's title may properly be quieted though his pleading is not technically a cross-complaint. Talbot v. Gadia, 123 Cal.App.2d 712, 721, 267 P.2d 436; Rinker v. McKinley, 65 Cal.App.2d 109, 111, 149 P.2d 859.

Even if Plaintiffs' Pleadings Contained Sufficient Allegations to Place Riparian Rights in Issue, Plaintiffs Did Not Prove a Right to Take Water as Riparians.

[2, 3] One who relies upon a riparian right must plead: (1) the riparian character of his land, (2) the quantity of water or the proportion of the stream to which he claims to be entitled as a riparian owner, and (3) the location of his land with respect to the land of the other party. Riverside Water Co. v. Gage, 89 Cal. 410, 420–421, 26 P. 889; San Luis Water Co. v. Estrada, 117 Cal. 168, 182–183, 48 P. 1075; Wutchumna Water Co. v. Pogue, 151 Cal. 105, 112, 90 P. 362; Montecito Valley Water Co. v. Santa Barbara, 151 Cal. 377, 378, 90 P. 935. It has been said that the pleader should also allege the quantity of his irrigable riparian land, Wutchumna Water Co. v. Pogue, supra; Montecito Valley Water Co. v. Santa Barbara, supra, but since that fact is important only as evidence of the amount of water to which the riparian owner is reasonably entitled, it is more properly a matter for proof than pleading.

Plaintiffs alleged in their first amended complaint as amended by a pleading entitled "second amended complaint," that they are the owners of certain described land and of a water right "appurtenant" thereto; that they have been in possession thereof and paid taxes thereon for more than five years; that said water right of four inches has its source in Grub Ravine; that Grub Ravine is a natural watercourse; that the water flowing in Grub Ravine has its source on land above that of defendants and that said water flows from defendants' land, through intervening land, onto the land of plaintiffs; and that defendants' land is at an elevation higher than that of plaintiffs.

[4] It is apparent that plaintiffs sufficiently alleged the location of their land with respect to the land of defendants. They claim to be owners of land downstream from defendants' land. It is also clear that plaintiffs claim the right to take "four inches" of water. Although without further qualification "four inches" is an indefinite quantity of running water, in the absence of a special demurrer for uncertainty, plaintiffs sufficiently alleged the quantity of water that they claim the right to use.

[5] The remaining question is whether plaintiffs sufficiently alleged the riparian character of their land. The riparian character of land may be pleaded in either of two ways: (1) by alleging the existence of ultimate facts, which if proved would establish the land as riparian or (2) by alleging generally that the land is riparian to a stream or natural watercourse. Although the latter allegation is conclusional, it is sufficient to indicate to the other party the nature of the pleader's claim and is analogous to the commonly accepted general allegations of ownership and negligence.

[6, 7] In Rancho Santa Margarita v. Vail, 11 Cal.2d 501, 528–529, 81 P.2d 533, it was held that three things must be proved to establish land as riparian in character: (1) some part of the land must be shown to be contiguous to a stream or natural watercourse; (2) the land for which water is claimed must be shown to be within the

watershed of the stream, Bathgate v. Irvine, 126 Cal. 135, 143, 58 P. 442; (3) the land for which water is claimed must be shown to be part of the smallest tract held under one title in the chain of title leading to the present owner, that is that the land's riparian status has not been lost by severance. Boehmer v. Big Rock Irrigation District, 117 Cal. 19, 48 P. 908. It follows that one who attempts to plead the riparian character of his land by specific allegations must plead the existence of the foregoing facts. Plaintiffs allege that their land is traversed by a natural watercourse, but their pleadings contain no allegation that any land for which water is claimed is within the watershed of the watercourse, nor is there any allegation touching the matter of severance. It is apparent, therefore, that plaintiffs' specific allegations are insufficient to place in issue the riparian character of their land.

The question arises whether plaintiffs' allegation that they own land and a water right "appurtenant" thereto may be construed as a general allegation of the riparian character of plaintiffs' land. Such an allegation has been held to be indicative of a right by prescription, Morgan v. Walker, 217 Cal. 607, 608, 20 P.2d 660; see 26 Cal.Jur. 209, § 414, but a riparian water right has also been described as "appurtenant" in recent cases. See City of Pasadena v. City of Alhambra, 33 Cal.2d 908, 925, 207 P.2d 17. Even if an allegation of ownership of land contiguous to a natural watercourse and of a water right appurtenant to the land, liberally construed, Code Civ.Proc. § 452; see Matteson v. Wagoner, 147 Cal. 739, 742, 82 P. 436; Toney v. Security First Nat. Bank, 108 Cal.App.2d 161, 167, 238 P.2d 645, would be sufficient to place in issue the riparian character of the pleader's land, plaintiffs did not prove a right to take water as riparians.

[8] Although the riparian character of land may be put in issue by a general allegation, to prove that land is riparian it is necessary, as previously noted, to show that: (1) some part of the land is contiguous to a stream or natural watercourse; (2) the land for which water is claimed is within the watershed of the stream; and that (3) the land for which water is claimed is part of the smallest tract held under one title in the chain of title leading to the present owner. Rancho Santa Margarita v. Vail, supra, 11 Cal.2d 501, 528–529, 81 P.2d 533 and cases cited; see Kinney on Irrigation and Water Rights, 2d ed., vol. 1, pp. 794–795, § 466. Plaintiffs proved that they are the owners of land through which a natural watercourse runs. They introduced no evidence, however, to show that any of their land for which water is claimed is within the watershed. Furthermore, although they traced their title back to a deed of 1890 by which the owner of some 120 acres conveyed the four-acre tract that they now own, plaintiffs offered no evidence of the state of the title to this tract prior to 1890. Plaintiffs proved only one of the three facts it was incumbent upon them to prove, namely, that their land is contiguous to a natural watercourse. Proof of that fact alone does not establish the riparian character of plaintiffs' land, nor does it entitle plaintiffs to any water as riparian owners. Rancho Santa Margarita v. Vail, supra, 11 Cal.2d at pages 528–529, 81 P.2d 533; Riverside Water Co. v. Gage, supra, 89 Cal. at pages 420–421, 26 P. 889; San Luis Water Co. v. Estrada, supra, 117 Cal. at pages 172–173, 182–183, 48 P. 1075; Wutchumna Water Co. v. Pogue, supra, 151 Cal. at pages 111–112, 90 P. 362.

Having Failed to Prove Their Own Right to Take Water Plaintiffs May Not Complain of a Judgment Confirming Defendants' Water Right.

[9] In Warden v. Stoll, 210 Cal. 374, 377, 291 P. 835, 837, it was held: "A simple judgment in a quiet title action in favor of the defendant, that is a judgment that plaintiff take nothing by his said action and that the defendant recover his costs, operates as an estoppel upon the plaintiff and determines title as between the parties and protects the defendant against any

claim of the plaintiff as fully as would an affirmative decree in his favor. [Citations.] The insertion, therefore, in the decree in this action of a provision awarding the respondents affirmative relief against the appellant, while erroneous, does not prejudice the appellant in any of her substantial rights and may be regarded as surplusage." This rule is well settled. California Bank v. Traeger, 215 Cal. 346, 349–351, 10 P.2d 51; Allen v. McGee, 54 Cal.App.2d 476, 485–486, 129 P.2d 143; Wagner v. Worell, 76 Cal.App.2d 172, 182–183, 172 P.2d 751; and see generally, White v. Lantz, 126 Cal.App. 693, 14 P.2d 1041 and authorities their cited. Moreover, it derives additional support from section 581c of the Code of Civil Procedure, which provides that when a plaintiff fails to prove his case and a judgment of nonsuit is entered against him, the judgment is an adjudication upon the merits unless the court provides to the contrary.

[10] It is fundamental that a party who would quiet his title must prevail, if at all, on the strength of his own title and not on the weakness of the claims of an adversary. Helvey v. Sax, 38 Cal.2d 21, 23, 237 P.2d 269. The record in this case discloses that plaintiffs failed to prove any right to take water from Grub Ravine, and it was therefore properly adjudged that they take nothing by their action. By that judgment plaintiffs and their successors are forever barred from again asserting against defendants or their successors claims, made or which could have been made, to the water right that is the subject of this action. Plaintiffs are not harmed, therefore, by a judgment confirming defendants' right to take all the water flowing through their land in Grub Ravine during the irrigation season and may not challenge the sufficiency of the evidence to support such a judgment. Allen v. McGee, supra.

[11] The judgment entered by the trial court, however, is too broad in providing that defendants are the owners of all waters arising on, or flowing on, or upon, their land. The record discloses that the subject of this action was the right to take water from Grub Ravine during the irrigation season. The right to take water during the remainder of the year was not litigated. The judgment is modified, therefore, to limit defendants to the right to use all the water flowing through their land in Grub Ravine during the irrigation season. As so modified the judgment is affirmed. Plaintiffs shall bear the costs of this appeal.

GIBSON, C. J., and CARTER and SPENCE, JJ., concur.

CARTER, Justice (concurring).

I concur in the judgment of affirmance and in the reasoning in the majority opinion with the exception of the inference which might be drawn therefrom that a riparian right may be pleaded by simply alleging the ownership of land situated on a natural stream or watercourse and the ownership of a water right from said stream as being appurtenant to said land. It is my opinion that such a pleading would not be sufficient to raise an issue of riparian ownership or the existence of a riparian right. See, Riverside Water Co. v. Gage, 89 Cal. 410, 420, 26 P. 889; Wutchumna Water Co. v. Pogue, 151 Cal. 105, 112, 90 P. 362; San Luis Water Co. v. Estrada, 117 Cal. 168, 182, 48 P. 1075; Creighton v. Evans, 53 Cal. 55; Montecito Valley Water Co. v. Santa Barbara, 151 Cal. 377, 90 P. 935; Title Ins. & Trust Co. v. Miller & Lux, Inc., 183 Cal. 71, 190 P. 433; Strong v. Baldwin, 154 Cal. 150, 97 P. 178; Rancho Santa Margarita v. Vail, 11 Cal.2d 501, 528–529, 81 P.2d 533. It appears to be the settled law of this state that the riparian right, or the right of a riparian owner to have his portion of the water flowing in the stream past his riparian land, is not an easement or an appurtenance, but a part and parcel of the land itself. 26 Cal.Jur., pp. 209–210, §§ 414, 415; Lux v. Haggin, 69 Cal. 255, 4 P. 919, 10 P. 674; Ferrea v. Knipe, 28 Cal. 340; Stanford v. Felt, 71 Cal. 249, 16 P. 900; Miller & Lux v. Enterprise C. & Land Co., 169 Cal. 415, 147 P. 567; Anaheim Union Water Co. v. Fuller, 150 Cal. 327, 88 P. 978,

11 L.R.A.,N.S., 1062; Miller & Lux v. Madera Canal etc. Co., 155 Cal. 59, 99 P. 502, 22 L.R.A.,N.S., 391; Herminghaus v. Southern California Edison Co., 200 Cal. 81, 252 P. 607; Fall River Valley Irrigation Dist. v. Mt. Shasta Power Corp., 202 Cal. 56, 259 P. 444, 56 A.L.R. 264. The rule as above stated has been restated in innumerable decisions of this court and the appellate courts of this state and the only case in which the riparian right has been referred to as being appurtenant to the land on which it is used is the recent case of City of Pasadena v. City of Alhambra, 33 Cal.2d 908, 207 P.2d 17, 28. This case, however, did not involve the riparian right doctrine and no issue involving riparian rights was considered or decided in that case. It may be said, therefore, that the statement in the majority opinion in that case that "Generally speaking, an overlying right, analogous to that of a riparian owner in a surface stream, is the right of the owner of the land to take water from the ground underneath for use on his land within the basin or watershed; the right is based on ownership of the land and is appurtenant thereto," is mere dictum. It is not supported by any of the cases cited in the opinion in that case and I have found no other case decided by either this court or any of the appellate courts of this state in which the riparian right has been referred to as being appurtenant to the land on which it is used. On the other hand the authorities are uniform in holding that a water right acquired by prescription, appropriation, adverse user or parol license may properly be pleaded by alleging that such a right is appurtenant to the land on which it is used. 26 Cal.Jur., pp. 209–210, §§ 414, 415; In re Estate of Thomas, 147 Cal. 236, 81 P. 539; Miller & Lux, Inc., v. J. G. James Co., 179 Cal. 689, 178 P. 716; Verdugo Canon Water Co. v. Verdugo, 152 Cal. 655, 93 P. 1021; McDonald v. Bear River & Auburn W. & Min. Co., 13 Cal. 220; Rianda v. Watsonville Water & Light Co., 152 Cal. 523, 93 P. 79; American Co. v. Bradford, 27 Cal. 360; Irrigated Valleys L. Co. v. Altman, 57 Cal.App. 413, 207 P. 401.

In my opinion a litigant in a case involving water rights is entitled to know whether his opponent is claiming the right to use water on his land as a riparian owner or is claiming that his right to the use of water is predicated upon prescription, appropriation, adverse user, parol license or other sources of title. This knowledge can be gained only by an allegation in a pleading that the claimant is relying upon his right as a riparian owner. The elements of this right are properly set forth in the majority opinion, and I agree with the majority in its statement that a riparian right may be pleaded by either alleging all of the factors necessary to establish that right or by pleading the riparian character of his land in general terms; that is, by pleading ownership of specifically described land adjacent to a natural stream or watercourse and specific allegations that said land is riparian to said stream or watercourse and that the owner has the right to devote a specific quantity of water from said stream to a beneficial use on said land as a riparian owner. The elements which are necessary to support the allegation of riparian ownership may be established by proof as correctly set forth in the majority opinion.

I would be disposed to hold, however, that although a riparian right was not properly pleaded, if the proof offered was sufficient to establish the elements of a riparian right and the case were tried on the theory that a riparian right was involved, I would be disposed to sustain a judgment based upon the riparian right theory. Such, however, is not the situation in this case. Here, there is no allegation in any of the pleadings and no statement in the findings or judgment which would support the riparian right doctrine. Neither is there any evidence which in the slightest degree supports the elements necessary to establish riparian ownership in either of the parties hereto or the right of either of said parties to make a riparian use of water. In fact,

the only mention of the riparian right doctrine was in a colloquy between court and counsel and it is clear that neither party to this action had any thought of basing his claim to a water right upon the doctrine of riparian rights. It is clear, therefore, that there is no issue pertaining to riparian rights in this action.

The dissenting opinion of Mr. Justice Schauer in this case is based upon the assumption that the riparian right issue is involved in this case and that the controversy between the parties involves the right to store and impound water. Both of these assumptions are erroneous. From what I have heretofore stated it is obvious that the riparian right issue is not involved in this case. With respect to the question of the right to store or impound water, plaintiff alleged in his second amended complaint: "V. That on or about October, 1949, the defendants West herein constructed, across the said ravine, a dam of earth in excess of about fifteen feet in height, and that said dam constructed on the lands of defendants has stopped the flow of water as it was wont to flow from and across the lands of defendants through the intervening lands onto the lands of plaintiffs; that the defendants West herein have taken, used and diverted all of the water flowing in said water course and that the plaintiffs herein have not been able to use any water from said ravine or water course by reason of the fact that the defendants West did construct said dam and did take, use and divert said water.

"VI. That said dam constructed by the defendants is in direct contravention of the Water Code of the State of California and particularly Section 6003 thereof; that said dam, as now constructed, constitutes a hazard, in that in the event said dam would burst or become destroyed by flood or otherwise, the lands and the improvements thereon belonging to plaintiffs would be irreparably injured and damaged by flooding." At the trial the undisputed evidence disclosed that in 1950 defendant constructed a dam on his property across Grub Gulch or Red Ranch Ravine. The dam was 15 feet high, about 55 feet long on top and 30 feet on the bottom. The maximum depth of the water in the dam was about 8 feet and it backed the water up about 60 feet. The maximum capacity of the reservoir created by the dam was about two acre feet of water. The purpose of constructing the dam was to impound the very small flow of water in the ravine which defendant had previously diverted by means of a ditch, flume and pipe line to his land for the purpose of irrigating his orchard. This flow was determined by the only measurement made to be one and one-half miner's inches of water. After defendant constructed his dam, he pumped water out of the reservoir for the irrigation of his orchard instead of diverting it as he did previously by means of a ditch, flume and pipe line.

Neither the plaintiff nor the defendant has alleged or made any claim that the dam constructed by defendant was for the purpose of impounding water during the rainy season for use during the irrigation season and it is obvious that the reservoir behind the dam is not of sufficient capacity to store a sufficient quantity of water to irrigate any considerable area of land. We may take judicial notice that two acre feet of water would not be sufficient to irrigate even two acres of land during the irrigation season in the locality where defendant's land is situated. The record discloses that defendant owns approximately 25 acres of land which is devoted to an orchard and that he found it more practical to impound the small flow of water flowing in the ravine above his reservoir so that he could more efficiently use it to irrigate his orchard.

As stated in the majority opinion defendant makes no claim to the use of any water from the ravine during the non-irrigation season and the evidence shows that the water in the ravine would flow through the spillway of the dam during the non-irrigation season and on down the ravine.

In fact, the plaintiff complained that the dam constituted a hazard to his property because it might fail and the increased flow of water from the reservoir would damage his property. The trial court found against this contention.

The undisputed evidence showed that the irrigation season extended from May to October and that during the rest of the year there was so much water flowing down the ravine that it was a menace to plaintiff's property and one of the issues raised by his complaint was that the dam constructed by defendant in the ravine accentuated that menace and for this reason he wanted the dam abated.

The trial court wrote a memorandum opinion in which he stated that plaintiff had not made out a case because he had not proven that he had used any given quantity of water from the ravine, that prior to the installation of the steel syphon in the ditch of the El Dorado Irrigation District plaintiff had undoubtedly received sufficient water for his needs from the leaky wooden syphon and the spring on the Clark property which was located between the property owned by plaintiff and defendant.

The court made findings of fact to the effect that defendant had used all of the water which flowed from the Jones property continuously for more than five years and that no water flowed from defendant's property to plaintiff's property; that the dam was not a menace or hazard to plaintiff's property and that defendant had not violated plaintiff's right by building the dam and impounding the water behind it. The court quieted defendant's title to his land and all of the water flowing in the ravine above his dam and denied plaintiff any relief.

I agree with the majority that the judgment should be modified by limiting defendant's use of all of the water flowing in the ravine to the irrigation season, as it is conceded that neither he nor plaintiff has any use for water for irrigation during the non-irrigation season.

SCHAUER, Justice (dissenting).

The majority opinion avoids rather than answers the basic questions presented by this appeal, which questions have been the subject of extended study and debate among the justices of this court. I respectfully differ with them in at least three significant aspects of their action: (1) As to the tenability of the ground on which they make present disposition of the appeal; (2) as to the wisdom and practicality of this court's undertaking (instead of reversing and remanding to the trial court) to itself revise and delimit the trial court's judgment purporting to quiet title to "all waters * * * flowing on" defendants' property; and (3) as to the implied determination that present avoidance of the real issues is the better administration of justice. (See Code Civ.Proc., § 53.) I am not sure to what extent, if any, I differ with the majority as to the law which should govern the important questions which have been debated but are not decided because I do not know in sufficient detail what the majority's holdings would be. This I do know; their opinion leaves unanswered the following questions which are important:

1. Under the majority holding do the defendants have the absolute right to impound and store behind their dam *all water* or *any water* flowing in the Grub (sometimes called Red Ranch) Ravine during the *non-irrigation* season for use *during the dry season?*

2. If not, of what avail to defendants is the judgment, since their proof was that *for more than five years* before building the dam they already had been *using* on their land *during the irrigation season all waters* flowing in the ravine?

3. If the majority intend to give defendants the right to impound and store *all* or *any* waters flowing in the ravine *during the non-irrigation season* for use during the dry season, where in the record, and what, is the evidence (necessarily showing *five years' adverse user during the non-irrigation season*) to support such award?

4. If the majority intend that defendants shall have the right to impound and store above their dam during the non-irrigation season a part but not all of the waters then flowing in the ravine, what and where is the workable standard or measure which shall govern the defendants in their taking and plaintiffs in their demands?

Since the majority have seen fit not to resolve or even discuss the above noted questions, a much more full statement of the issues which have been debated in this case, and of my views thereon, is indicated.

This is a typical water rights controversy. Defendants (upper owners) became the original aggressors when they built a dam on their land and cut off the natural flow of water in the ravine leading to plaintiffs' (lower owners) property. Plaintiffs as a defensive and retaliatory move then instituted the subject proceeding seeking injunctive relief and to have their title to a fixed amount of water quieted. Defendants answered and themselves sought and were awarded affirmative relief. Plaintiffs appeal from the judgment which purports not only to deny the relief they sought but also to quiet title in defendants to their described real property in the County of El Dorado, together with "all ditches, water ways and water courses, of whatsoever kind or character situate upon said real property, and all waters arising on, or flowing on, or upon, the said real property."

Ownership of the several parcels of land by the respective parties, as established by the findings of fact, is not in dispute. Hence it follows that (in respect to the water here in dispute) such respective parties are, prima facie, entitled to whatever presumptions of ownership of water the law attaches to the ownership of the land over which the water flows in the circumstances disclosed by the evidence. The judgment in defendants' favor as to the water is based on their claim of a prescriptive right thereto. Defendants' claim of title by prescription is new matter on which they had the burden of proof. Plaintiffs attack the judgment principally on the ground that the evidence fails to establish adverse user by defendants for the statutory period.

It is to be emphasized that in considering the issues presented by plaintiffs' appeal the problem is not whether plaintiffs established any right to the quiet title and injunctive relief which they themselves sought, but, rather, whether the judgment decreeing affirmative relief in favor of defendants, by which their title to water in a much more inclusive scope than they had asserted before building the dam is declared and quieted against plaintiffs, may stand, or should be reversed.

As acknowledged in the majority opinion, "It is fundamental that a party who would quiet his title must prevail, if at all, on the strength of his own title and not on the weakness of the claims of an adversary." (See Helvey v. Sax (1951), 38 Cal.2d 21, 23, 237 P.2d 269; Peabody v. City of Vallejo (1935), 2 Cal.2d 351, 381, 40 P.2d 486.) That rule is properly applied in the majority opinion as against plaintiffs here, and supports the determination that they take nothing on their complaint, but the opinion fails to make even-handed application of the rule as against defendants when the latter assume the legally equivalent status of plaintiffs in asserting their claim to quiet their alleged title. Just as fundamental as the strength [burden] of proof rule above stated is the rule that the character of a pleading is to be determined by its substance rather than by the designation appended to it. (Pickwick Stages v. Board of Trustees (1922), 189 Cal. 417, 419 [2], 208 P. 961; Terry Trading Corp v. Barsky (1930), 210 Cal. 428, 434 [8], 292 P. 474; Zarillo v. Le-Mesnager (1921), 51 Cal.App. 442, 444 [3], 196 P. 902; Keenan v. Dean (1955), 134 Cal. App.2d 189, 194 [5], 285 P.2d 300.)

Following the above stated rule, I agree with the majority that upon a sufficient showing of adverse use defendants' title to the water "may properly be quieted though his [their] pleading is not technically [denominated] a cross-complaint." As stated in County of Los Angeles v.

Hannon (1910), 159 Cal. 37, 48, 112 P. 878, when a defendant in his "answer denies title in plaintiff and alleges that he is the owner in fee" of the disputed property, "In effect his answer is in the nature of a cross-complaint to quiet his alleged ownership of this property." Certainly, as the above quoted authorities make abundantly clear, defendants are not to be deprived of any *proven* right merely because they failed to label the pleading of their affirmative claim a "cross-complaint." But the defendants should not, as the majority do for them, give their pleading the character of a cross-complaint to attain its benefits but disavow that character to avoid its burdens.

A simple quiet title proceeding (which is the nature of the quiet title right asserted by defendants) is regarded as a suit in equity, and the issue of title is an equitable one. (See Thomson v. Thomson (1936), 7 Cal.2d 671, 681 [1], 62 P.2d 358, 117 A.L.R. 1.) Certainly if ordinary fairness is important in equity, the quoted rule that a party must prevail, if at all, only on the strength of his own title, should be applied equally as against defendants here in respect to their cause of action for equitable relief on their "in effect * * * cross-complaint to quiet [their] alleged" title by prescription to "all waters * * * flowing on, or upon" their land. Applying the subject rule, I cannot agree with the majority holding that "Having Failed to Prove Their Own Right to Take Water, Plaintiffs May Not Complain of a Judgment Confirming Defendants' Water Right." Plaintiffs here may, and do, properly complain of that portion of the judgment (decreeing title by prescription in defendants to *all waters* flowing in the ravine) which goes beyond determination of the issues *made by plaintiffs' complaint* and so much of defendants' answer *as relates to defeating plaintiffs' claims.* The judgment as entered goes far beyond the scope of the issues tendered by plaintiffs, and far beyond any possible support in the evidence.

Looking deep in the record it appears probable that the mischief in this case arises from the fact that the trial court apparently was persuaded, after submission of the cause and after it initially determined the decision it would make on the evidence and the law, to enlarge the scope and character of its intended judgment. The memorandum decision of the court states that "the plaintiffs should not recover and the defendants should recover their costs. The defendants will prepare, serve and file proposed findings and form of judgment in accordance herewith." [1] Nowhere in that memorandum decision does the court mention or suggest that judgment will be rendered for defendants quieting their title to the disputed *and to undisputed* water as against plaintiffs, but only that defendants should recover their costs. Moreover, the court's review of the evidence, in such memorandum decision, appears to be with a view to deciding whether *plaintiffs* are entitled to the relief they sought, rather than of determining defendants' affirmative cause of action.

But legally the court had the power to change its mind, and presumptively did. The judgment finally entered quiets title in defendants to "all ditches, water ways and water courses, of whatsoever kind or character situate upon [defendants'] said real property, *and all waters arising on, or flowing on, or upon, the said real property,*" (Italics added) and adjudges that plaintiffs have no right, title, estate or interest therein.

It is not in the denial of relief to plaintiffs, but in the affirmative judgment quiet-

1. The memorandum decision also states that "The plaintiffs have made no measurements of water which flowed from the lands of the defendants before the dam was built. * * * It is possible to guess * * * that the dam reduced the flow of the water, but there is no credible evidence in what quantity it reduced the flow * * * To grant plaintiffs relief * * * would require a decree that the defendants release water in a stated quantity * * * This cannot be done from the evidence * * * except by an arbitrary guess. * * *"

ing title to "all waters," etc., in defendants, that the court on this record is shown to have erred. A scrutiny of that record reveals that, as urged by plaintiffs, the evidence is insufficient to support defendants' claim of a prescriptive right to the water based on asserted adverse user for the statutory five-year period.

In conformity with the rule above stated, "that a party who would quiet his title must prevail, if at all, on the strength of his own title and not on the weakness of the claims of an adversary," the burden was on defendants, with respect to their claim for affirmative relief quieting their title to the disputed water, to prove their own title thereto. The evidence fails to support such affirmative relief in the hereinafter developed respects.

The record shows that plaintiffs and defendants each own land near Smithflat, El Dorado County. Defendants' land is at a higher elevation than that of plaintiffs. The ravine here involved was alleged by plaintiffs and found by the trial court to be a natural watercourse.[2] This finding is supported by abundant evidence,[3] which also shows that the ravine has its source in springs on land owned by one Jones, which is adjacent to and at a higher elevation than defendants' land. There is also evidence, although disputed, that such springs are likewise the source of natural water flowing in the ravine and through defendants' land down to plaintiffs' land.[3] Such ravine or watercourse, as also found by the court,[2] lies between the lands of plaintiffs and defendants and extends in a general westerly direction from defendants' land, through the land of one Clarke, and thence to plaintiffs' land. As further found by the court, defendants, in October, 1950, built a dam within the ravine and upon their lands.[4]

Under normally applied rules of construction the above epitomized findings should be accepted as establishing that both plaintiffs' and defendants' lands are ripar-

2. Finding No. II: "That Grub Ravine, sometimes known as Red Ranch Ravine, is a natural water course lying between the real properties owned by the parties to this action and extends in a general Westerly direction from the lands of the defendants to the lands of the plaintiffs."

3. Deacon Jones testified that "the actual beginning of the * * * [ravine is] up near the north side of our ranch," on which there are three springs "that lead into Red Ravine or this gulch or water course that we are talking about"; that "after and before the irrigation season * * * the waters of * * * these springs feed into this ravine * * * [but] during the irrigation season * * * I use it all."

Plaintiff testified that the water in the ravine originates "about a mile above" his land and has "its source in natural springs"; that there was no "water that came onto" his place "from any source * * * that connects with this ravine * * * other than the thread of this ravine" and other than occasional leakage from the irrigation ditch prior to replacement of the syphon in 1950.

Mr. McKinsey, residing in the vicinity, testified that the ravine is "a natural water course" which has its source in "an enlarged spring at the top of the hill, or almost to the top of the hill * * * on Deacon Jones' place"; that "the springs * * * on Deacon Jones' property * * * is * * * the source of the water flowing in the * * * [ravine], down to Mr. Hudson's [plaintiff's] property."

Mrs. Williams, who resided on plaintiffs' property from 1944 to 1947, testified that during such period she and her husband got "plenty of water all the time [out of the ravine] for our horses and our milk cows" and for their garden, and "I just supposed it was natural, because it ran all the time."

Mr. Estey, a prior owner, during 1925–1926, of plaintiffs' property, testified that during such period he used water that "Come down that ravine. It is a natural run-off from that hill"; that the water flowing in the ravine is from a "couple of big springs up there" on Deacon Jones' land plus "very little" seepage water from such land; that there are no other canyons carrying water which runs into the ravine during the summertime (the irrigation season).

4. Finding No. III: "That in the month of October, 1950, the defendants constructed within the said Grub Ravine, also known as Red Ranch Ravine, and upon the lands of the defendants an earthen dam."

ian to the watercourse.[5] As declared in Seneca Consol. Gold Mines Co. v. Great Western Power Co. (1930), 209 Cal. 206, 215, 287 P. 93, 70 A.L.R. 210, "The riparian doctrine comes down to us from the common law and it has been repeatedly defined in this state; hence little time need be spent in recounting the holdings of the courts in this regard. A few citations will suffice.

"'* * * Every owner of land, through which a natural stream flows, has a usufruct in the water of the stream as it passes along, and has an equal right with those above and below him to the natural flow of the water in its accustomed channel, at its usual level, without unreasonable detention or substantial diminution in quantity or quality, and that none of the owners can make any use of it prejudicial to the rights of the other owners, unless he has acquired a right to do so by license, grant, or prescription.' [Citations.]" (See also Wright v. Best (1942), 19 Cal.2d 368, 382, 121 P.2d 702; Rancho Santa Margarita v. Vail (1938), 11 Cal.2d 501, 528–529, 81 P.2d 533; Gin S. Chow v. City of Santa Barbara (1933), 217 Cal. 673, 684–690, 695–697, 706, 22 P.2d 5; Weck v. Los Angeles etc., Flood Control Dist. (1951), 104 Cal.App.2d 599, 609, 232 P.2d 293.)

And in City of Pasadena v. City of Alhambra (1949), 33 Cal.2d 908, 925, 207 P. 2d 17, the court declares, speaking through Mr. Chief Justice Gibson, that "Generally speaking, an overlying right, analogous to that of a riparian owner in a surface stream, is the right of the owner of the land to take water from the ground underneath for use on his land within the basin or watershed; the right is based on ownership of the land and *is appurtenant thereto.* [Citations.] The right of an appropriator depends upon an actual taking of water. [Citation.]" (Italics added.) (See also, Peabody v. City of Vallejo (1935), supra, 2 Cal.2d 351, 381–383, 40 P. 2d 486.)

Defendants' dam, as above mentioned, was constructed in 1950. It impounded the water from the ravine. Plaintiffs commenced this action in 1951, contending that before construction of the dam they had procured water for irrigation purposes from the ravine, but that since such construction the ravine has dried up and they have been deprived of such water. The trial court expressly found that for more than five years preceding commencement of the action defendants had "used all the waters arising on, or flowing on or upon * * * [defendants' land] *for beneficial purposes,* to wit, for *irrigating an orchard and pasture and for watering fowl and livestock* * * *,"[6] and as stated above, quieted title to all the water in defendants, with no reservation as to time or amount of taking. (Italics added.)

5. I agree with the majority (if such be the intended holding) that plaintiffs' pleadings are sufficient to place riparian rights in issue. To hold otherwise would be to impose far stricter rules on the construction of pleadings than is currently permitted under our code system. (See Code Civ.Proc., § 452; Faulkner v. Cal. Toll Bridge Authority (1953), 40 Cal.2d 317, 328, 253 P.2d 659; Mix v. Yoakum (1927), 200 Cal. 681, 687, 254 P. 557.)

It may be noted in this connection that plaintiffs allege in their second amended complaint that they "are the owners of a certain water right, which said water right is appurtenant to the real property owned by plaintiffs herein, and the source of said water right * * * is Grub Ravine, also known as Red Ranch Ravine. That said ravine is a natural water course, and the waters therefrom flow onto the lands of plaintiffs, across intervening lands, from the lands of defendants and have their source on lands above the lands of defendants." And in their original complaint and first amended complaint (indicating that the riparian nature of their claim has been an issue since the very inception of the action) they allege that their water right is "appurtenant to" and "an appurtenance to" their land. (See City of Pasadena v. City of Alhambra (1949), 33 Cal.2d 908, 925, 207 P.2d 17.)

6. Finding No. VII.

Plaintiffs-appellants (in the course of their argument) state that the "questions of law involved are: Whether or not an upper riparian owner who, for five years, has used all of the water of a stream acquires a prescriptive right to the waters of said stream when the lower riparian owner has not made use of the water during the same period?" [7] The stated question is neither answered nor even discussed in the majority opinion. In my view the resolution of such question is material to proper disposition of the appeal.

Generally speaking, there are three ways in which rights to surface water have been acquired in California: 1. By acquiring land through or over which a natural watercourse flows, which ordinarily and presumptively carries with it the so-called riparian right (see cases, supra) analogous to the overlying water right (see City of Pasadena v. City of Alhambra (1949), supra, 33 Cal.2d 908, 925, 207 P.2d 17.)

2. By appropriation. Prior to adoption of the Water Commission Act of 1913 (now, Water Code) first right to water, as between persons neither of whom had other or higher rights therein, was declared under the principle of prior appropriation to be in the one who first appropriated it (i. e., diverted it to non-riparian land or for non-riparian uses) for beneficial purposes. (See 26 Cal.Jur. 32–51, and cases there cited.) Under the act the Legislature placed the regulation of appropriation procedure in the hands of a water commission (now the Department of Water Resources, Water Code, § 22). In Wood v. Pendola (1934), 1 Cal.2d 435, 439, 35 P.2d 526, it is stated that "The main purpose of the act is to regulate the right to appropriate and the issuance of permits for the appropriation of unappropriated waters of the state, through the administrative offices of a state water commission thereby created. The act defines what are or may become unappropriated waters subject to appropriation." (See also Temescal Water Co. v. Dept. Public Works (1955), 44 Cal.2d 90, 95, 280 P.2d 1; Bloss v. Rahilly (1940), 16 Cal.2d 70, 75, 104 P.2d 1049.) And in Meridian, Ltd. v. San Francisco (1939), 13 Cal.2d 424, 450, 90 P.2d 537, 91 P.2d 105, the court declared that the act gives to the commission "power to allow the appropriation for beneficial purposes of unappropriated water under such terms and conditions as in the judgment of the commission will best develop, conserve and utilize in the public interest the water sought to be appropriated. It should be the first concern of the court in any case pending before it and of the department in the exercise of its powers under the act to recognize and protect the interests of those who have prior and paramount rights to the use of the waters of the stream. The highest use in accordance with the law is for domestic purposes, and the next highest use is for irrigation. When demands on the stream for those and other recognized lawful purposes by riparians and appropriators are fully met and an excess of water exists, it is for the state to say whether, in the conservation of this natural resource in the interest of the public, the diversion [made by another] is excessive." (See also Water Code, §§ 101–106, 1052, 1201, 1225.)

3. By prescription. As against one with a prior or higher right to water, such as a riparian owner, an appropriator thereof can establish a prescriptive right to such water upon proof of the elements essential to the existence of such a right. Such elements include those customary in the case of other prescriptive claims: Actual, open and notorious user, hostile and adverse to the original owner's title, continuous and uninterrupted for the statutory period, and under a claim of title in the

7. Petition for Hearing in the Supreme Court, page 2. Also, in the opening brief of Plaintiffs-Appellants, it is pointed out (pp. 11–12) that the springs which form the source of the water in the ravine "are riparian to the ravine," and that "This ravine goes through the property of plaintiffs."

claimant, *and not by virtue of another right.* The claimant must also show that his use of the amount of water he claims was for beneficial purposes. (See 25 Cal. Jur. 1156–1165, and cases there cited.) Although the law is clear that rival appropriators who seek as against each other to establish rights based on claims to previously unappropriated waters must now follow the regulations and precedures laid down by the Water Code (§§ 1200–1801), no case yet decided has determined whether or not, subsequent to adoption of the act of 1913, and particularly of the 1917 amendments thereto, a later appropriator who has not shown compliance with the procedure thereby laid down can obtain a prescriptive water right as against one whose rights are expressly recognized and saved by the statutory water law; i. e., riparian owners and "any appropriator of water to which he is lawfully entitled." (See Water Code, §§ 101, 1201, 1202, 1450–1456; Temescal Water Co. v. Dept. Public Works (1955), supra, 44 Cal.2d 90, 106, 280 P.2d 1; 42 Cal.L.Rev. 219–242, "Prescriptive Water Rights in California and the Necessity for a Valid Statutory Appropriation.") Inasmuch as the majority opinion affirms in part the judgment quieting title in defendants—a title claimed by defendants to have been acquired solely by prescription through adverse use—it would seem that determination of the law on this question is material to the plaintiffs, and to the issues in this case. Furthermore, this issue of law is important generally to the people of California, and is not, in my concept of our duty in the premises, adequately disposed of in the majority opinion by the statement that "The parties have not raised this issue * * * and the judgment quieting title in defendants prejudices no right of the state of California."

It is clear from plaintiffs' pleadings [5] and from a colloquy between court and counsel during the course of the trial of this cause [8] that plaintiffs were claiming a right to the water either as riparian owners or under continuous user for a five-year period, or under both theories, and that the issue of riparian rights was in any event inherently in controversy as a necessary incident of determining whether either plaintiffs or defendants had established title to the claimed water by adverse use. As stated hereinabove, the ownership of the land here concerned is not in dispute. As also heretofore stated, the judgment in defendants' favor as to the water rests on their claim of a prescriptive right thereto, based on asserted adverse use thereof for the statutory five-year period prior to construction of their dam in 1950. And as further already noted, both plain-

8. Such colloquy was as follows: "The Court: Let me see if I understand your position here: There has got to be shown by the plaintiff, by the greater weight of the evidence, the acquiring of a water right by grant.

"Mr. Milham [Counsel for Plaintiffs]: Color of title.

"The Court: To maintain that, Mr. Hughes, do you think they have to show actual use constantly and continuously?

"Mr. Hughes [Counsel for Defendants]: Yes, Your Honor.

"The Court: How about that Mr. Milham? Do you agree?

"Mr. Milham: A water right must, under our water code, or can be lost, if the Court please, by non-use, but if it is *riparian* and it hasn't been deeded away from a *riparian owner* by grant, a *riparian owner* does not lose by non-use. Now, that is the law. [Italics added.]

"Mr. Hughes: There is no claim in this amended complaint or the complaint at all about riparian rights.

"The Court: We will pass that point for the moment. The other one, other alternative, is to establish the right to it through the element of adverse possession, if you can."

It will be recalled that it is not plaintiffs' claim, but the sufficiency of defendants' proof of title by adverse user, that is the critical point on this appeal. As developed in the text of the opinion, an upper riparian owner, if he is to establish a prescriptive right against a lower riparian owner, must show that his use of the water went beyond his own riparian rights.

tiff's and defendants' lands are shown to be presumptively riparian to the watercourse involved. Use of water in the proper exercise of riparian rights by an upper riparian owner (defendants) has long been understood to be not a use adverse to the rights of lower riparian owners (plaintiffs), and it is only as to water diverted by the upper owner to so-called "improper" or nonriparian uses, *such as the storage of water during the wet season to be used during the dry season,* that the use has been held to constitute an appropriation (rather than a riparian use) and so to be adverse. (See Moore v. California Oregon Power Co. (1943), 22 Cal.2d 725, 730–738, 140 P.2d 798; Seneca Consol. Gold Mines Co. v. Great Western Power Co. (1930), supra, 209 Cal. 206, 214–219, 287 P. 93, 70 A.L.R. 210; Colorado Power Co. v. Pacific G. & E. Co. (1933), 218 Cal. 559, 564–565, 24 P.2d 495; cf. Peabody v. City of Vallejo (1935), supra, 2 Cal.2d 351, 374 [14], 40 P.2d 486; Pabst v. Finmand (1922), 190 Cal. 124, 128–130, 211 P. 11; Miller & Lux v. Enterprise C., etc., Co. (1915), 169 Cal. 415, 443, 147 P. 567.) In City of Pasadena v. City of Alhambra (1949), supra, 33 Cal.2d 908, 925–926, 207 P.2d 17, this court declared that "The term 'appropriation' is said by some authorities to be properly used only with reference to the taking of water from a surface stream on public land for non-riparian purposes. [Citations.] The California courts, however, use the term to refer to any taking of water for other than riparian or overlying uses. [Citations.] Where a taking is wrongful, it may ripen into a prescriptive right. * * * As between overlying owners, the rights, like those of riparians, are correlative and are referred to as belonging to all in common; each may use only his reasonable share when water is insufficient to meet the needs of all. [Citations.]" In other words, a mere riparian use by an upper owner of any or all of the water in a stream does not constitute an appropriation of the water.

The right of the lower riparian owner does not depend upon his own use or disuse of the right. As stated in Stanford v. Felt (1886), 71 Cal. 249, 16 P. 900, "[T]he right of the riparian proprietor to the flow of a stream is inseparably annexed to the soil and passes with it, not as an easement or appurtenance, but as part and parcel of it. Use does not create the right, and disuse cannot destroy or suspend it. The right of such proprietor extends to the natural and usual flow of all the water of the stream, unless when the quantity has been diminished as a consequence of the reasonable use or appropriation of it by other riparian owners for proper and legitimate purposes. (Ferrea v. Knipe, 28 Cal. 340; S.C. 87 Am.Dec. 128; Lux v. Haggin, 69 Cal. 255, 4 P. 919, 10 P. 674.) The use by the riparian owner of the water for domestic purposes for irrigation and for the propulsion of machinery are recognized as proper and legitimate purposes. This we regard as the law of this state. (See Ferrea v. Knipe and Lux v. Haggin, supra.) It appears to be law that where all the water of a stream is needed for domestic purposes and for watering cattle, and is thus consumed by one proprietor, the law allows such use.

"But in making such reasonable use of water, such proprietor must return the surplus which remains after such use to the natural channel of the stream * * *" (See also Miller & Lux v. Enterprise C. etc. Co. (1915), supra, 169 Cal. 415, 442, 147 P. 567; Herminghaus v. Southern California Edison Co. (1926), 200 Cal. 81, 95, 252 P. 607; Fall River Valley Irrigation Dist. v. Mt. Shasta P. Corp. (1927), 202 Cal. 56, 65, 259 P. 444, 56 A.L.R. 264; Tulare Dist. v. Lindsay-Strathmore Dist. (1935), 3 Cal.2d 489, 530–531, 45 P.2d 972; Meridan, Ltd. v. San Francisco (1939), supra, 13 Cal.2d 424, 450, 90 P.2d 537, 91 P.2d 105; Moore v. California Oregon Power Co. (1943), supra, 22 Cal.2d 725, 140 P.2d 798; Prather v. Hoberg (1944), 24 Cal.2d 549, 562, 150 P.2d 405.) Further, "The use of water upon riparian lands is

presumed to be riparian, and the burden of proving prescriptive rights is upon the person asserting them. [Citations.]" (Morgan v. Walker (1933), 217 Cal. 607, 615, 20 P.2d 660; cf. Seneca Consol. Gold Mines Co. v. Great Western Power Co. (1930), supra, 209 Cal. 206, 217–218, 287 P. 93, 70 A.L.R. 210.) "The presumption is that in the use of water an upper riparian proprietor is exercising his riparian rights, and no title by prescription can be given, unless it is brought home to the lower riparian proprietors that the upper riparian proprietor asserts a right other than his riparian right. [Citations.]" (Scott v. Fruit Growers Supply Co. (1927), 202 Cal. 47, 52, 258 P. 1095.)

Here, there was neither proof nor finding that the upper riparian owners (defendants) were, prior to construction of their dam in 1950, using *all or any* of the water flowing in the ravine for non-riparian purposes which would give rise to prescriptive rights or that (prior to such dam construction) it was ever brought home to plaintiffs, the lower riparian owners, that defendants were either exercising or asserting a right other than their presumptive riparian right. On the contrary there is evidence that prior to construction of the dam plaintiffs secured from the ravine all the water they wanted or claimed therefrom. Further, although the trial court found that for more than five years preceding commencement (in 1951) of this action defendants had "used all the waters arising on, or flowing on or upon" their land, it also specifically found,[9] in accordance with the evidence, that such use was "for beneficial purposes, to wit, for irrigating an orchard and pasture and for watering fowl and livestock," which use, on its face, appears to be altogether in harmony with, and not adverse to, a lower owner's riparian rights. There was no showing or finding that the water was taken out of the watershed or was otherwise diverted by defendants to non-riparian uses. It therefore follows that defendants' user is not shown to be adverse to plaintiffs as lower riparian owners until such time as defendants constructed their dam in 1950 and thus artificially impeded the flow to plaintiffs' lands of water in the ravine. And inasmuch as this action was commenced in 1951, the judgment based upon defendants' claim of adverse user for the statutory period of five years is patently untenable. To suggest, as do the majority, that plaintiffs are not prejudiced in the premises of the case, and "may not complain" of the judgment, is unrealistic and untenable.

However, regardless of what view we may take as to the presumptive or proved character of the relationship of the water in Grub Ravine to the land over which it naturally flows (as being riparian or otherwise), the judgment here cannot be sustained. Such judgment as entered not only denies plaintiffs the additional *prescriptive* water rights they sued to establish but also deprives them of every vestige of riparian or other rights which apparently they had enjoyed undisputed until defendants erected their dam. Plaintiffs are left by the superior court judgment with no right to have any water at any time flow in Grub Ravine to their lands. That holding rests necessarily on a finding of prescriptive title to all the water in defendants. As hereinafter developed the majority recognize a deficiency in proof, which in my view requires reversal and remand, but which the majority dispose of by modifying the judgment.

The majority hold that "The judgment entered by the trial court * * * is too broad in providing that defendants are the owners of all waters arising on, or flowing on, or upon, their land. The record discloses that the subject of this action was the right to take water from Grub Ravine during the irrigation season. The right to take water during the remainder of the year was not litigated." This holding will probably come as something of a shock to

9. Finding No. VII.

the parties litigant. Certainly the trial court imposes no such limitation on the language it used, and *reason suggests that the thing most worth litigating was the right to take and store the water during the non-irrigation season for later use during the dry season.* And it appears rather likely that the parties have been under the impression that the dam was to remain in place and operative the year around. But, it seems, this is to be a new kind of water project: one in which water (if any) is to be impounded only during the dry season, and the surplus of the wet season is to run off unhampered.

From studying the record it can be inferred that the majority conclude that the judgment is "too broad" *for the evidence to support* because even the defendant husband did not claim that before the dam was built he used *all the water* of the watercourse *all the year.*[10] He testified that he had used all of it only during the irrigation season and admitted that during the remainder of the year the waters were permitted to flow down to plaintiffs' property.[11] I had thought it obvious that the main purpose of building the dam was to enable the defendants to *impound during the non-irrigation season water to be used later during the dry season.*

It appears altogether clear to me what the defendants have attempted to do by constructing the dam. It is likewise altogether clear, under what I have thought to be a well established view of the law, that defendants have failed to prove a *prescriptive* right to all or even any of the waters they propose to impound and store. If the defendants during the irrigation seasons for five years or more *used* all the water flowing onto their land in Grub Ravine *during those seasons* then it would not seem likely that there would be any surplus water to store up behind the dam *during those same seasons* in the future. Hence, the most rational purpose of the dam would seem to be to impound and store waters flowing onto defendants' land *during the non-irrigation* seasons. But defendants do not claim to have impounded or stored Grub Ravine waters during the non-irrigation season at any time before the dam was constructed. How then do they establish prescriptive rights (dependent on proof of prior adverse user) to do that which admittedly they had never done before? As suggested at the very beginning of this dissent, do the defendants have a clear title to do that very thing? Or do they not? I do not find the answer in the majority opinion. But I do find in its loosely-defined limitation of the trial court's judgment a source of much future discontent and probable litigation. I think that this court should not undertake, as the majority do, to revise the judgment of the trial court by declaring that it "is modified * * * to limit defendants to the right to *use* all the water flowing through their land in Grub Ravine during the irrigation season." (Italics added.) Do the findings of the trial court fail to support its judgment? If they do support it, what finding is modified by this court, and in what respect, to support its modification of the trial court's judgment? Have the majority made new or different findings to support their own judgment? What is "the irrigation season"? May defendants by staggering crops perhaps create several "irrigation" seasons? What meaning do the majority ascribe to the word "use" in the above

10. Defendant husband testified as follows: "Q. And you first became the owner of the property, as I remember, when? A. 1945. * * * Q. Now, during the period of time you have been there * * * how much of the water have you used? A. All there was. Q. After the irrigation season, is there any difference in the volume of the water? A. That is, in the ditch? Q. Yes. A. Yes; after the irrigation season is over, I don't need the water in the orchard, so I cut the ditch and let it go into the ravine."

11. Likewise, the trial court in its memorandum of decision declares that "the testimony shows that the defendants used all of the natural spring water *during the irrigation season.*" (Italics added.)

quotation from their opinion? Is it equivalent, in their meaning, to "impound and store" above the defendants' dam? If the proscription against "use" of all the water during the non-irrigation season does not prohibit accumulation and storage during that season, does it mean that defendants may accumulate and store *all* the waters during that period but must not water their stock (if any) from it or avail themselves of it for any other useful purpose? Is it to stagnate as a breeding pool for mosquitoes? If defendants may *use part* of it, who has the superior right to how much?

It appears to me that the difficulties these contesting parties are having will not be solved until it is at the least made clear to *what extent and when,* if at all, the defendants may impound and store water. This can better be done in the superior court, and to make such determination it may well be that even the superior court would want to secure the assistance of the experts of the State of California Division of Water Resources. (Cf. Allen v. California Water & Tel Co. (1946), 29 Cal.2d 466, 488–490, 176 P.2d 8.) Certainly on the record before us it is not a task which this court is equipped to perform. We should not undertake to modify, in this type of litigation and in the major aspects here involved, the obviously erroneous judgment which is before us; we should, rather, reverse it and remand the cause to the trial court for further proceedings. And lastly, if the majority modification of the judgment means what it appears that a trial court could properly construe it to mean—that defendants may impound water behind their dam only during the dry season—then the order that "Plaintiffs shall bear the costs of this appeal," is patently unreasonable, for they (if anyone) will be the real winners on appeal. That is, they will be, if they can afford and prevail in the further litigation which seems indicated unless the parties can agree on what their respective rights shall be.

SHENK and McCOMB, JJ., concur.

47 Cal.2d 597

The IVANHOE IRRIGATION DISTRICT, Plaintiff and Appellant,

v.

ALL PARTIES AND PERSONS, etc., Defendants,

Courtney McCracken et al., Defendants and Respondents,

The People of the State of California, Defendant and Appellant.

L. A. 23043.

Supreme Court of California.

In Bank.

Jan. 24, 1957.

Rehearing Denied Feb. 19, 1957.

Proceeding in rem by irrigation district for confirmation of contract between it as debtor and United States as creditor for, inter alia, financing irrigation project with federal funds, and operation of project by United States during period of repayment of loan. The Superior Court, Tulare County, Benjamin C. Jones, J., assigned by Chairman of Judicial Council, rendered judgment upon holding that contract was invalid, and the irrigation district appealed. The Supreme Court, Shenk, J., held, inter alia, that where proposed contract provided, in accordance with federal statute, that if any single owner owned lands in excess of 160 acres in district, he could not receive irrigation for such excess lands unless he would agree to sell such excess lands, such proposed contract was in violation of constitution in limiting landowners' rights to waters held in trust by state on sole basis of amount of property which he owned.

Judgment affirmed.

Gibson, C. J., and Carter and Traynor, JJ., dissented.

1. Judgment ⇐812(3)
Waters and Water Courses ⇐228½

In special in rem proceeding by irrigation district for confirmation of contract, between it and United States, for financing of irrigation project with federal funds, judgment fixes status of all property with-

in district lawfully affected by contract and forecloses further inquiry into matters to which judgment properly relates, and, within its pertinent issues, is binding on world at large. West's Ann.Code Civ.Proc., § 1908; West's Ann.Water Code, §§ 22670 et seq., 23175 et seq., 23220 et seq., 23222, 23225, 24253; 43 U.S.C.A. § 423e.

2. Stipulations ⇐3

In special in rem proceeding by irrigation district for confirmation of contract, between it and United States, for financing of irrigation project with federal funds, attorney general representing state and water project authority and the Secretary of the Interior could not, by agreement, exclude from proceeding question of title or ownership of water involved or foreclose other interested parties from pressing question. West's Ann.Code Civ.Proc., § 1908; West's Ann.Water Code, §§ 22670 et seq., 23175 et seq., 23220 et seq., 23222, 23225, 24253; 43 U.S.C.A. § 423e.

3. Constitutional Law ⇐278(1)
Eminent Domain ⇐84

Vested rights in waters of state, subject to constitutional doctrine of reasonable beneficial use, may not be destroyed or infringed upon without due process of law and without just compensation being paid. St.1913, p. 1012, § 1 et seq.; St. 1941, p. 2943, §§ 1, 2; St.1956, 1st Ex.Sess., c. 52; West's Ann.Water Code, §§ 10001, 10500–10506, 11100–11830, 11128, 11451, 11452, 11460, 11463; West's Ann.Const. art. 14, § 3.

4. Waters and Water Courses ⇐224

An irrigation district is trustee for landowners within district and limited in its trust to receive and to distribute water to them. West's Ann.Water Code, §§ 22670 et seq., 23175 et seq., 23220 et seq., 23222, 23225, 24253.

5. Waters and Water Courses ⇐180

The state is not owner of domestic water of state in sense that it has absolute power and dominion over it to exclusion of rights of those who have beneficial use therein, but state's title is an equitable one residing in water users of state. West's Ann.Const. art. 14, § 3.

6. Waters and Water Courses ⇐180

State may not, in any way inconsistent with rights of beneficiaries, divest itself of legal title to water, by grants, assignment or otherwise. West's Ann.Const. art. 14, § 3.

7. Waters and Water Courses ⇐180

State, as trustee of waters for water users, may not pass legal title freed from trust to any third party, including United States. West's Ann.Water Code, §§ 102, 104, 105; West's Ann.Const. art. 14, § 3; 43 U.S.C.A. § 423e.

8. Waters and Water Courses ⇐180, 224

The state, and an irrigation district, as trustees of water are bound to faithfully administer that trust and are answerable to courts, in exercise of their traditional powers in equity, for proper discharge of their stewardship which they must administer consistently with and not in violation of the rights of beneficiaries. West's Ann. Water Code, §§ 102, 104, 105, 1052, 10001, 10500–10506, 11040, 11041, 11128, 11451, 11460, 11463; 43 U.S.C.A. § 423e; West's Ann.Const. art. 14, § 3.

9. Waters and Water Courses ⇐180

The state in administration of trust in waters, may prescribe or provide for reasonable terms and conditions to which beneficiaries must conform in order to have benefit of expenditures made necessary in providing those benefits, and may do so either by statute or by contracts when duly authorized by law. West's Ann.Water Code, §§ 102, 104, 105, 1052, 10001, 10500–10506, 11040, 11041, 11128, 11451, 11460, 11463; West's Ann.Const. art. 14, § 3.

10. Waters and Water Courses ⇐180

When an outside party, such as the United States, by contract, legislation or otherwise, steps into shoes of state to administer state's trust in waters, by development, conservation, and distribution of trust res, it is bound by same rules of law as govern state or any other purveyor of water in state for benefit of its water users.

West's Ann.Water Code, §§ 102, 104, 105, 1052, 10001, 10500–10506, 11040, 11041, 11128, 11451, 11460, 11463; 43 U.S.C.A. §§ 372, 383, 391, 423e; West's Ann.Const. art. 14, § 3.

11. Constitutional Law ⇐209
Waters and Water Courses ⇐180

Water users of state whose rights have not become vested, subject to reasonable use doctrine, but who are dependent upon an adequate supply of fresh water for their existence have an inchoate right to such uses, subject to like enforcement and equal protection of law. West's Ann.Const. art. 14, § 3.

12. Waters and Water Courses ⇐202

The inchoate right to use in state waters of present and potential water users whose rights have not become vested is subject to and dependent upon compliance with reasonable rules and regulations, ability of supplier to furnish water, reasonable payment for services and other conditions necessary in conservation and distribution of water supply. West's Ann.Water Code, §§ 102, 104, 105, 1052, 10001, 10500–10506, 11040, 11041, 11128, 11451, 11460, 11463; West's Ann.Const. art. 14, § 3.

13. Evidence ⇐23(1)

It is a matter of common knowledge that where statutory acreage limitations were imposed upon sales of public lands to any single purchaser, that after title had passed to purchasers, land was subject to resale either to private individuals or to corporations within ordinary channels of purchase, and that one holder might accumulate properties so that his total acreage would far exceed original statutory acreage limitation. Act Cong. May 20, 1862, 12 Stat. 392; Act Cong. May 10, 1872, 17 Stat. 91; Act Cong. March 3, 1877, 19 Stat. 377; Act Cong. June 3, 1878, 20 Stat. 89.

14. Constitutional Law ⇐209, 278(1)

Landowner is entitled both to equal protection of laws and to due process of law with respect to his rights to state waters.

15. Constitutional Law ⇐208(1)

A law is general and constitutional when it applies equally to all persons embraced in a class founded upon some natural or intrinsic or constitutional distinction.

16. Constitutional Law ⇐208(1)

A law is not general and is unconstitutional if it confers particular privileges or imposes peculiar disabilities or burdensome conditions in exercise of common right, upon class of persons arbitrarily selected from general body of those who stand in precisely same relation to same subject of law.

17. Waters and Water Courses ⇐180

The extent of right of owner of real property to use and enjoyment of property right, including water right which may be attached thereto, cannot constitutionally be limited on sole basis of amount of property which he owns. West's Ann.Const. art. 14, § 3.

18. Waters and Water Courses ⇐228½

Where proposed contract between United States and an irrigation district providing for financing of irrigation project with federal funds and for federal operation of project during period of repayment by district provided, in accordance with federal statute, that no single owner could receive irrigation for lands in excess of 160 acres unless landowner would agree to sell such excess land, such proposed contract was in violation of constitution in limiting landowners' rights to waters held in trust by state on sole basis of amount of property which he owned. West's Ann.Water Code, §§ 102, 104, 105, 1052, 10001, 10500–10506, 11040, 11041, 11128, 11451, 11460, 11463; 43 U.S.C.A. §§ 372, 383, 391, 411, 416, 419, 423e, 431, 432, 434; West's Ann.Const. art. 14, § 3.

19. Waters and Water Courses ⇐228½

In view of facts that United States as assignee of appropriative water rights, or as original appropriator thereof, stands in same relation of trustee to beneficial use of water users as state, and that limitation of such water rights to users solely on basis of amount of acreage owned is unconstitutional, for purposes of state statute providing that all water acquired by an irrigation district under contract with United States shall

be distributed in accordance with the "applicable acts of Congress" provisions of Federal statutes limiting to 160 acres, the land of any single owner within district which could be benefited were not "applicable acts of Congress". West's Ann.Water Code, § 23200; 43 U.S.C.A. §§ 391, 411, 416, 419, 423e, 431, 432, 434, 498; West's Ann. Const. art. 14, § 3.

See publication Words and Phrases, for other judicial constructions and definitions of "Applicable Acts of Congress".

20. Waters and Water Courses ⇐228½

Under proposed contract, drawn pursuant to federal reclamation statutes, between United States and an irrigation district, providing for, inter alia, financing of irrigation project with federal funds and repayment of stipulated obligation in annual installments within 40 years, properly construed, insofar as it provided for construction of works for storage and distribution of water, relationship of United States and district was that of contractor and contractee with contractee obligated to pay costs of construction in equal annual installments, and, upon completion of such payments, contractee was entitled to ownership of works free from any claims of United States. West's Ann.Water Code, §§ 102, 104, 105, 1052, 10001, 10500–10506, 11040, 11041, 11128, 11451, 11460, 11463; 43 U.S.C.A. §§ 391, 411, 416, 419, 423e, 431, 432, 434, 485h(d, e), 498.

21. Waters and Water Courses ⇐222

Provisions of the Reclamation Act of 1902 that nothing therein would affect or interfere with laws of any state or territory relating to control, appropriation, use, or distribution of water used in irrigation, or any vested rights acquired thereunder, remain in full force and control operations of Department of the Interior with respect to cooperation with and loans to states for irrigation. 43 U.S.C.A. § 383.

22. Waters and Water Courses ⇐228½

Under contract, between United States and irrigation district, drawn pursuant to federal reclamation acts, and providing for, inter alia, financing of irrigation project with federal funds, insofar as it provided for furnishing of water by United States, to district, at a price, United States was acting as purveyor of domestic water of state to district and, under provisions of such statutes, was bound to comply with laws of state with reference to rights which were vested in water being served or entitled to be served, and such contract could not provide that distribution of water to such persons for whose benefit right was acquired could be arbitrarily discontinued. West's Ann.Const. art. 14, § 3.

23. Waters and Water Courses ⇐228½

Validating act purporting to make legally effective all instruments evidencing indebtedness of public bodies could not operate to render effective a contract between an irrigation district as debtor and the United States as creditor for use of federal funds to finance irrigation project where such contract came into existence after adjournment of legislature but before effective date of validating act, ninety days after adjournment. St.1949, p. 1511, § 1 et seq.

24. Statutes ⇐268

A validation statute assumes legislative consciousness of some act of omission on part of public body affected which is designed to be cured and confirmed. St.1949, p. 151, § 1 et seq.

25. Statutes ⇐268

Purpose of provision in validating act making it effective ninety days after adjournment of legislature was to permit referendum provisions of law to be made available and not to give validity to acts of public bodies subsequent to adjournment of legislature but prior to effective date. St.1949, p. 151, § 1 et seq.

26. Statutes ⇐268

Legislature may ratify only that which it could have theretofore authorized. St. 1949, p. 151, § 1 et seq.

27. Waters and Water Courses ⇐228½

Act purporting to validate instruments of indebtedness of public bodies could not validate contract between irrigation district as debtor and United States as creditor for

construction of irrigation facilities with federal funds where such a contract was in derogation of constitutional rights of water users. St.1949, p. 151, § 1 et seq.; West's Ann.Const. art. 14, § 3.

28. Public Service Commissions ⇐6.3

Assuming plenary power of legislature to enact laws respecting regulation and control of public utilities, notwithstanding any provision of Constitution to contrary, such legislation must appear on its face to be cognate and germane to regulation of utilities. West's Ann.Const. art. 12, § 22.

29. Waters and Water Courses ⇐228½

Where there was nothing on face of validating statute to indicate that it related to regulation of public utilities, it was ineffective to circumvent laws of state requiring regulation and control of such activities and could not validate contract between irrigation district and United States so as to allow United States to furnish waters from project in public utility type arrangement to water users of state. St.1949, p. 1511, § 1 et seq.; West's Ann.Const. art. 12, § 22; West's Ann.Public Utilities Code, §§ 2708, 2710, 2711.

30. Waters and Water Courses ⇐228½

Temporary arrangement by a flood control district which had completed one of its storage dams and had stored water in reservoir but had not completed its distribution system, whereby, pending completion of distribution system, it furnished water to lands outside district under contracts with users providing that when system within district was completed and water was made available to landowners within district, use of water outside district would terminate violated no law of state and, the furnishing of such water to users outside district did not confer upon such users vested rights to continuance of service after distribution system was completed. West's Ann.Public Utilities Code, §§ 2708, 2710, 2711; West's Ann.Water Code, §§ 22252.1, 22262, 35453; West's Ann.Water Code Appendix, § 46–1 et seq.

31. Waters and Water Courses ⇐228½

If provision of contract between United States as creditor and irrigation district as debtor, providing for, inter alia, financing of irrigation project with federal funds purported to condition delivery of water to landowners otherwise entitled thereto, to payment of any assessment levied although it had been judicially declared to be void assessment, it could be deemed a reasonable and additional assurance under contract of reimbursement to United States for expenditures incurred on behalf of district and might be deemed legitimate object of contract.

E. I. Feemster, Visalia, James R. McBride, Yuba City, Ralph M. Brody, Sacramento, Edmund G. Brown, Atty. Gen., B. Abbott Goldberg and Adolphus Moskovitz, Deputy Attys. Gen., for appellants. Roy A. Gustafson, Dist. Atty., and James E. Dixon, Deputy Dist. Atty., Ventura, as amici curiæ on behalf of appellants.

Horton & Knox, Harry W. Horton, El Centro, M. A. Bailey, Madera, W. R. Bailey, Visalia, Henry Holsinger, Principal Atty., Division of Water Resources, and Gavin M. Craig, Senior Atty., Sacramento, for respondents. Brobeck, Phleger & Harrison, Herman Phleger, Alvin J. Rockwell, John M. Naff, Jr., and Edson Abel, San Francisco, as amici curiæ on behalf of respondents.

SHENK, Justice.

The plaintiff Ivanhoe Irrigation District and certain of the defendants appeal from a judgment refusing to confirm a proposed contract between the United States, acting by and through the Bureau of Reclamation of the Department of the Interior, and the District. The contract provides for the delivery of a supply of water for irrigation purposes from the Central Valley Project and for the construction of a distribution system to make the water available for beneficial use on the lands within the District.

On September 23, 1949, the plaintiff District, purporting to act under the Irrigation District Federal Cooperation Law, Water Code, § 23175 et seq., entered into the contract with the United States. As required

by law the contract was approved by the California Districts Securities Commission, but with reservations, Water Code, §§ 23222 and 24253, and by the District's electors, Water Code, § 23220 et seq.

[1] This proceeding was commenced by the District on October 31, 1949, in the Superior Court in and for the County of Tulare to have the contract confirmed. Confirmation is required by federal law, Omnibus Adjustment Act of 1926, § 46, 44 Stat. 649, 650, 43 U.S.C.A. § 423e, Federal Reclamation Laws, Annotated, 318–319, by section 42 of the contract and by the Water Code of the State of California, § 22670 et seq., § 23225. It is a special proceeding in rem, and summons was by publication. It was brought against all persons having or claiming to have an interest in the formation of the plaintiff District and in the operation of the proposed contract and the lands affected thereby. It will fix the status of all property within the District lawfully affected by the contract and a final judgment will foreclose further inquiry into the matters to which the judgment properly relates. Within its pertinent issues it will be binding on the world at large. Code Civ.Proc. § 1908; Becher v. Contoure Laboratories, 279 U.S. 388, 49 S.Ct. 356, 73 L.Ed. 752; Riley v. New York Trust Co., 315 U.S. 343, 62 S.Ct. 608, 86 L.Ed. 885; see Frenchman-Cambridge Irr. Dist. v. Ferguson, 154 Neb. 20, 46 N.W.2d 692. The judgment is limited to a determination of the validity of the contract. As necessarily incident thereto questions relating to the title to and the control to be exercised over the unappropriated domestic waters of the state, to the distribution and sale of those waters by the district and to the ownership of the distributing system to be acquired by the district, will be considered.

Originally only two parties appeared as parties defendant, the first being the People of the State of California, acting by and through the Attorney General. The other appearing defendant is Courtney McCracken, the owner of 309 acres of irrigable land within the District. He filed a demurrer on December 13, 1949, and an answer on November 11, 1950. He is a bachelor and those provisions of the contract (§§ 34, 35 and 36) which would limit to a single person the ownership of no more than 160 acres of land entitled to the distribution of water, particularly are sought to be applied to him. He is a non-resident of the District and could not, under terms of the applicable law, § 23220 et seq., Water Code, vote for or against approval of the contract. He opposes confirmation for numerous reasons but particularly on the ground that the 160 acre limitation hereinafter considered is not applicable and is invalid as to him and his property within the District.

A default was entered against everyone not appearing within the time specified in the published notice of service. The United States did not formally appear but caused the Regional Counsel and Assistant Regional Counsel of the Bureau of Reclamation of the Department of the Interior to request permission to appear as amici curiae. Objection to such an appearance was interposed by the then Attorney General on the ground that the United States was a party interested in the proceeding and should appear as such. The objection was overruled and the request granted. Federal counsel thus appeared and took part in the proceedings throughout the trial.

The State Engineer is Chief of the Division of Water Resources of the Department of Public Works and pursuant to law has exercised the duties imposed upon the Water Commission.[1] He did not appear prior to argument in the trial court, but at that time the court, on its own motion, set aside the default of the State Engineer and he appeared and filed an answer by his

1. Under the provisions of A.B. 4, Ch. 52, 1956 First Extra. Sess., effective July 5, 1956, these duties, with the exception of supervision of water distribution, were transferred to the new State Water Rights Board, and the new Director of the Department of Water Resources assumed the functions of the Water Resources Board.

own counsel as he had the right to do. Government Code, §§ 11040, 11041. He stated that his interest in the proceeding was to protect the state water law from impairment, and that in the event the court saw fit to validate the contract he requested the court to confirm what he claimed to be established state law relating to the title of the state's water resources and regulations pertaining thereto. The particular relief which he seeks will be hereinafter noted.

Counsel for the Di Giorgio Fruit Corporation, the owner of large areas of irrigated and irrigable lands in the San Joaquin Valley in and out of the District, appeared as amici curiae and participated in the trial in opposition to confirmation of the contract.

The petition sets forth the essential facts as a basis for the request for confirmation. The prayer is that the court examine and enquire into the proceedings for the organization of the District and the validity of the contract, and that a judgment be entered confirming those proceedings and the contract. A copy of the proposed contract is attached to the petition and made a part thereof.

On December 13, 1949 the Attorney General filed a general and special demurrer on behalf of the state in which he attacked the validity of the contract sought to be confirmed. Before the demurrer was ruled upon and on November 8, 1950, he filed an answer reiterating as defensive matter the position taken in the demurrer, which was (1) that the proposed contract would be an unconstitutional delegation of the legislative power of California to Congress, to the Secretary of the Interior, and to the District, acting jointly; (2) that certain land limitation provisions of the Reclamation Laws which the contract purports to apply within the District are not applicable to the land within the District; (3) that the contract unconstitutionally deprives owners of excess land of property without due process of law; (4) that the Irrigation District Federal Cooperation Law of the State of California, under which the District purports to proceed, violates the Constitution and laws of the State of California requiring uniform operation of general laws and prohibiting special laws where general laws may be applicable, and (5) that the contract is not authorized by federal law.

The prayer of the state was that a judgment be entered that the plaintiff take nothing by the petition; that a declaration be made of the rights and duties among themselves of the State of California, the United States, the plaintiff District and the landowners therein with respect to the contract, and for all other proper relief.

On March 7, 1951, in open court, the Attorney General sought leave to withdraw the original answer of the State of California and to file an amended answer. Permission was granted and the amended answer was filed on March 30, 1951, seeking the confirmation of the contract.

The filing of the amended answer occurred after conferences and correspondence between the state's representatives and the Secretary of the Interior. In his letter of March 5, 1951, the Secretary of the Interior stated that questions "with respect to the historical, present and future ownership of water or water rights" would seem "to be immaterial to the question whether a particular contract for water service or for the construction of a distribution system, or both, is a valid one and to the question of the authority of the district to enter into it"; that he did not believe "that a finding that the contractual obligations are valid is determinative of the title of the water", and that the question "whether an individual water user, or a district may have a legal right to demand the continual delivery of project water after the expiration of the 40 year term of a water service clearly is not affected by a finding that the contract of itself is binding during its own express term."

In response to the letter of March 5, 1951, the Attorney General replied, under date of March 22, 1951, that "It is my view that this contract is not intended to and does not deal with, determine, or settle any questions with respect to the his-

torical, present or future claims of ownership of water or water rights that are now or may hereafter be urged by the United States, the State of California, the Ivanhoe Irrigation District, or individual or corporate landowners or users of the water, the furnishing of which is provided for by the said contract."

To the letter of March 22, 1951, the Secretary of the Interior replied under date of March 27, 1951, in which he agreed with the Attorney General that the ownership of water or water rights would not be affected by the contract or by the validation proceedings. He concluded that it would follow that water will be supplied pursuant to appropriations filed by the United States, appropriations filed by the state and assigned to the United States, and rights acquired by contract and otherwise from private individuals and corporations; that, as to such water, the United States will contract only to furnish a supply and to be paid for services rendered; that the contracts will not and will not purport to affect the ownership of the water or rights thereto, and that the ownership of water or water rights by a water district or a landowner therein will be no different than had the supply been furnished by the Water Project Authority of the state.

Notwithstanding the foregoing the allegations of paragraphs VI and VIII of the original answer on behalf of the state and the same numbered paragraphs of the amended answer in effect remained the same. Paragraph VI of the amended answer alleges that the State of California, acting through its Department of Finance, pursuant to state law, previously filed with the Division of Water Resources of the Department of Public Works of California certain applications for the appropriation of the unappropriated waters of the Sacramento and San Joaquin rivers and their tributaries for the use and benefit of the Central Valley Project and the owners of lands to be irrigated therefrom; that by assignments, made pursuant to statute, the State of California, again acting through its Department of Finance, assigned to the United States for the use and benefit of the Central Valley Project certain of those applications.

Paragraph VIII of the state's amended answer alleges that by virtue of the terms of the applications, the state has become and is the trustor of an express trust; that by the assignments the United States has become and is the trustee of that trust; that the landowners to be served from the works of the Central Valley Project, including the landowners of plaintiff District, have become and are the beneficiaries of that trust; that any and all claims or interests of the United States obtained by the proposed contract are held by the United States as such trustee as a part of a trust corpus or res for the use and benefit of the Central Valley Project and the landowners to be served water from the works of that project, and in particular the landowners of plaintiff District; that the State of California is entitled to be heard, among other things, as to all matters relating to the administration and execution of the trust by the United States and is entitled to require that the trustee administer the trust according to its true intent and meaning.

However in apparent furtherance of the understanding between the Attorney General and the Secretary of the Interior it was alleged in paragraph XI of the amended answer that the validity of the contract "does not depend on whether the United States has rights to the water to be delivered by it pursuant to the contract or rights to the use thereof or title or ownership thereto; * * * that an adjudication of such rights to water or the use thereof or title or ownership thereto is not appropriate in this proceeding, and that such an adjudication herein would be contrary to the best interests of the State and of the United States." Copies of correspondence between the Secretary of the Interior and the Attorney General, including the letters above referred to, were attached as exhibits to the amended answer.

The prayer of the amended answer is "(1) that the district's legal capacity and authority to enter into the contract, the proceedings on the part of the district for the authorization of the execution of the contract, and the execution of the contract between the Ivanhoe Irrigation District and the United States be confirmed and declared valid; and (2) that the decree in this proceeding recite that on the issues properly raised in this proceeding the decree is not required to and does not purport to be an adjudication of the right or interest of the State of California or of its agencies, including but not limited to the Ivanhoe Irrigation District and the Water Project Authority, or of the right or interest of the United States or its agencies, or all or any of the above, in or to the waters or water rights or respecting the regulation of the use thereof under the laws of the State of California, involved in the Central Valley Project.

"And wherefore, the Water Project Authority which is not taking any position on the validity of the contract between the Ivanhoe Irrigation District and the United States, prays that the decree in this proceeding recite that on the issues properly raised in this proceeding the decree is not required to and does not purport to be an adjudication of the right or interest of the State of California or of its agencies including but not limited to the Ivanhoe Irrigation District and the Water Project Authority, or of the right or interest of the United States or its agencies, or any or all of the above, in or to the waters or water rights or respecting the regulation of the use thereof under the laws of the State of California, involved in the Central Valley Project."

On the day set for hearing, March 7, 1951, the court suggested that the District might be infringing upon the powers of the Water Project Authority of the State of California, and that the Authority might well be an active, indispensable party to the proceedings. Accordingly, the court set aside the default of the Authority and permitted it to file an answer. The Authority appeared through the Attorney General, whose joint answer served as the amended answer for the State of California, heretofore set out in part, and the answer of the Authority. The latter assumed a neutral attitude so far as the validity of the contract was concerned, and prayed that a decree issue declaring the rights of the parties but not purporting to adjudicate the right or interest in or to water or water rights or respecting the regulation or use thereof under the laws of the state. The principal attorney for the Division of Water Resources of the Department of Public Works appeared as amicus curiae on behalf of the Water Project Authority.

The trial of the case insofar as the taking of evidence was concerned took place on April 3, 1951. The record consists of documentary evidence and other matters of which the court may take judicial notice. There are no disputed questions of fact. Briefing in the trial court was extensive and oral argument was not presented until more than a year later. The findings of fact and conclusions of law were signed and judgment was entered on February 27, 1953, denying confirmation of the contract on numerous grounds. Under the statute if the contract fails of confirmation on one material ground it must fail of confirmation as a whole. (See Water Code, § 22680.) However, as the trial court refused confirmation on many grounds, more than one must be ruled upon for the guidance of the trial court in possible further proceedings. The judgment contained injunctive orders prohibiting the District from refusing or failing to supply to the defendant Courtney McCracken water for irrigating purposes for all of his lands within the District and in general from proceeding under the contract. Since the judgment declaring the invalidity of the contract must be affirmed, the injunctive provisions may be disregarded. Neither those provisions nor anything herein should be taken as prohibiting the contracting parties from renegotiating a new contract

or from continuing the distribution of water pending such negotiations.

Notices of appeal were filed on March 16, 1953, by the plaintiff Ivanhoe Irrigation District, and on March 17 by the People of the State of California and the Water Project Authority of the State of California. The District and the state have filed joint briefs. Reply briefs have been filed by the defendant Courtney McCracken supporting the judgment and the defendant State Engineer who seeks a judicial declaration of the nature of appropriative water rights under the state law, the legal status of the state in relation to water subject to appropriation, the status of the United States as trustee for the benefit of the project water users, and the interpretation of certain provisions of the Federal Reclamation Project Acts of 1902 and 1939 hereinafter referred to. Amici curiae briefs in support of the judgment have been filed by the California Farm Bureau Federation and the Di Giorgio Fruit Corporation. An amicus curiae brief has been filed by the Ventura County Flood Control District, which does not attack the judgment as to the invalidity of the contract but contends that the court's conclusion of law to the effect that the water rights involved are appurtenant to the lands upon which the water is now used or is to be used, is not in accordance with existing law. The federal government is not a party to the appeal but it is apparent that its attitude is reflected in the position of the Attorney General, particularly with reference to the 160 acre limitation hereafter discussed. There is no disagreement on the part of any party appearing as to the correctness of the judgment of the trial court that the title to and control over the unappropriated domestic waters of the state are vested in the state in trust for the water users of the state.

The questions raised in this case cannot be answered without reference to the nature and character of the title to the water rights involved. Closely related thereto and in part determinative thereof are the efforts put forth by the state in aid of the development of its water resources for the benefit of the people of the state, which efforts finally resulted in part in the Central Valley Project. From the beginning it was realized that the growth and development of the state, from the standpoint of agriculture, industry, population and general welfare, required sources of water supply in addition to the annual rainfall and underground supplies. This was especially true in the vast arid or semi-arid sections of the state, including the great central valleys of the Sacramento and San Joaquin Rivers.

Authorization to inquire into the problem was provided for as early as 1850. Stats. 1850, p. 256. These efforts were repeated in 1878, Stats.1878, p. 634, in 1911, Stats. 1911, p. 822, in 1913 by the adoption of the Water Commission Act, Stats.1913, p. 1012, and in 1915, Stats.1915, p. 514. In 1921 a state-wide conservation plan study was authorized, Stats.1921, p. 1685, and reports thereon were made to the Legislature in 1923 in Public Works Bulletins Nos. 4, 5 and 6. In 1923 the Legislature failed to furnish funds for further studies and money was provided by the Chambers of Commerce of Los Angeles and San Francisco for that purpose. A further report was made in 1925 in Public Works Bulletin No. 9. This report emphasized the needed coordinated development in the Sacramento and San Joaquin Valleys. In 1925 the Legislature provided for further studies and reports, Stats.1925, p. 1013, which were made to the Legislature in 1927 by Public Works Bulletins Nos. 12, 13, 14, 15 and 16. These reports also emphasized the needed coordinated development in the Sacramento and San Joaquin Valleys. Following these reports the Legislature in 1927, Stats.1927, p. 508, deemed it advisable to provide for the appropriation within the provisions of the then Water Commission Act of all of the unappropriated waters of the various streams of the state which might be needed for the coordinated plan of conservation in the central valleys. It was under this authorization that the Director of Finance, beginning in 1927, filed

some 37 applications on behalf of the state on streams within the central valley area, some of which were intended for the storage of water in the Friant Reservoir of the San Joaquin River and the construction of the proposed main canal southerly therefrom through the area of plaintiff District. Several of these filings cover water which is essential to the Central Valley Project.

As the result of the prolonged studies and planning by the state, the Legislature in 1933 enacted a statute designating the Sacramento-San Joaquin coordinated project as the Central Valley Project, and created the Water Project Authority as an agency of the state to construct, operate and cover the cost of the project, estimated at $170,000,000. Stats.1933, p. 2643. The units and works to constitute the Project were defined in the statute. They included, among other works, Friant Dam and the Friant-Kern Canal to conduct water to and through the Ivanhoe area. That act is now contained in sections 11100–11830 of the Water Code.[2]

The Central Valley Project Act authorized the issuance and sale of $170,000,000 in revenue bonds. But in those days of depression and unemployment, such bonds were of doubtful or uncertain financial favor so far as the investing public was concerned. At any rate they were not sold and the state turned to the Federal Government for financial assistance. The problem then confronting the state was simply one of *money*. It is an undeniable fact that the State of California, without federal or other outside assistance, could have followed through with its plans for the development of the Central Valley Project if it had had the money with which to do it. The state was well equipped with an engineering staff and other expert assistance in its Department of Public Works, Division of Water Resources, to construct and operate necessary works and facilities to do all that has been done by the United States. All that was needed was the money available through state channels and expendable under the authority of the state alone. The Legislature contemplated and required that the Water Project Authority "proceed with the construction of the project immediately upon funds being available therefor", Water Code, § 11452, and that the Authority have "full charge and control of the construction, operation, and maintenance of the project and the collection of all rates, charges, and revenues from it", Water Code, § 11451.

The studies of California water problems by the Board of Public Works through the State Engineer pursuant to legislative authority beginning in 1921 and extending over a ten year period at state expense were far reaching. They have been characterized as "the most comprehensive and thorough going set of studies instituted by a state agency looking to the development of its natural resources." (History of Legislation and Policy Formation of the Central Valley Project, U. S. Dept. of Agriculture, Bureau of Agricultural Economics [1946].) The report based on these studies (Public Works Bulletin 25, Report to Legislature of 1931 on State Water Plan) was officially approved by the Legislature in 1941. Stats.1941, p. 2943; Water Code, § 10001. Admittedly the Central Valley Project is not the result of the planning, ingenuity and energy of the Bureau of Reclamation, but is recognized by the Bureau and the Department of Interior to be the creature of the state. This is shown by the testimony of the Commissioner of Reclamation in relation to the Department's 1948 Appropriation Bill as follows: "The history of [the Central Valley Project] is also necessary to understand this project. This project has been a dream of over half a century in California. The Bureau of Reclamation did not start this project. It has been made the agent for

2. An overall state water plan, entitled "The California Water Plan", was undertaken by the Director of Water Resources and a preliminary report was issued entitled "Report on the California Water Plan, Preliminary Edition", State Water Resources Board, Bull. No. 3, May, 1956."

completing it." (Hearings before the Subcommittee of the Committee on Appropriations, House of Representatives, Eightieth Congress, First Session on the Interior Department Appropriation Bill for 1948, p. 723.)

Faced with lack of state funds sufficient to finance such an extensive enterprise application was made to the United States for loans or grants of federal funds sufficient to construct the initial units of the project. The loans sought were to be secured by the revenue bonds of the Project Authority authorized by the Central Valley Project Act. Although the engineering feasibility and the need for the project were recognized by the Financial Division of the Public Works Administration, and several other federal agencies reported favorably on the project, the economic soundness of the project was questioned and efforts along these lines were terminated. However, in 1935 the project was referred to the Bureau of Reclamation of the Department of the Interior for study. In the report of the Secretary of the Interior to the President on the 26th of November, 1935 (Booklet of Information for Conferences Between U. S. Dept. of the Interior and Water Project Authority of the State of California, [Aug. 28, 1940] p. 16), on the feasibility of the project it is stated: "The next declaration required is that the cost of construction will probably be returned to the Federal Government. This is interpreted to mean that it will be returned within forty years from the time the Secretary issues public notice that water is available from the Project works. The estimated cost of construction is $170,000,000.00 and the annual cost, including repayment of all other charges, is $7,500,000.00. It is estimated that the annual revenues from the sale of water and of electric power will be sufficient to cover these charges. The favorable conditions heretofore recited justify the belief that the project will return its cost." Relying on this report the President gave his approval to the proposed plan as a federal reclamation project. (Booklet of Information, supra, p. 15.) The President, on recommendation of the Secretary of the Interior, allocated $20,000,000, later reduced to $4,200,000, under the Emergency Relief Appropriation Act of 1935, 49 Stat. 115, to initiate construction of the project. In that same year, with the passage of the Rivers and Harbors Act on August 30, 1935, a direct contribution of $12,000,000 from federal funds was authorized for the construction of Kennett (now Shasta) Dam. U. S. Stats., 49 Stat. p. 1038. Thereafter Congress regularly made funds available to the Bureau of Reclamation for the construction of the project, and prior to August 31, 1951, a total of $396,937,427 had been appropriated. The Bureau of Reclamation established an office in Sacramento and commenced work on the project in 1935. Work on the project units including the plaintiff District's unit has been continuously prosecuted. It is to be noted that the allocations of funds by the federal government were generally made with a proviso that such funds were reimbursable in accordance with the Reclamation Laws. (See First Deficiency Appropriation Act of 1936, June 22, 1936, 49 Stat. 1597, 1622; Booklet of Information, supra, pp. 23, 24, 25, 30, 31.)

There can be no question but that the federal Bureau of Reclamation and not the Water Project Authority of the state has constructed those units of the Central Valley Project heretofore completed. But it appears from the foregoing and the following that the parties contemplated a state project to be eventually owned and operated by the state. The Water Project Authority, at the request of the Bureau, was in close cooperation with the Bureau throughout. On March 25, 1936, a cooperative contract was executed between the United States and the Water Project Authority. This was followed by four additional supplemental contracts on March 13, 1937, November 8, 1937, January 17, 1939 and June 30, 1939. These contracts and others executed by the state's Department of Public Works provided, among other things, for the performance of certain tasks

by the state agencies and approval of the Bureau's planning by the Authority. The first cooperative contract with the Authority contained a special provision as follows: "It is contemplated that at the earliest practicable date a contract will be entered into between the United States and the Water Project Authority, providing for, but not limited to: (a) The operation and maintenance by the authority of useful units of the project, upon presenting assurance of payment satisfactory to the United States of the cost thereof. (b) Appropriate payment by the authority to the United States for expenditures in construction of the project." In the second and third supplemental contracts the special provision was restated in about the same terms. On February 15, 1939, the Governor of the state addressed a letter to the Secretary of the Interior in which he suggested that a contract be entered into immediately providing for the administration, operation and maintenance of the project by the Authority, and for the repayment of the reimbursable costs of the project by the Authority to the United States. In answer thereto the Secretary of the Interior suggested procedures by which state agencies might take over certain facilities. No definite developments resulted along this line.

The United States has acquired in its own name rights to certain domestic waters of the state. These rights are to waters which are essential to the success of the Central Valley Project. No claim is made that such water has been acquired for any purpose other than for the use and benefit of the project. The nature of the interest or title which the United States has acquired is hereinafter referred to. The United States owns no lands in the Central Valley, and by express provision the acquisition of water rights in most instances was for the benefit of the Central Valley Project or units thereof. The greater portion of water to which the United States has acquired rights is by assignments from the state's Director of Finance. Water Code, §§ 10500 through 10506. Four assignments of applications for the appropriation of unappropriated water of the Sacramento River, totaling 35,000 second-feet diversion and 12,690,000 acre-feet annual storage, were made on September 3, 1938. On September 30, 1939, three assignments of applications for the appropriation of unappropriated water of the San Joaquin River, totaling 9,500 second-feet diversion and 4,420,000 acre-feet annual storage, were made to the United States. Requests for additional assignments have been made to the Director of Finance by the United States. The assignments made were in trust for the use and benefit of the Central Valley Project and with the necessary reservation that the landowners and inhabitants within a watershed area or other area conveniently supplied by the watershed area are not to be deprived of their prior rights to water reasonably required for their beneficial needs. Water Code, §§ 11460 and 11463; see Water Code, § 11128, as added in 1951, Stats.1951, p. 3216.

The United States itself, between 1943 and 1952, as original applicant, filed eight applications for the appropriation of unappropriated water totaling 33,810 second feet diversion and 2,646,000 acre-feet annual storage of domestic waters of the state. In all instances these applications were made for specific purposes in connection with the Central Valley Project.

The United States has also acquired through contract extensive riparian, appropriative and prescriptive water rights in the San Joaquin River once held by Miller & Lux, Inc. Water rights in the area involved have been the subject of considerable litigation. See United States v. Gerlach Livestock Co., 339 U.S. 725, 70 S.Ct. 955, 94 L.Ed. 1231; Rank v. Krug, D.C.S.D.Cal., 142 F.Supp. 1; Hollister Land and Cattle Co. v. Krug, D.C.S.D.Cal., 90 F.Supp. 773. It is asserted that the United States intends to divert some of this water to the Central Valley Project. By agreement dated May 24, 1939, between the United States and the Madera Irrigation District, the United States acquired assignments of all of the District's applications to appropriate the water of the San Joaquin

River, grants of the Friant Dam site, portions of the reservoir area and certain gravel deposits. In addition to the foregoing, the United States has acquired, or is in the process of acquiring, the riparian, appropriative and prescriptive water rights of hundreds of smaller landowners, all of whom are affected by the construction of units and the diversion of water for the Central Valley Project.

[2] In view of the foregoing circumstances the trial court properly refused to eliminate the issue of title from the case. It is obvious that the Attorney General of the state and the Secretary of the Interior could not, by agreement, exclude from the proceeding the question of title or ownership of water or foreclose other interested parties from pressing it as a vital question in the case. There is no dispute between any of the parties appearing in the litigation as to the nature of that title and it is of great importance for upon it depends the extent to which the state or the United States or any party dealing with the domestic waters of the state may exercise powers of control.

If the United States, or the State of California or any of its agencies, should be declared to be the owner of the title to the water without restriction it would necessarily follow that it would have complete dominion and control over such property for purposes of distribution or for any other incident of ownership and use. In such case the principles of law applying to unrestricted ownership would control. On the other hand, if the United States or the State of California or its agencies, in dealing with the storage, sale, distribution and use of such water, is acting as trustee for the beneficiaries of the trust, other principles of law, namely the law of trusts, would necessarily apply. The exclusion of the question of title from the case could be justified only on the theory that without question, and as a matter of law, the fee simple unrestricted title to the water is in the state or in its assignee, the United States, or in the United States other than by assignment unaffected by the claims of the land owners in the District as the beneficiaries of a trust. Such a theory finds no support in the present case.

A trust relationship has existed at all times here involved, and now exists, between the State of California and the water users of the state, including the water users of the plaintiff District, as to all waters the control of which has been acquired by the state by appropriation or purchase. As stated it is asserted by appropriate allegations in the pleadings of all of the parties formally appearing as parties defendant, including the State of California, and the existence of such a trust relationship is not denied by the plaintiff District or by any party appearing in the proceeding. It is only because of the position alleged to be asserted by the United States that it is vested with absolute ownership in and to the water to be distributed to the lands in the District, and to the property of the District used and usable in the distribution of water to lands therein, that the question of title has arisen. The question is also important as bearing on the contention of the landowners in the District that the contract would deprive them of vested rights without due process of law and without just or any compensation.

In considering the question of the title of the United States and of the State of California in and to the domestic water of the state and the corresponding limited measure of control which they may exercise over them, it is well to consider certain historical phases of the water law of this state. And this may be better understood by considering the attitude assumed by some of the water users of the state in their contentions for many years that they had absolute and unrestricted title and dominion over the waters riparian to their lands to the exclusion of the rights of the state in administering the trust imposed upon it by the water law of the state for the benefit of other water users.

In the early history of California the waters of the rivers and streams of the state, especially in the northern section were used for placer and hydraulic min-

ing, the raising of livestock, domestic and kindred purposes. It was early realized that water in this semi-arid region was of utmost importance to the welfare, progress and prosperity of the people of the state. There were few court decisions on the subject having a statewide significance prior to the case of Lux v. Haggin in 1886, 69 Cal. 255, 454, 4 P. 919, 10 P. 674. At that time section 4468 of the Political Code provided as follows: "The common law of England, so far as it is not repugnant to or inconsistent with the constitution of the United States, or the constitution or laws of the state of California, shall be the rule of decision in all the courts of this state." This court took the general language of that declaration by its four corners and applied the English common law doctrine of riparian rights to the ownership, control and use of the waters of the rivers and streams of the state. The doctrine was declared to be that the owner of real property bordering such a river or stream had a right co-existent with the same rights of other landowners on the stream, to the use of its waters and the flow thereof as it was "wont to do in the course of nature" unimpaired in quality and undiminished in quantity. This right was declared by this court in Lux v. Haggin, supra, 69 Cal. 255, 4 P. 919, 10 P. 674, to be a right appurtenant to the land, in fact a part and parcel of the land itself. Under this doctrine the riparian owner had the right to insist that the full flow of the stream continue to pass by his land in its natural state whether he needed the water or not. This riparian right as so defined was declared by this court to be a property right which vested in the riparian owner and as such was protected by the state and federal Constitutions. It could not be limited or impaired without due process of law and without just compensation. The enforcement of that right as so defined led to the adoption of the Water Commission Act of 1913. Stats.1913, p. 1012.

By the provisions of that act it was sought, among other objectives, to subject the enjoyment of the riparian right to the rule of reasonable beneficial use. Accordingly it was provided in that act that the use of the waters of the rivers and streams of the state on the part of the riparian owners be limited to the water they could reasonably use for beneficial purposes and that whatever water remained in the stream flow would be subject to reasonable use through appropriation or other methods provided by law. The substance of what the Legislature was endeavoring to do was to provide, in the exercise of its police power, that the riparian owner could continue to have the right to the benefit and enjoyment of the waters of the stream both in the present and in the future insofar as he was able to put it to beneficial use on his own land but that beyond that he could not insist that the water flow by and beyond his land whether he needed it or not. Nevertheless this court adhered to the doctrine of Lux v. Haggin and by judicial interpretation made ineffective those provisions of the Water Commission Act of 1913 designed to restrict riparian rights to reasonable beneficial use. In Herminghaus v. Southern California Edison Co., 1926, 200 Cal. 81, 252 P. 607, the court reannounced its adherence to the ancient doctrine and held in effect that no matter how unreasonable the claim of a riparian owner to the full flow of a stream might be he had the right to assert it.

Following that decision the Legislature sought to implant in the Constitution of the state, and there was subsequently incorporated in that document, the provisions of section 3 of Article XIV, which again declared the policy of the state that "the general welfare [of the state] requires that the water resources of the State be put to beneficial use to the fullest extent of which they are capable, and that the waste or unreasonable use or unreasonable method of use of water be prevented, and that the conservation of such waters is to be exercised with a view to the reasonable and beneficial use thereof in the interest of the people and for the public welfare. * * * Riparian rights in a stream or water course attach to, but to no more than so much of

the flow thereof as may be required or used consistently with this section, for the purposes for which such lands are, or may be made adaptable, in view of such reasonable and beneficial uses; provided, however, that nothing herein contained shall be construed as depriving any riparian owner of the reasonable use of water of the stream to which his land is riparian under reasonable methods of diversion and use, or of depriving any appropriator of water to which he is lawfully entitled."

[3] The foregoing amendment to the Constitution as proposed by the Legislature in 1927 and adopted in November 1928 focused the attention of the courts upon the persistent endeavor of the people of the state, first through the Legislature in 1913 by the adoption of the Water Commission Act in that year and then by the constitutional amendment in 1928, to put into effect the doctrine of reasonable beneficial use. The obvious purpose of the new constitutional provision was to invite and urge a judicial declaration that the vested right of the riparian owner be subjected to that doctrine. Thereafter this court so declared. Gin S. Chow v. City of Santa Barbara, 1933, 217 Cal. 673, 22 P.2d 5; Peabody v. City of Vallejo, 1935, 2 Cal.2d 351, 40 P.2d 486. Within the scope of reasonable beneficial use, vested rights of the riparian owner continued to attach to his land as a part and parcel of the land itself, and as such was necessarily protected from unlawful encroachment by both state and federal Constitutions. The result is that this vested right as now defined may not be destroyed or infringed upon without due process of law or without just compensation under either Constitution.

No encroachment on the vested rights of riparian owners is directly involved in this proceeding, but the foregoing observations are pertinent as bearing upon the rights of the people of the state, both present and prospective, to avail themselves by appropriation or other lawful means of the right to the use of waters to which a prior lawful use has not attached. In this category the waters here sought to be furnished to and used by the landowners in the District must be classified. We are therefore here directly concerned with the title, distribution and use of water which has not heretofore been subjected to beneficial use except as contemplated by acquisition, by appropriation or otherwise on the part of the State of California and the United States.

It is thus apparent that the more recent changes in the constitutional and decisional law of this state, had the effect of making available for beneficial uses by appropriation and other means great volumes of unappropriated domestic waters of the state. The nature of the title to the waters here involved is further indicated by the statutory law of this state. The title to these waters was mentioned at an early date in the amendment of section 1410 of the Civil Code in 1911 which provided that "All water or the use of water within the state of California is the property of the people of the state of California" subject to appropriation and use in the manner prescribed by law. That provision in effect was carried into section 11 of the Water Commission Act of 1913 which provided that "All waters flowing in any [natural water course in the state] excepting so far as such waters have been or are being applied to useful and beneficial purpose upon, or in so far as such waters are or may be reasonably needed for useful, and beneficial purposes upon lands riparian thereto, or otherwise appropriated, is and are hereby declared to be public waters of the State of California and subject to appropriation in accordance with the provisions of this act." Stats.1913, p. 1018. The same provision was carried into the Water Code in 1943 as section 102.

Section 104 of that code provides: "It is hereby declared that the people of the State have a paramount interest in the use of all the water of the State and that the State shall determine what water of the State, surface and underground, can be converted to public use or controlled for public pro-

tection." Section 105 of the same code provides that "It is hereby declared that the protection of the public interest in the development of the water resources of the State is of vital concern to the people of the State and that the State shall determine in what way the water of the State, both surface and underground, should be developed for the greatest public benefit." Section 1052 of that code provides that the diversion or use of water other than as authorized by the code is a trespass and the Department of Public Works, acting through the State Engineer, may initiate actions in the Superior Court to have the trespass enjoined.

[4] It has long been the established law of the state that an irrigation district is trustee for the landowners within the district and limited in its trust to receive and distribute water to them. Merchants' Nat. Bank of San Diego v. Escondido Irrigation District, 144 Cal. 329, 77 P. 937; Tulare Irrigation District v. Collins, 154 Cal. 440, 442, 97 P. 1124. In the Merchants Bank case [144 Cal. 329, 77 P. 939] the court stated: "But here the corporation in question is distinguished from ordinary municipal corporations by the fact that 'the legal title' only of the property of the corporation is vested in the district, 'in trust for * * * the uses and purposes set forth in (the) act,' and that the beneficiaries of the trust, who, upon familiar equitable principles, are to be regarded as the owners of the property, are the landowners in the district, with whose funds the property has been acquired (Civ.Code, § 853), and in whom, indeed, is vested by the express provisions of the statute, in each, the right to the several use of a definite proportion of the water of the district, and in all, in common, the equitable ownership of its water rights, reservoirs, ditches, and property generally, as the means of supplying water. St.1887, pp. 34, 35, §§ 11, 13. Such rights as these cannot be distinguished in any way from other private rights, and therefore clearly come within the protection of the provision of section 13 of article 1 of the state Constitution—that 'no person shall be * * * deprived of * * * property without due process of law,' and of the similar provision of section 1 of the fourteenth amendment to the Constitution of the United States." See also Allen v. Hussey, 101 Cal.App.2d 457, 472, 225 P.2d 674; Bottoms v. Madera Irrigation District, 74 Cal.App. 681, 702, 242 P. 100; Colburn v. Wilson, 23 Idaho 337, 130 P. 381.

[5–9] Likewise the state is not the owner of the domestic water of the state in the sense that it has absolute power and dominion over it to the exclusion of the rights of those who have the beneficial interest therein. The title is an equitable one residing in the water users of the state. The state as an entity is the holder of the legal title as trustee for the benefit of the people of the state, all of whom in the last analysis, are the water users of the state. See Hall v. Superior Court, 198 Cal. 373, 383, 245 P. 814; Tulare Irrigation District v. Collins, 154 Cal. 440, 442, 97 P. 1124; Merchants' Nat. Bank of San Diego v. Escondido Irrigation District, supra, 144 Cal. 329, 77 P. 937. To avail themselves of the right thereto, individually, collectively or in a corporate capacity, administrative procedures have been established and are set forth in the Water Code and related statutory provisions. Compliance with those provisions is necessary in order that the right to use the water may be acquired, but always consistent with the trust relationship incident thereto. Occupying such a relationship it would be incompetent for the state to divest itself of the legal title, by grant, assignment or otherwise, in any way inconsistent with the rights of the beneficiaries. It would necessarily follow that it would be inconsistent with the trust for the state to attempt to pass the legal title freed from the trust to any third party, including the United States. As trustee the state and its agencies, of which the plaintiff district is one, are bound faithfully to administer that trust and are answerable to the courts, in the exercise of their traditional powers in equity, for the proper discharge of their stewardship. They must administer it con-

sistently with and not in violation of the rights of the beneficiaries. Merchant's Nat. Bank of San Diego v. Escondido Irrigation District, supra, 144 Cal. 329, 77 P. 937; Lindsay-Strathmore Irrigation District v. Wutchumna Water Co., 111 Cal. App. 688, 698, 296 P. 933; Allen v. Hussey, 101 Cal.App.2d 457, 467, 225 P.2d 674. But it is not to say that the state may not in the administration of the trust prescribe or provide for reasonable terms and conditions to which the beneficiaries must conform in order to have the benefit of expenditures made necessary in providing those benefits. These may be provided for by statute or, as here, by contracts when duly authorized by law.

[10–12] The trust relationship existing between the state and the beneficiaries of the trust must therefore be kept in mind in connection with any transactions between the state or any of its agencies and outside parties. It follows that when an outside party, such as the United States, by contract, legislation or otherwise, steps into the shoes of the state to administer that trust by the development, conservation and distribution of the trust res, it is bound by the same rules of law as surround and govern the State of California or any other purveyor of water of the state for the benefit of its water users. The state may not therefore lawfully dispossess itself of the title to such water and may not surrender its control of the same in any way inconsistent with the administration of the trust under which the title is held. The state by general law may and has in the main prescribed the terms and conditions under which the several classes of water users may become secure in their right to the water and use thereof. The water users of the state whose rights have not become vested within the classes above mentioned but who are dependent upon an adequate supply of fresh water for their existence in the manifold uses to which it may be supplied, have an inchoate right to such uses subject to like enforcement and equal protection of the law. This right is necessarily dependent upon compliance with reasonable rules and regulations attending it and to the circumstances of each case such as an adequate water supply, the ability of the supplier to furnish the water, reasonable payment for the service and perhaps other conditions not necessary to mention in the conservation and distribution of a water supply in our complex civilization. This inchoate right of present and potential water users of the state is a right of which cognizance must be taken in dealing with the general subject of the water law of the state and in particular with the rights of landowners and water users within the plaintiff District.

It is therefore concluded that the title to the unappropriated domestic waters of the state is in the State of California in trust for the use and benefit of the beneficiaries of that trust; that the trust character of that title is anchored in the state by constitutional provisions, by statutes enacted in furtherance thereof, and by the decisional law of the state; that the beneficiaries of that trust are the water users of the state who in a general sense constitute all of the people of the state; that the beneficiaries of the trust relationship whose rights are here under consideration are those present or prospective users who individually or in properly classified groups bring themselves within the orbit of the state law under which they may be in position to demand benefits without discrimination, and that within that category are the landowners of the District. It is they who are in position to avail themselves of the right to beneficial use of the waters to be purveyed and to demand indiscriminate service. There is nothing in the foregoing declaration which interjects anything new into the water law of the state. It is but a recognition and re-declaration of existing fundamental concepts of this phase of our law.

It is well to consider at this point the federal law relating to the nature of the water rights acquired by the United States and affecting the rights of the land owners of the District thereunder. The Reclamation Act of 1902, 32 Stat. 388, 43 U.S.C.A.

§ 391, is the basic federal enactment on that subject. Under that law and subsequent laws in aid thereof, the Bureau of Reclamation is assuming to administer water through the Central Valley Project. Section 8 of the Act of 1902, 43 U.S.C.A. §§ 372, 383, provides: "That nothing in this Act shall be construed as affecting or intended to affect or to in any way interfere with the laws of any State or Territory relating to the control, appropriation, use, or distribution of water used in irrigation, or any vested right acquired thereunder, and the Secretary of the Interior, in carrying out the provisions of this Act, shall proceed in conformity with such laws, and nothing herein shall in any way affect any right of any State or of the Federal Government or of any landowner, appropriator, or user of water in, to, or from any interstate stream or the waters thereof: Provided, That the right to the use of water acquired under the provisions of this Act shall be appurtenant to the land irrigated, and beneficial use shall be the basis, the measure, and the limit of the right." The meaning and intent of section 8 of the Reclamation Act as it specifically applies to the waters involved in the Central Valley Project has been stated by the Supreme Court in United States v. Gerlach Livestock Co., supra, 339 U.S. 725, 70 S.Ct. 955, 94 L.Ed. 1231. At pages 734–735 of 339 U.S., at page 960 of 70 S.Ct., the court said: "Congress proceeded on the basis of full recognition of water rights having valid existence under state law. By its command that the provisions of the reclamation law should govern the construction, operation, and maintenance of the several construction projects, Congress directed the Secretary of the Interior to proceed in conformity with state laws, giving full recognition to every right vested under those laws. Cf. State of Nebraska v. State of Wyoming, 295 U.S. 40, 55 S.Ct. 568, 569, 79 L.Ed. 1289 [1291]; California-Oregon Power Co. v. Beaver Portland Cement Co., 295 U.S. 142, 164, 55 S.Ct. 725, 731, 79 L.Ed. 1356 [1364]; State of Nebraska v. State of Wyoming, 325 U.S. 589, 614, 65 S.Ct. 1332, 1348, 89 L.Ed. 1815, [1820, 1830]; [Silas] Mason Co. v. Tax Comm., 302 U.S. 186, 58 S.Ct. 233, 82 L.Ed. 187. * * * We think it clear that throughout the conception, enactment and subsequent administration of the plan Congress has recognized the property status of water rights vested under California law. * * * The governing water law of California must now be derived from a 1928 Amendment to its Constitution * * *" (Art. 14, § 3) "* * * to which," as the Supreme Court in the Gerlach case said, "the Federal Reclamation Act defers." See also United States v. Rio Grande Dam & Irrig. Co., 174 U.S. 690, 19 S.Ct. 770, 43 L.Ed. 1136; State of Connecticut v. Commonwealth of Massachusetts, 282 U.S. 660, 51 S.Ct. 286, 75 L.Ed. 602. Thus the federal government both by legislation and court decision has recognized that the law of this state is determinative of rights to water in this state. This court also so held in Peabody v. City of Vallejo, 2 Cal.2d 351, at page 366, 40 P.2d 486.

We therefore feel free to declare that in all transactions between the United States and the State of California or its agencies such as the plaintiff District, the parties are dealing with trust property held by the state or by those who have acquired rights to it from the state or otherwise for the benefit of the real owners thereof. They are the present and prospective water users of the state who may become entitled thereto under the laws of the state. Whatever interest or title the United States has acquired to water by appropriation, assignment or by other means of acquisition in furtherance of the execution of its trust relationship with the water users of the state is necessarily subject to the limitations of title herein determined.

It is to be observed that we are not here dealing with all of the problems incident to the relationship of the state and its agencies and the federal government in the construction, maintenance, control and operation of the works for the distribution and use of the domestic waters of the state. We are not here concerned with the own-

ership and control of interstate waters or any other waters coming within well recognized federal control. See Federal Power Commission v. State of Oregon, 1955, 349 U.S. 435, 75 S.Ct. 832, 99 L.Ed. 1215. We are not concerned with problems attending the title, sale, distribution and use of water in the development of government owned land for there are no federally owned irrigable lands within the plaintiff District. Nor are we concerned with questions relating to the sale and distribution of water by a privately owned public utility, nor with the distribution and sale of electrical energy developed through or by means of storage facilities constructed by the State of California or by the United States or both. We are here concerned only with questions of the title, sale and distribution of intrastate or domestic waters and with the title to the distributing system and facilities acquired for the specific purpose of irrigating the lands within the plaintiff District.

We now turn to the provisions of the contract in controversy. Considered in connection with the legislation surrounding it, both federal and state, the contract is an instrument which, from the standpoint first of its fiscal provisions, provides in Part B for the construction by the United States of a distributing system within the District for a specified consideration payable to the United States in forty equal annual installments; and in Part A to furnish to the District and by it to the owners of irrigable lands within the District a supplementary supply of domestic waters of the state developed through the construction and operation of the Central Valley Project at a price per acre foot payable annually. The concept of repayment to the United States for its costs is the unmistakable theme throughout the entire transaction.

In entering into the contract the parties are dealing within statutory authorization but at arm's length. It is not over simplification to state that the relationship of the parties so far as construction work is concerned is that of debtor and creditor, for it is clear beyond question that they and the law under which they are operating contemplate that when the money expended by the United States has been repaid by the District or on its behalf, the District is entitled to an acquittance and will thereby become the owner of the distribution system and all of the property used and useful in the maintenance and operation thereof free and clear of any claims of others, to the same extent as if the District had constructed the distributing system itself with its own funds and had thus become the owner in trust for the water users within the District. As stated it is certainly true that it was within the power of the District under the laws of this state to do in the first instance all that the United States is obligating itself to do under the contract with reference to the construction of a distributing system. The District was authorized to obtain funds for that purpose by borrowing from the United States with or without the issuance of irrigation district bonds, Water Code, §§ 23280–23289, and it could contract for the payment for water distributed to it by or through an outside source at a fixed point of delivery upon the payment of the charges agreed upon from funds of its own, if available. Water Code, § 22228. In essence, therefore, we have here one party agreeing to provide the funds for construction work and undertaking to furnish water at a definite delivery point, and the other party agreeing to accept the water at that point with payment therefor at a fixed rate and repayment of the construction charges in installments within forty years, coupled with what appears to be all sufficient assurances of security in the event of non-payment. Within the compass of those provisions there can be no doubt of the right and power of the parties to lawfully contract.

Included in the assurance of payment according to the contract are obligations on the part of the District to provide funds for repayment by taxation of the lands within the District, by assessments against the

lands for that purpose and the fixation of water charges sufficient to provide the security required by the United States. It is the right of the United States to demand that assurances of security for repayment of monies advanced by it be included in the contract; and provisions to that effect are included therein. The contract goes further and provides that upon default in payments as they become due the United States shall have the right to take over the operation of the affairs of the District in order to assure timely and adequate repayment. Likewise, it is the right and duty of the District to have included in the contract provisions for adequate clearance of its obligations to repay, including the designation therein of the amount expended or to be expended by the United States for the benefit of the District and its landowners, or to a workable provision therein as to how the amount advanced by the United States may be ascertained when the time for final accounting, repayment and acquittance arrives, together with the designation of a definite time when repayment is finally due. The present contract does not with certainty set forth such fiscal matters, particularly as it relates to repayment for the construction of the major storage facilities from which water will be delivered to the District. Upon repayment the District would succeed to whatever title to lands, structures or works acquired by the United States within the District in aid of its activities on behalf of the District and the landowners within the District, in like manner and to the same extent as an ordinary debtor is entitled to a satisfaction of record evidencing the payment of his indebtedness.[3] See Owl Creek Irr. Dist. v. Bryson, 71 Wyo. 30, at pages 69–70, 253 P.2d 867, 258 P.2d 220.

Although the relationship of debtor and creditor is clearly established on the record, it is not clear in what way the District and its landowners may become free of indebtedness upon repayment. For example, it is provided in the contract that the United States may acquire property within the District in its own name for the purpose of constructing the distributing system, and that pursuant to an act of Congress authorizing such acquisition of property for the benefit of the landowners of the District, the United States may divest itself of ownership only in such manner as may be provided by Congress. Obviously such a provision in the agreement is contrary to the debtor-creditor relationship existing between the United States and the District. The right and obligation on the part of the United States would seem to be to hold the property thus acquired by it in its own name only until final repayment is made, with the right of the District to a conveyance thereof not dependent on a future and necessarily discretionary act of Congress.

However, it is mainly because the contract includes provisions not relating to its fiscal aspects that the defendant landowner, the State Engineer representing the Division of Water Resources of the Department of Public Works and amici curiae are opposing it.

On behalf of the state, the Attorney General first directs his attack upon that portion of the judgment which holds the 160-acre limitation of the contract void as applied to the state, to the District and to the owners of irrigable land within the District. The genesis of the 160-acre limitation is found in the original Reclamation Act of June 17, 1902, heretofore referred to. 32 Stat. p. 388. That act is entitled "An Act Appropriating the receipts from the sale and disposal of public lands in certain States and Territories to the

3. In an obvious attempt to correct the uncertainty in contracts entered into pursuant to existing reclamation law, recent legislation by Congress has defined in greater detail the allocation of payments for water service between operation, maintenance and construction costs of reclamation projects. Pub.L.No.643, 84th Cong., 2d Sess., § 1(3), July 2, 1956, 70 U.S.Stat. 483, 484 (1956), 43 U.S.C.A. § 485h–1(3). Such legislation, of course, was not in effect at the time the present contract was entered into and the judgment herein entered.

construction of irrigation works for the reclamation of arid lands."

It is relatively a brief enactment. It occupies less than three pages of the Statutes at Large of the 57th Congress. Section 1 provides that all moneys received from the sale and disposal of public lands in western states should be set aside in a special fund known as the "reclamation fund." This fund is to be used in the examination and survey for and the construction and maintenance of "irrigation works for the storage, diversion, and development of waters for the reclamation of arid and semiarid lands in the said States and Territories." Subsequent sections provide that the Secretary of the Interior construct appropriate irrigation works; that he may withdraw certain public lands from entry, or restore other lands to public entry, as such lands are required for irrigation works; "that public lands which it is proposed to irrigate by means of any contemplated works shall be subject to entry only under the provisions of the homestead laws in tracts of not less than forty nor more than one hundred and sixty acres" §§ 432, 434; that the Secretary may limit the area per entry of such public lands to be irrigated; that he shall fix the charges "which shall be made per acre upon the said entries, and upon lands in private ownership which may be irrigated by the waters of the said irrigation project" § 419; that no "right to the use of water for land in private ownership shall be sold for a tract exceeding one hundred and sixty acres to any one landowner, and no such sale shall be made to any landowner unless he be an actual bona fide resident of such land" § 431; that the Secretary is authorized to use the reclamation fund to accomplish the purpose of the act; that when repayments required by the act "are made for the major portion of the lands irrigated from the waters of any of the works herein provided for, then the management and operation of such irrigation works shall pass to the owners of the lands irrigated thereby" except that "the title to and the management and operation of the reservoirs and the works necessary for their protection and operation shall remain in the Government until otherwise provided by Congress," § 498, and that the Secretary may acquire, by judicial process or otherwise, the lands necessary to carry out the purpose of the act.

It is noted that the repayment period was originally ten years as provided for in section 9 of the act. It was increased to 20 years by the Reclamation Act of 1914. 38 Stats. 686, 687. It was changed by the Second Deficiency Act of 1924 to an indefinite period determined by the productive power of the land. 43 Stat. 702. It was again changed in 1926 to 40 years by the Interior Department Appropriation Act of 1927. 44 Stat. 479.

It is readily observed from the provisions of the Reclamation Act of 1902 that one of its main purposes was to provide for the reclamation of vast areas in the seventeen western states and territories where title to the land was still in the federal government as owner, and the development of that land into private ownership was deemed essential to the general welfare in establishing homes and small farming enterprises in the great western domain.

As a part of this farsighted plan of the federal government it was undoubtedly recognized that the desired result could best be accomplished by limiting the amount of land thus to be purchased and developed. To justify such a limitation in the contract in question, the Attorney General points to other federal enactments which it is claimed were designed for the same purpose and which are claimed to have had the same effect. Among these enactments are the Homestead Act of May 20, 1862, 12 Stat. 392, where it was provided that the amount of land to be acquired by any one person from the federal government should not exceed 160 acres. Again on May 10, 1872, the Mines and Mining Act provided for a limitation on a mining claim usually running lengthwise on the vein of ore. 17 Stat. 91.

Another illustration of a limitation placed by the federal government on the sale of its publicly owned land is found in the Desert Land Act of March 3, 1877, 19 Stat. 377, where a limitation of 640 acres was placed on a purchase by one individual. One of the conditions of purchase of land under that act was that the entryman or purchaser provide for the water to reclaim the desert land. Another illustration is the Timber and Stone Act of June 3, 1878, where a limitation for purchase by an individual was placed at 160 acres, 20 Stat. 89.

[13] Further research would probably disclose other illustrations, but sufficient have been noted to demonstrate that the federal government in all of such instances has exercised its power as the owner of the land to be offered for sale. No limitation on its power to sell and convey its own lands existed or could properly be asserted. The United States was the owner of the fee with all of the rights of proprietorship. It could sell or refuse to sell as it pleased. It could and often did withdraw such lands from entry or sale. As proprietor it could part with its lands under such terms and conditions of sale as it saw fit, including a limitation on acreage, price, term of payment, and otherwise. However, in its activities as the owner and grantor it controlled the limitation only as to the first purchasers. It is common knowledge that after the title passed to the buyer, the land then was subject to resale to grantees either private or corporate within the ordinary channels of purchase and sale in the field of private property acquisition and ownership. The buyer was then in position to sell to whom he pleased, or accumulate properties similarly purchased by others so that his total acreage might far exceed the original statutory acreage limitation.

We attribute no merit to argument on behalf of the respondents that the 160-acre limitation was conceived as a socialistic scheme to divide up private property for the benefit of the many at the expense of "larger landowners." It may not be denied that the 160-acre limitation originally had a social objective. It was designed to encourage home seekers to obtain and develop land owned by the federal government in the undeveloped western states and territories. The plan sought to arouse the interest of as many settlers as possible and to prevent, so far as could lawfully be done, the accumulation of large tracts of land by single individuals. This the government, as sole owner, could do as it pleased, without let or hindrance.

Contrasted with the social objective of a land limitation in furtherance of the plan to encourage individuals as home seekers to purchase government lands and to initiate and increase the productivity of undeveloped public lands was the objective of the federal government in another field. That was in the grant to corporations seeking to provide transcontinental transportation of alternate sections of land for twenty miles on each side of the railroad right of way, as provided for in various acts of Congress. (See 43 U.S.C.A. § 881 et seq.) In a large sense it may be said that those grants had the social objective of aiding in the increase in population and development of the vast uninhabited expanse of land owned by the federal government by affording transportation more convenient, timely and certain than the covered wagon, the stage coach and the pony express.

The foregoing objectives and others which might be mentioned were well within the power and control of the federal government as the owner of the lands to be granted or otherwise disposed of. But we are not here dealing with social objectives as such. We are here concerned with the question of the extent of power, dominion and control which the United States as a trustee may exercise to deprive beneficiaries of the trust, namely, the water users of the state and particularly those in the plaintiff District, of a property right thereunder or of an inchoate right to the use of water within the District.

Under Articles 34, 35, 36, and 37 of the contract, the owner of land in excess of 160 acres is called a "large land owner," and lands in excess of 160 acres are called "excess lands." If a so-called "large land owner" desires to avail himself of the benefits of project water on any of his lands, he must select from his larger tract 160 acres of land which is to be retained by him for the use of water. If the landowner refuses to make the selection, the members of the board of directors of the District may do so without his consent. If they do not, the Secretary of the Interior makes the selection. Excess lands may not receive water unless prior thereto the landowner executes a recordable contract between himself and the United States, whereby he agrees to sell his land in excess of 160 acres within 10 years at a price to be fixed by an appraisal board consisting of one appraiser appointed by the District, one by the Secretary of the Interior, and the two choosing a third. The landowner has no voice in the appraisal. The appraised value must be fixed as of the time of the execution of the recordable agreement and the appraisal cannot take into consideration any increase in the value of the land resulting from the supply of water to the land, or from any other normal increase in value such as might result from an increase in population, an extraordinary increase in the productivity of the land or perchance the discovery of oil or other valuable substances beneath the land. In practice, according to official government statements, the interpretation placed on contractual provisions required by federal law, Section 46, Omnibus Adjustment Act of 1926, 44 Stat. 636, similar to the excess land provisions here is as follows: "Thus the administrative procedure usually adopted has been to refuse to deliver water to any lands, excess or non-excess, until the owner of excess land has executed a recordable contract agreeing to dispose of the excess." (Land Ownership Survey on Federal Reclamation Projects, Department of the Interior [1946], p. 47.)

It thus appears that the federal statute as interpreted by those administering it states in effect to the owner of land within the District susceptible of irrigation: "If you own more than 160 acres of land within the District you may not enjoy one of the incidents of that ownership, namely, the right to the use of water to which you are entitled on all your land unless you agree to execute a recordable contract to sell your land in excess of 160 acres within 10 years at a price fixed by a board of appraisers in whose selection you have no voice and at a price to which you do not agree." In addition, no account is taken of the item of possible damage to the remainder of the land because of a possible severance, and a possible natural increment in land values.

The duty of both of the contracting parties in the performance of their obligations to the landowners in the District is set forth in section 22250 of the Water Code. It is there provided that water distributed by districts shall be "apportioned ratably to each landowner upon the basis of the ratio which the last assessment against his land for district purposes bears to the whole sum assessed in the district" except as provided otherwise in the code. No pertinent exceptions appear.

[14–16] In addition to his right to due process, the landowner McCracken is entitled to equal protection of the laws. Discrimination among water users in an irrigation district is expressly contrary to state law as expressed in the above quoted section 22250 of the Water Code. The well established rule on this subject is expressed in City of Pasadena v. Stimson, 91 Cal. 238, at pages 251 and 252, 27 P. 604, at page 607 as follows: "* * * although a law is general and constitutional when it applies equally to all persons embraced in a class founded upon some natural or intrinsic or constitutional distinction, it is not general or constitutional if it confers particular privileges, or imposes peculiar disabilities or burdensome conditions in the exercise of a common right, upon a class

of persons arbitrarily selected from the general body of those who stand in precisely the same relation to the subject of the law." See also Application of Miller, 162 Cal. 687, 698, 124 P. 427. Notwithstanding the fact that the 160 acre limitation has been a part of the Reclamation Law for more than fifty years, a diligent search has failed to disclose that the imposition of the limitation has been approved by any court of last resort, either state or federal, in a situation where the federal government had no interest in the lands to be irrigated and possessed only a trustee's interest in the waters to be supplied. On the other hand the Supreme Court of Wyoming in Owl Creek Irr. Dist. v. Bryson, supra, 1953, 71 Wyo. 30, beginning at page 67, 253 P.2d 867, at page 882, had the following to say with reference to the terms of a contract similar as to the excess land provisions to the terms of the present contract: "The large landowner is specifically defined in this subdivision and additional burdens imposed upon him. He is forbidden to receive water for excess lands until he acquiesces in all the conditions which by this and the two preceding paragraphs are placed upon him. * * * These contract clauses which are thus questioned if applied to owners of private land are unreasonable, coercive and devised to deprive them of their property against their will and without invoking the condemnatory processes which require due compensation to be made when land is thus taken. These processes embody the full protective machinery of the law as concerns the private property owner. These clauses now drawn in question * * * are subversive of the most elementary rights which our forefathers carried from English law to this country and which were centuries in their formation. * * * It is quite obvious if these contract clauses were to be scrutinized under the light of familiar constitutional limitations they would necessarily fall."

[17, 18] As to the acreage limitation of of the contract, it is therefore concluded that the extent of the right of an owner of real property to the use and enjoyment of his property right, including the water right which may be attached thereto, cannot be constitutionally limited on the sole basis of the amount of property he owns. This is especially true with reference to property of the same kind and similarly situated. If there are any exceptions to the rule which should be applied, they have not been pointed out, nor, on reflection, are they apparent. In other words there appears to be no basis founded in reason or authority why the owner of a property right which is or may be appurtenant to all of his land suitable for irrigation can be limited in the enjoyment of that right to 160 acres of his larger holdings. The same right should attach to his lands in excess of 160 acres and to the excess lands of all those similarly situated. Thus to deprive members of the same class of their rights clearly results in an unlawful discrimination which as said in City of Pasadena v. Stimson, supra, 91 Cal. 238, 27 P. 604, is not "founded upon some natural or intrinsic or constitutional distinction." If a constitutionally authorized preferment may be extended only to owners of 160 acres of land or less the question might well be asked whether a like preferment might not be extended only to owners of more than 160 acres. The suggestion of either preferment under the long and well established rule governing classification is enough to demonstrate its impropriety.

Notwithstanding the long prevailing provisions of the original Reclamation Act of 1902 that in the construction and operation of the reclamation projects under the supervision of the Secretary of the Interior, rights vested under state law should not be disturbed and should be protected, the contract in controversy is proposing to transgress those vested rights. The plaintiff District and the United States, through its Bureau of Reclamation, are parties to the contract but as to both the record discloses that they deemed themselves bound by federal law to include these provisions in the contract. That law is included in the original Reclamation Act of 1902. 32 Stat. p.

388. It was re-enacted and supplemented by the Omnibus Adjustment Act of 1926 as amended. 44 Stat. 636, § 46, now § 423e of the United States Public Lands Code Annotated, 1955. Section 46 of that act requires that any contract with an irrigation district bearing the approval of the Secretary of the Interior shall include the 160 acre limitation. It is to be noted that this omnibus act covers many subjects dealing generally with federal reclamation projects where the intention of the act as shown by section 48, 43 U.S.C.A. § 423f, was the development of public lands and the rehabilitation of some 20 federal reclamation projects theretofore existing in many of the western states. The omnibus act is now included, in material parts, in Title 43 U.S.C.A. §§ 1 to 670, inclusive. This volume is entitled "The Code of the Laws of the United States of America, Title 43, Public Lands." A survey of this code shows that its provisions deal generally with the control, development and sale of public lands of the United States and section 46 may be deemed to apply to public lands alone. If, however, its general language as to the 160 acre limitation be considered as applicable to the purchase by the United States of unappropriated domestic waters of this state and, as here, its distribution to irrigation districts and privately owned lands in the state, such a construction would obviously remove it from consideration as an "applicable" law governing the execution of the contract in question. Since its attempted application to the contract is unauthorized under the laws of this state it is necessarily not an "applicable" law. Also carried into the Public Lands Code of the United States is the provision of the original Reclamation Act of 1902 that state laws remain unaffected by later enactments. This was recognized by the Supreme Court in the Gerlach case as late as 1950 where it said that when Congress directed the Secretary of the Interior to proceed under the Reclamation Act of 1902 he should not interfere with the laws of the state " 'relating to the control, appropriation, use, or distribution of water used in irrigation, or any vested right acquired thereunder.' 32 Stat. 388, 390." United States v. Gerlach Livestock Co., supra, 339 U.S. 725, at page 739, 70 S.Ct. 955, at page 962. As indicated the federal law could be applicable only on the theory that the United States is the owner absolute of the domestic waters of the state with the right to the use thereof freed from any trust relationship on behalf of the real owners thereof, namely, the water users in the District. As also indicated such a theory is untenable and it necessarily follows that the inclusion in the contract of Articles 34, 35, 36 and 37 cannot be legally justified.

[19] Attention has been called to section 23200 of the Water Code providing that under contracts such as the one in question water "shall be distributed and apportioned by the district in accordance with the applicable acts of Congress, the rules and regulations of the Secretary of the Interior thereunder, and the provisions of the contract." It is argued that since the 160 acre limitation is contained in the Federal Reclamation Act of 1902 the state, the owners of irrigable lands and the water users are subject to that limitation. But such is not the case. Section 23200 contemplates that *applicable* federal law shall apply. As previously noted the 160 acre limitation is inapplicable in the present case where the title to the water to be purveyed is not an unlimited title in the United States.

[20] An important question relating to the debtor-creditor nature of the contract is raised by the Attorney General and concerns matters which the State Engineer as Chief of the Division of Water Resources deems essential to what is said to be the established water law in this state. We have heretofore declared the debtor-creditor nature of the contract in question. In arriving at that conclusion it was considered that applicable federal law requires that the contract specify a specific amount of money to be repaid by the District by installments, within forty years; that this is an obligation for repayment of the cost

of construction of storage and delivery works, and that the payments by the District be credited against this obligation.

The Attorney General asserts that this is an incorrect construction of the federal Reclamation Project Act of 1939, 53 Stats. 1195, 1196. He states that under present federal law the repayment of construction costs to the United States is governed by both section 9(d) and 9(e) of that Act. 43 U.S.C.A. § 485h. Section 9(d) provides in part:

"No water may be delivered for irrigation of lands in connection with any new project, new division of a project, or supplemental works on a project until an organization, satisfactory in form and powers to the Secretary, has entered into a repayment contract with the United States, in a form satisfactory to the Secretary, providing among other things * * *. (2) That the part of the construction costs allocated by the Secretary to irrigation shall be included in a general repayment obligation of the organization * * *. (3) That the general repayment obligation of the organization shall be spread in annual installments, of the number and amounts fixed by the Secretary, over a period not exceeding forty years, exclusive of any development period fixed * * *."

As section 9(d) is read in the light of its particular provisions and of the general law, it is authority for the terms of Part B of the contract which provides for the repayment of a stipulated sum in installments within 40 years. If the construction obligations are not paid within the times specified, the remedies for the enforcement of payment by assessment, taxation and possibly other means are provided for in the contract.

Section 9(e) of the Reclamation Project Act of 1939 provides: "In lieu of entering into a repayment contract pursuant to the provisions of subsection 9(d) of this section to cover that part of the cost of the construction of works connected with water supply and allocated to irrigation, the Secretary, in his discretion, may enter into either short- or long-term contracts to furnish water for irrigation purposes. Each such contract shall be for such period, not to exceed forty years, and at such rates as in the Secretary's judgment will produce revenues at least sufficient to cover an appropriate share of the annual operation and maintenance cost and an appropriate share of such fixed charges as the Secretary deems proper, due consideration being given to that part of the cost of construction of works connected with water supply and allocated to irrigation; and shall require payment of said rates each year in advance of delivery of water for said year. In the event such contracts are made for furnishing water for irrigation purposes, the cost of any irrigation water distribution works constructed by the United States in connection with the new project, new division of a project, or supplemental works on a project, shall be covered by a repayment contract entered into pursuant to said subsection (d)."

In view of the last sentence of section 9(e), it is conceded by the Attorney General that Part B of the contract for the construction of the physical works is a repayment contract, but the question raised is whether the water delivery portions of the contract (Part A) are invalid because of inferences which may be drawn that the District and landowners therein are not entitled to water rights which continue beyond the forty-year term of the contract.

It is contended by the Attorney General that the United States has properly contracted as a water purveyor under section 9(e). The State Engineer contends that the United States improperly assumes to take section 9(e) as its authority for an alternate method of contracting with the state, that is, that the United States has construed that section to mean that, in lieu of a definite contract for repayment within forty years, the United States may waive or avoid the repayment provisions in regard to its water rights and obligation to supply water to the District and substitute therefor the right to renew or not to renew the contract as the occasion might suit its

purpose and elect to continue to serve the district with water but under terms and conditions which it might impose in the nature of an utility service, with no power upon the part of the District as the contracting agency of the state to prevent it from so doing. It is claimed by the State Engineer that the United States and particularly the Bureau of Reclamation and its legal advisers have decided that section 9(e) contains such authorization. The record supports that contention by documents and transcripts of hearings before Congressional Committees which need not now be set forth at length.

It is because of this asserted authorization to the Bureau of Reclamation that the State Engineer is much concerned. The effect of the validation of this contract would be, impliedly at least, to approve a procedure by which the United States as a purveyor of the domestic waters of this state, might continue indefinitely to by-pass the established law of the state and procedures thereunder applicable to water services generally.

[21, 22] In furnishing its domestic waters to consumers at a price, the activities of the United States under its purported construction of section 9(e) resemble those of a public utility acting in a proprietary capacity. As above noted, the Reclamation Act of 1902 provided that: "Nothing in this Act shall be construed as affecting or intended to affect or to in any way interfere with the laws of any State or territory relating to the control, appropriation, use, or distribution of water used in irrigation, or any vested right acquired thereunder, and the Secretary of the Interior, in carrying out the provisions of this Act, shall proceed in conformity with such laws * * *." It may fairly be said that the foregoing federal statutory provision remains in full force; that it controls the operations of the Department of the Interior so far as federal law is concerned, and that under the controlling state law, the furnishing of water to consumers by a utility must be subject to and be in conformity with certain rules and regulations established by or under the authority of the Constitution and the statutes of the state.

Moreover, as we have already held, whatever title the United States has to the domestic waters of this state is limited by the trusteeship under which that title was acquired. The United States cannot administer the corpus of that trust except in the manner defined by the terms of the trust, namely, the applicable water law of this state. The Attorney General argues that in this validation proceeding it is not necessary to consider what might or might not be contemplated at the termination of the contract, but the water rights of the landowners in the District, as members of the class to which the beneficiaries of the declared trust belong, are present and existing, see Ickes v. Fox, supra, 300 U.S. 82, 93–94, 57 S.Ct. 412, 81 L.Ed. 525, and they are entitled to a declaration thereof. "By directing the Secretary to proceed under the Reclamation Act of 1902, Congress elected not 'to in any way interfere with the laws of any State * * * relating to the control, appropriation, use, or distribution of water used in irrigation, or any vested right acquired thereunder.'" United States v. Gerlach Livestock Co., supra, 339 U.S. 725, 70 S.Ct. 955, 962. If this contract were construed as imposing upon the District and the landowners therein a burden under which they may suffer the loss of water rights at the discretion of the United States, such a construction would be contrary to well established constitutional principles and protections.

[23] The validity of the contract is sought to be established under the Second Validating Act of 1949. Stats. 1949, p. 1511. The attitude of the United States is reflected in the position of the Attorney General to the effect that "any non-constitutional defects in the contracts under state law" were cured by the act.

The act became effective on October 1, 1949, which was ninety days after the final adjournment of the Legislature of that year. The act "confirmed, validated, and

declared legally effective * * * all acts and proceedings heretofore taken by or on behalf of any public body under any law, or under color of any law, for the authorization" of "all instruments evidencing an indebtedness of a public body incurred or to be incurred for any public purpose * * *." The act includes proceedings taken by "counties, cities and counties, cities, public districts of any kind or class" and some fifty other specifically named public bodies, including irrigation districts. The Attorney General contends that "this language clearly covers contracts between irrigation districts and the United States for a water supply and distribution system construction."

In this connection it appears that at the time the Second Validating Act of 1949 was passed by the Legislature the contract was not in existence; that it was not approved by the electors of the District until August 23, 1949, and that it was not signed until September 23, 1949. It would seem that validating statutes cover only those transactions or omissions which occur before the Legislature adjourns. Such acts no doubt serve a useful purpose but as said by Chief Justice Beatty in City of Oakland v. Oakland Water Front Co., 118 Cal. 160, at pages 193 and 194, 50 P. 277, at page 290: "It is to be regretted * * * that a court should ever feel itself bound by rules of construction to give effect to statutes which ratify and confirm by wholesale the acts of municipal or other political agencies of the state. There is no more reckless or dangerous species of legislation. It is really legislating with the eyes shut, and * * * should * * * be closely scrutinized, and strictly construed, in order to prevent as far as possible the evils which they involve * * *."

[24, 25] If the position of the Attorney General be sustained, it would mean that from the time of the final adjournment of the Legislature on July 2, 1949, to October 1, 1949, every city, city and county, county, and some fifty specifically named other public entities or agencies of the state could run full rein in violation of all of the laws of the state governing and regulating the making of contracts and the incurring of obligations for the payment of public moneys thereunder not constitutionally otherwise controlled. Likewise, within that ninety-day period they could do anything not yet subjected to regulation but which could be constitutionally authorized and this situation would continue during the ninety days after the final adjournment of the Legislature. A validation act assumes legislative consciousness of some act or omission on the part of the public body affected which is designed to be cured or confirmed. After the final adjournment of the Legislature and until the effective date of the act (ninety days thereafter) there is no opportunity for the exercise of this legislative purpose to function. Obviously the only purpose of postponing the effective date of the act is to permit the referendum provisions of the law to be made available.

[26–29] Furthermore if the contract be deemed to include a utility type contract at the option of the United States, the Second Validating Act of 1949, or any validating act of the character of the one here relied upon by the Attorney General, could not render such a contract valid. It is well settled that the Legislature may ratify only what it could have theretofore authorized. It is obvious that the Legislature could not by a general ratifying statute breathe validity into a contract the effect of which would be to avoid all of the laws of the state, both constitutional and statutory, respecting the regulation and control of public utilities in this state. Assuming the plenary power of the Legislature to enact laws respecting the regulation and control of public utilities notwithstanding any provision of the Constitution to the contrary, Art. 12, § 22, Constitution, nevertheless such legislation must appear on its face to be cognate and germane to the regulation of public utilities to come within the Legislature's plenary power. Pacific Telephone & Telegraph Co. v. Eshleman, 166 Cal. 640, 655, 656, 137 P. 1119, 50 L.R.A.,N.S., 652. There is nothing on the face of this ratifying statute to

indicate in the slightest degree that it relates to the regulation and control of public utilities. It is therefore ineffective to circumvent the laws of the state requiring regulation and control of activities which are in all essential respects those of a public utility. In addition any validating act could not have confirmed the 160 acre limitation for the obvious reason that the Legislature could not have theretofore constitutionally authorized it.

The District Attorney of Ventura County has filed a brief as amicus curiae on behalf of the Ventura County Flood Control District. He calls attention to the declaration of the trial court in its conclusion of law to the effect that when water is furnished by a purveyor of water under the laws of this state to a landowner for irrigation purposes such owner thereby acquires a vested right to the continuance of such service.

[30] Objection to the views of the trial court in this respect is made on the ground that they do not correctly reflect the present laws of the state on the subject. This is the only cause of concern on the part of counsel for the flood control district. The background for this objection is disclosed by the following facts: The Ventura Valley has highly developed urban and interurban industrial and agricultural areas which have been subjected to a shortage of water with threatened need of further sufficient supply. To alleviate this water condition the Ventura County Flood Control District was organized under Chapter 44 of the Statutes of 1944, 4th Ex.Sess., p. 168, West's Ann.Water Code Appendix, § 46–1 et seq. One storage dam has been constructed and another is in the course of construction or nearly completed. The distribution systems have not been completed but water is stored in the reservoirs. Pending the completion of the distribution systems the district is furnishing to certain lands outside of the district some of the stored water under contracts with the users that when the system within the district is completed and water made available to landowners within the district the use of water outside of the district will terminate. This arrangement was made because of the dire need of water on lands without the district for even temporary purposes and perhaps to tide the owners thereof over to a time when they could develop an additional supply of water on their own behalf. If this temporary agreement with the outside landowners is not permitted because of the declaration of the trial court, increasing amounts of water now in storage and to be stored in the reservoirs of the Ventura district will be required to go to waste.

There is no law of this state which may properly be invoked to prevent such a temporary arrangement. The question is pertinent to the present case because of the fact that a supplemental water supply has been furnished to landowners in the Ivanhoe Irrigation District by the United States for an extensive period pending the negotiations for a contract such as involved in the present proceeding.

There appear to be early cases to the effect that when a purveyor of the domestic waters of the state furnishes water to lands for irrigation purposes, the right of the owner of the lands to a continuance of the use may not be cut off. The rules of the earlier cases have in general been modified by enactments in the Water Code of the state with reference to the use of water as authorized by the Constitution. As bearing on the right acquired by user in particular cases, including the rights of landowners in connection with the administration of the water law of the state the Legislature has provided in Division 11, Irrigation Districts, Part 5, Chapter 2, Article 2, Water Distribution, § 22262, as follows: "No right in any water or water right owned by the district shall be acquired by use permitted under this article." Stats.1943, p. 1897, based on Stats.1897, p. 259. An identical provision is contained in that portion of the code pertaining to Water Districts, Water Code, § 35428. Other code provisions provide authority for entities supplying public water to serve some of their territories with water and not serve others in the event of shortages. Water Code, §§

22252.1, 35453; Public Utilities Code, §§ 2708, 2710, 2711.

[31] It is claimed that article 26 of the contract purports to condition the delivery of water to a landowner otherwise entitled to delivery, upon the payment by him of any assessment levied although it has been judicially declared to be a void assessment. It seems unusual that a party should, except under compulsion, contract to pay an assessment declared to be void by a court of competent jurisdiction. But when taken as a reasonable and additional assurance of reimbursements to the United States for expenditures incurred on behalf of the District and to cover operating expenses in furnishing water to the District, it may be deemed a legitimate subject of contract.

Questions are raised as to the sufficiency of the notice of election whereby the electors of the District were called upon to approve the proposed contract, and the trial court concluded that the contract was invalid for lack of proper notice. Water Code, § 23223. These questions need not be determined in this case for the reason that upon submission of any further proposed contract they need not recur.

The trial court in its findings of fact and conclusions of law declared the contract to be invalid on numerous additional grounds not carried into the judgment. Conclusions that the contract is uncertain, lacks mutuality, improperly delegates powers to the Secretary of the Interior, improperly prevents changes in the boundaries of the District, provides unreasonable security measures to the United States and other conclusions not necessary to the judgment are insufficiently supported when considered in connection with the views herein expressed as to the terms under which the parties may properly contract.

In accordance with the foregoing it is concluded:

(1) That the plaintiff is an irrigation district duly organized, existing and operating as such under the laws of this state.

(2) That the title to the unappropriated domestic waters of the state is in the State of California in trust for the water users of the state as beneficiaries and such waters are subject to appropriation under the laws of the state.

(3) That the United States as assignee of appropriative rights, as original appropriator thereof, and in the acquisition of other rights for the same purpose stands in the same relation to such beneficial owners as does the state, namely, as trustee for such beneficial owners and is answerable for the faithful performance of that trust.

(4) That in distributing the water contracted to be delivered to the District the United States does so as a purveyor of water at a price for the benefit of the water users of the District.

(5) That in so delivering the water to the District it is not competent for the United States or the District, either or both, to discriminate against the present or potential water users in the District on the basis of the amount of land owned by them, and that the 160-acre limitation contained in the original Reclamation Act is inapplicable to the subject matter of the contract and is improperly contained therein.

(6) That insofar as the contract provides for the construction of works for the storage and distribution of water to and by the District, the relationship of the parties is that of contractor and contractee. Upon the completion of the construction work the District is obligated under the law to pay for the same within forty years in equal annual installments. Upon the completion of such payments the District is entitled to ownership of the works and property of the storage and distribution system free from any claims of the United States.

(7) That insofar as the contract provides for furnishing water to the District at a price the United States in acting as a purveyor of domestic waters of the state to the District, under federal law, is bound to observe and comply with the laws of the

state with reference to the rights which are vested in the water users being served or entitled to be served. In this respect neither the state nor any of its agencies may contract or otherwise provide that the distribution of water to those for whose benefit the right to the water was acquired may be arbitrarily discontinued.

The judgment is affirmed.

SCHAUER, SPENCE and McCOMB, JJ., concur.

GIBSON, Chief Justice.

I dissent.

The holding of the majority opinion, which invalidates the 160-acre water limitation and other vital provisions of the contract between Ivanhoe Irrigation District and the United States Government, undermines the very foundation of federal reclamation policy and threatens to end the flow of federal funds into this state for reclamation and irrigation purposes at a time when the need for rapid development of our water resources is most critical. In reaching its conclusion the majority ignores the Irrigation District Federal Cooperation Law of this state, relies on a statutory provision relating to the apportionment of water by districts which is inapplicable to water from a federal project, and enunciates a trust theory with respect to the ownership of water which has no basis in existing law, is unsound in principle, and will prove a serious obstacle in the resolution of state-wide problems involving the distribution and utilization of available water supplies for domestic and industrial purposes, the irrigation of land, and the production of power.

The Central Valley Project, which is now nearing completion, is a federal undertaking being built under the provisions of the national reclamation laws. Since the passage of the Federal Reclamation Act in 1902, the federal statutes have imposed a limit on the amount of irrigation water from federal projects which will be sold to any one landowner, namely, sufficient water to meet the needs of 160 acres of land. In California, by reason of our community property law, the limitation has been interpreted as allowing a man and wife to buy sufficient water to supply 320 acres. (Graham, "The Central Valley Project: Resource Development of a Natural Basin" (1950), 38 Cal.L.Rev. 588, 608–611.) The restriction is not a limit on the amount of land a person may own. There is nothing in the governing federal statute, section 46 of the Omnibus Adjustment Act of 1926, which compels an individual who owns more than 160 acres to sell any of his land as a condition to receiving water sufficient for 160 acres. 44 U.S.Stat. 649, 43 U.S.C.A. § 423e. He may retain all his land, receiving federal project water for the first 160 acres and irrigating the remainder with whatever other water may be available. It is only where he elects to request delivery of federal project water for the portion of his land in excess of 160 acres that he may be compelled to dispose of the excess land within a period of time fixed by the Secretary of the Interior. (See Graham, op. cit., 38 Cal.L.Rev. at pp. 606–608.)

The suggestion that the limitation may not have been intended to apply to lands held in private ownership prior to construction of a reclamation project flies in the face of specific language in the statute of 1902, which provides that no right to the use of water "for land in private ownership shall be sold for a tract exceeding one hundred and sixty acres to any one landowner * * *." 32 U.S.Stat. 389, 43 U.S.C.A. § 431. Subsequent enactments contain similar provisions making specific reference to lands in private ownership. 36 U.S.Stat. 926 (1911), 43 U.S.C.A. § 524; 37 U.S.Stat. 266 (1912), 43 U.S.C.A. § 544; 38 U.S.Stat. 689 (1914), 43 U.S.C.A. § 418; 44 U.S.Stat. 649–650 (1926), 43 U.S.C.A. § 423e; see Graham, op. cit., 38 Cal.L.Rev. at p. 616. The Omnibus Adjustment Act of 1926 expressly requires that contracts between the federal government and irrigation districts shall contain the acreage limitation as a condition to delivery of water from a federal project. 44 U.S.Stat. 649–650, 43 U.S.C.A. § 423e.

Thus the water limitation in the Ivanhoe contract follows the requirement of the federal statute, and, unless the statutory limitation may properly be construed as inapplicable in California, or is declared unconstitutional, or is removed from the law by congressional action, the representatives of the federal government would have no power to negotiate a new contract without it.

Local irrigation districts are authorized by *state law* to enter into contracts with the federal government for a water supply *on terms required or authorized by federal law.* Direct authority for the action of the Ivanhoe district is found in the California Water Code which, since its adoption in 1943, has contained a chapter known as the Irrigation District Federal Cooperation Law, § 23175 et seq., most provisions of which are based on statutes originally enacted in 1917, Stats.1917, ch. 160. Section 23195 provides: "Districts may cooperate and contract with the United States under the Federal Reclamation Act of June 17, 1902, and all acts amendatory thereof or supplementary thereto or any other act of Congress heretofore or hereafter enacted permitting cooperation." No delegation of legislative power is involved, and the state law clearly authorizes a contract which includes the provisions of the Federal Omnibus Adjustment Act of 1926. Section 23196 of the Water Code authorizes districts to contract with the United States for a water supply and for acquisition and operation of works for irrigation.

With respect to the delivery, distribution, and *apportionment* of water among irrigators, section 23197 provides that district contracts with the federal government may include provisions for "(a) Delivery and distribution of water for the land in the district *under the relevant acts of Congress and the rules and regulations established thereunder* * * *" and section 23200 provides, "All water, the right to the use of which is acquired by a district under any contract with the United States shall be *distributed and apportioned by the district in accordance with the applicable acts of Congress, the rules and regulations of the Secretary of the Interior thereunder, and the provisions of the contract,* * * *." (Italics added.)

The majority takes the position that sections 23197 and 23200 must be construed as referring only to federal acts which do not conflict with state law and that the 160-acre limitation in the contract is invalid because it assertedly conflicts with section 22250 of the state Water Code which provides that water shall be apportioned ratably to each landowner on the basis of the last assessment against his land for district purposes.[1] The only reasonable interpretation of sections 23197 and 23200 is that the Legislature intended to authorize irrigation districts to enter into contracts with regard to the delivery, distribution, and apportionment of federal project water under the terms imposed by Congress as a condition to participation of the federal government in such contracts. The substance of section 22250 is contained in statutes enacted long before there was any water limitation in the federal reclamation law and before this state adopted the Irrigation District Federal Cooperation Law, the express purpose of which was to enable irrigation districts to secure the assistance of the United States Government in obtaining a water supply. Moreover, section 22250 is a *general* provision governing the distribution of irrigation water by districts, and it is obviously qualified by the more recent provisions in sections 23197 and 23200 which relate *specifically* to the distribution and

1. Section 22250 of the Water Code provides: "All water distributed by districts for irrigation purposes shall except when otherwise provided in this article be apportioned ratably to each landowner upon the basis of the ratio which the last assessment against his land for district purposes bears to the whole sum assessed in the district for district purposes." The substance of this section was included in the statutes of 1887, page 34, section 11. It also appears in the statutes of 1897, page 259, section 18.

apportionment of federal project water under contracts between irrigation districts and the United States. As we have seen, sections 23197 and 23200 authorize the acquisition of a supply of water from the United States and direct that such water shall be distributed and *apportioned* by the district in accordance with the applicable acts of Congress, the rules established thereunder, and the provisions of the contracts. It follows that section 22250 cannot prevail here in the face of the water limitation which is required by the federal statute and which is thus authorized by sections 23197 and 23200.

It should also be noted in considering the effect of section 22250 that the statute should not be interpreted as fixing the exclusive method of apportioning available water among landowners in all irrigation districts in the state. Section 22250 appears in part 5 of Division 11 of the Water Code relating to the powers and purposes of irrigation districts, and, to be at all intelligible, it must be read in connection with the provisions in part 5 and elsewhere relating to the financing by a district of the cost of constructing, maintaining and operating an irrigation system. Aside from incidental sources of revenue, there are two major methods of financing a district irrigation system under the Water Code: (1) ad valorem assessments on land in the district, § 25500 et seq.; see § 25503; and (2) tolls charged to district irrigators for water delivered and other services, § 22280 et seq. Where all district costs are financed by levying ad valorem assessments on district land, the formula for water apportionment set out in section 22250 is clearly applicable and, when coupled with a provision such as section 22251 authorizing a landowner to assign any or all water apportioned to him, is reasonable. Fallbrook Irr. Dist. v. Bradley, 1896, 164 U.S. 112, 162–163, 17 S.Ct. 56, 64, 41 L.Ed. 369. But, once an irrigation system is in operation and the district, as it may, finances a share or all of its expenses by means of charging rates or tolls to actual water users, it seems clear that the formula for water apportionment in section 22250 is not intended to apply.

The uncertainties and inequities of the assessed-land-value formula for water apportionment were discussed in Willard v. Glenn-Colusa Irr. Dist., 1927, 201 Cal. 726, 741–743, 258 P. 959, where this court upheld the constitutionality of a 1911 statute providing that, "In lieu (either in part or in whole) of levying assessments," irrigation districts have the power to raise all or part of the cost of operating and maintaining an irrigation system by means of charging rates or tolls to actual water consumers. (Cal.Irrig.Dist.Act, § 55, Stats.1911, p. 516 [now Water Code, § 22280]; see Water Code, § 25655.) It was pointed out that the assessed-land-valuation formula for water apportionment created hardship and uncertainty for owners of land having a relatively low assessed valuation but containing crops which required more water than the land would be entitled to under the formula for water apportionment. "On the other hand," states the opinion, "by giving to the board of directors [of an irrigation district] the power to raise the whole or a part of the cost of maintenance by tolls * * * every landowner of the district is given an opportunity to the extent of the water supply of the district of securing a definite, certain, and adequate supply of water for his lands." 201 Cal. at page 743, 258 P. at page 966. While the question of water apportionment was not before the court, the language of the opinion clearly indicates that the formula for apportionment in section 22250 is not applicable in a situation where all or part of the district expenses are paid by means of charging rates or tolls to actual water users rather than by levying an ad valorem tax on district land.

Ivanhoe and most of the other irrigation districts in the state have adopted the practice of defraying costs of maintenance and operation by means of a combined system of levying assessments and charging rates or tolls to actual water users. See Willard v. Glenn-Colusa Irr. Dist., 201 Cal. at page 744, 258 P. 959; Cal. Dept. of Pub. Works, Div. Water Resources, Bull. 21K, "Report

on Irrigation Districts of California for the year 1939," pp. 8, 22; ibid., Bull. 21P, "Report on Irrigation Districts in California, 1944–1950," appendix. The services for which tolls and rates may be charged have been gradually extended. (See Water Code, § 22280.) Section 25655 provides that revenues derived from such rates or tolls may be spent for "district purposes" generally, and section 25219 authorizes their use to pay principal and interest on construction and refunding bonds. Hence most, if not all, district expenses may ultimately be financed not by assessments but by tolls charged to actual water and power consumers, see Willard v. Glenn-Colusa Irr. Dist., 201 Cal. at pages 740–741, 258 P. 959, and the Legislature could not have intended that the water apportionment formula in section 22250 should be applicable under such circumstances.

Even if it be assumed, for the sake of argument, that there is a conflict between section 22250 and the water limitation provisions of the federal statutes, the assertion by the majority that section 8 of the 1902 Reclamation Act provides for the supremacy of state law is untenable. Section 8 provides: "Nothing in this chapter shall be construed as affecting or intended to affect or to in any way interfere with the laws of any State or Territory relating to the control, appropriation, use, or distribution of water used in irrigation, or any vested right acquired thereunder, and the Secretary of the Interior, in carrying out the provisions of this chapter, shall proceed in conformity with such laws. * * *" However, as stated in State of Nebraska v. State of Wyoming, 1945, 325 U.S. 589, 612, 615, 65 S.Ct. 1332, 1349, 89 L.Ed. 1815, section 8 will not be construed in every instance to mean that "where Congress has provided *a system of regulation* for federal projects it must give way before an inconsistent state system." (Emphasis added.) In the present case it is conceded that all water rights necessary to construction of the irrigation system have been acquired by the federal government in strict compliance with state law. The question before us is how a future supply of water from the completed federal project, *water not hitherto available,* shall be apportioned among district landowners. The 160-acre water limitation is clearly part of a "system of regulation" for federal projects within the meaning of the language quoted above from State of Nebraska v. State of Wyoming and thus appears to fall in that area where section 8 does not compel federal law to give way before inconsistent state legislation; hence, if there is any state-recognized vested right which, in fact, conflicts with the acreage limitation, that right may be taken and compensated for by the federal government under its power of eminent domain. See United States v. Gerlach Live Stock Co., 339 U.S. 725, 733, 739, 70 S.Ct. 955, 94 L.Ed. 1231; 32 U.S.Stat. 389; 43 U.S. C.A. § 421; Rivers and Harbors Act of 1937, § 2, 50 U.S.Stat. 844, 850. The question of compensation for loss or threatened invasion of a vested water right is not before us.

In holding the Ivanhoe contract invalid, the majority opinion invokes the aid of a "trust" theory assertedly based on general state law. The theory is that unappropriated domestic water is owned by the state in trust for water users and that the federal government can acquire no title to appropriate water rights free of such trust. For reasons hereinafter stated, it is my opinion that the trust theory is erroneous, but, if it be assumed that such a trust exists, it is clear, as indicated above, that there is nothing in the federal water limitation which conflicts with state law, state water policy, or the best interests of the water users of the state, hence nothing which can be held to constitute a breach of trust.

There is no legal basis for the trust theory developed by the majority opinion. The Constitution and statutes of California reserve to the state considerable control over the use to which domestic water shall be put but contain nothing which creates a trust as to such waters. Section 3 of article XIV of the Constitution provides

in substance that the water resources of the state must not be wasted, that conservation of such waters is to be exercised with a view to the reasonable and beneficial use thereof in the interest of the people and for the public welfare, and that the right to the use or flow of water from any natural stream or water course in the state is limited to such water as shall be reasonably required for the beneficial use to be served. Sections 104 and 105 of the Water Code provide, in effect, that the state may regulate the use of water in the interest of the people. These and other general regulatory provisions apply to all water and water rights, whether riparian, appropriative or underlying, and whether privately or publicly owned.

The fact is that no declaration of trust is intended or effectuated by these general provisions enunciating water policy and providing for regulation, and they are in no way inconsistent with the existence of full title to water rights in the state or in private persons. While the use to which certain property may be put is controlled by state law, this does not mean that the owner thereof has something less than full title. It adds nothing to the strength and effectiveness of the laws regulating the use of water to say that they give rise to a trust relationship between the state and water users, but, to the contrary, such language threatens to confuse the development of our water law. The very use of the term "trust" draws with it the problem of applying settled trust principles to all water rights in the state, or at least to those acquired by appropriation—a problem which will certainly be attended by much uncertainty and difficulty.

Let us examine the trust theory as applied to the water rights involved in the present proceeding. The United States is acquiring the water rights necessary to completion of the project by means of (1) assignment of applications for appropriation made by the state, (2) applications for appropriation made directly by the United States, and (3) purchase and exchange agreements made by the United States with certain private owners of riparian rights to divert the flow of the San Joaquin River. (Graham, op.cit., 38 Cal.L.Rev. 596–600.) With regard to the first two, which relate to hitherto unappropriated water, even if it be assumed that all unappropriated water and water to which an appropriate right is not fully perfected belongs to the state, the ownership rights of the state do not differ from its rights in other state-owned property. Certainly the state has full title to the water and water rights which belong to it, and the people, acting through their representatives and within the limits of the Constitution, may dispose of it as they see fit. There may be occasions when the state would find it necessary to weigh the interests of a small group of potential water users against those of a much larger group, but it is difficult to see how this would be possible if all water users of the state have equal rights as beneficiaries of the trust, and it would be even more difficult if, as suggested, the water users of a particular district are the sole beneficiaries of a trust in all waters which may ever be brought into the district. Application of a trust theory, in such a situation, would be an obstacle to the development of a water plan otherwise consistent with the best interests of a majority of the people. In the absence of any specific constitutional or statutory provision establishing a trust, it is improper for this court to restrict the power of the state Legislature and the people as a whole by the device of declaring that such a trust relationship exists.

The series of cases beginning with Merchants' Nat. Bank of San Diego v. Escondido Irrigation District, 144 Cal. 329, 77 P. 937, which are cited in support of the trust theory, are not in point because they deal not with the relationship of the state to domestic waters but rather with the functions of irrigation districts under statutes which, like section 22437 of the Water Code, specifically declared that such a district held its property "in trust" for the purposes of the district.

Nor is there anything in section 102 of the Water Code which supports the trust theory. The section reads, "All water within the State is the property of the people of the State, but the right to the use of water may be acquired by appropriation in the manner provided by law." Nothing in this language is inconsistent with the view that the state holds and can convey full and complete title to the water rights which it owns. And it is settled that the broad statement, "All water within the State is the property of the people of the State," has no application to privately owned water or water rights. City of San Bernardino v. City of Riverside, 186 Cal. 7, 29–30, 198 P. 784. The court in the San Bernardino case said with respect to this broad language, "Taken literally, this would include all water in the state privately owned, and that pertaining to lands of the United States, as well as that owned by the state. It should not require discussion or authority to demonstrate that the state cannot in this manner take private property for public use. * * * The Constitution expressly forbids it. Art. 1, § 14. The water that pertained to or was contained in the lands of the state was already the property of the people when this [statute] was adopted. The statute was without effect on any other property." 186 Cal. 7, at pages 29–30, 198 P. 784, at page 794.

With respect to the third method by which the United States is acquiring water rights, i. e., through purchase and exchange agreements made with private owners of riparian rights, it is clear that under the well-recognized principles set forth above such rights are not subject to a trust.

We have been cited to no case which holds that the state or private persons cannot hold full and complete title to water or water rights, and the constitutional and statutory provisions regulating the use of water which are relied on by the majority opinion do not, even by remote implication, require or justify the application of a trust theory in this field. Under existing law water may be used only for beneficial purposes, and all property of the state is held for the benefit of the people and is subject to use and disposition only in their best interest. The application of formal trust principles in this field thus appears to be totally unwarranted. Moreover, the ramifications of the trust theory as applied by the majority are infinite, technical and unpredictable and, as pointed out above, may prove to be a handicap in the future development of the water resources of this state.

The water rights acquired by the United States must, of course, be used in accordance with federal law. Under section 8 of the Reclamation Act appropriations may be made by the federal government, not for its own use, but only for the use of landowners; the right to the use of water acquired under the act shall be appurtenant to the land irrigated, and beneficial use shall be the basis, the measure, and the limit of the right. State of Nebraska v. State of Wyoming, 1945, 325 U.S. 589, 614–615, 65 S.Ct. 1332, 89 L.Ed. 1815.

The suggestion that the 160-acre limitation violates principles of equal protection and due process is without merit. This court cannot, of course, properly enter into a discussion of the wisdom of the limitation or the desirability of having it apply to the farming economy of the central valley in California. These are matters for Congress to determine. The limitation has remained in the federal reclamation law for over 50 years and has survived numerous efforts to eliminate it.[2] (Taylor, "The Excess Land Law: Execution of a Public Policy" (1955), 64 Yale L.J. 477, 502–503.) It seems clear that the limitation upon the amount of water from a federal irrigation project to be sold to any one landowner creates a reasonable classification in furtherance of the

2. In three instances Congress specifically exempted certain reclamation projects in Colorado, Nevada and California from the limitation, but all attempts to obtain such an exemption for the Central Valley Project have failed. (Taylor, op. cit., at pp. 502–503.)

purposes of the federal legislation. The federal government does not propose to recover the entire cost of building the Central Valley Project, and its construction and operation will result in a considerable subsidy to irrigators.[3] They will have the long term use of federal money necessary to finance the construction of dams, storage and distribution systems for their benefit, free of interest, and will bear the ultimate cost of only a small part of the capital outlay allocated to irrigation construction. The water limitation was intended to prevent use of the reclamation service for speculative purposes, and it insures that the irrigators' subsidy and other benefits of federal irrigation projects will not go in disproportionate share to a few large landowners but will be confined to holders of moderate-size tracts of land sufficient to maintain one family; its purpose, in other words, is to distribute the government benefits in accordance with the greatest good for the greatest number of individuals. (Graham, op. cit., 38 Cal.L.Rev. at 617.) Any vested rights of the landowners which are taken by the federal government must, of course, be compensated for, but the problems of compensation are not within the issues of this proceeding. It should be noted in this connection that none of the landowners in the district has riparian rights or perfected appropriative rights to the waters involved here and that the land of Courtney McCracken, the individual defendant who is opposing confirmation of the contract, is located about 100 miles from the river from which such waters come.

We turn now to a consideration of the effect of the provisions in the Ivanhoe contract relating to the method by which the district irrigators shall reimburse the federal government for a part of the costs incurred in construction of the federal project. As noted earlier, the federal government proposes to recover from irrigators only a portion of the construction costs allocated to irrigation, and the federal reclamation laws now provide two methods by which the United States may recover this amount. Under section 9(d) of the Reclamation Project Act of 1939, based on provisions contained in earlier reclamation laws, an organization of irrigators and the federal government may enter into a repayment contract by the terms of which the government agrees to supply water at a rate to be fixed by the Secretary of the Interior, and the local organization agrees to repay a fixed sum representing its share of total construction costs allocated to irrigation. The Secretary fixes the sum of the organization's repayment obligation and sets the amount and number of annual installments sufficient to repay the sum within 40 years. It was found that this method lacked flexibility (see note, 38 Cal.L.Rev. 739, 740–741; Maass, op. cit., 38 Cal.L. Rev. 666, 672), and, in 1939, section 9(e) of the Reclamation Project Act created an

3. That portion of costs allocated to navigation and flood control (approximately 12 per cent of total estimated cost) is nonreimbursable. Of the costs for which the United States will be reimbursed, expenditures allocated to irrigation represent approximately 63 per cent of the total. Of the remainder, costs allocated to municipal and industrial water supply represent approximately 3 per cent of total reimbursable cost; that allocated to power development represents 33 per cent. (See note, 38 Cal.L.Rev. 728, 730, citing H.R. Doc. No. 146, 80th Cong., 1st Sess. 23 (1947).) Federal money expended for irrigation purposes is advanced free of interest over long periods of time, and, in the allocation of repayment obligations under plans formulated by the Bureau of Reclamation, irrigators are scheduled to repay the United States only 17 per cent of total reimbursable costs or, stated otherwise, approximately 35 per cent of the costs allocated to irrigation. (Harding, "Background of California Water & Power Problems" (1950), 38 Cal.L.Rev. 547, 564.) The difference is proposed to be made up by users of project power and municipal and industrial water who are scheduled to pay rates designed to return approximately 82 per cent of total reimbursable cost. (Harding, op. cit., 38 Cal.L.Rev. at 564; Graham, op. cit., 38 Cal.L.Rev. at 622; Maass, "Administering the C.V.P." (1950), 38 Cal. L.Rev. 666, 672; Note, 38 Cal.L.Rev. 728, 730.)

alternative method for repayment by irrigators of the costs incurred by the federal government in constructing project units other than water distribution works located inside the district.[4] Under contracts authorized by section 9(e) there is no agreement by the irrigators to pay a definite sum within 40 years to cover costs of project construction but, instead, the federal government, under short or long term contracts for a period not exceeding 40 years, agrees to deliver water to the local organization at a rate fixed by the Secretary which is sufficient to include some return to the federal government on construction costs as well as costs of operation and maintenance.

In the present contract, costs incurred by the federal government in constructing a water distributing system *inside* the Ivanhoe district are covered by a 9(d) type provision. The contract does not contain any express provision for repayment of a share of the costs of constructing portions of the project located *outside* the district, such as Friant Dam and other units of the Central Valley Project. It provides merely that the United States is to furnish water and the district is to pay for it at an acre-foot rate to be fixed annually by the Secretary, in no event in excess of $3.50 per acre foot. It is argued that the contract is defective because there is no specific requirement that a definite portion of that rate shall be allocated to repayment of the district's share of the costs of constructing project facilities outside the district. However, the applicable provisions of section 9(e) must be read into the contract, and they provide that the water rate fixed by the Secretary shall be such as will produce revenue sufficient to cover an appropriate share of annual operation and maintenance costs "and an appropriate share of such fixed charges as the Secretary deems proper, due consideration being given to that part of the cost of construction of works connected with water supply and allocated to irrigation."

It is obvious under section 9(e) that the water rate to be fixed by the Secretary under the Ivanhoe contract is to include a construction component and that revenue produced in excess of operation and maintenance costs is to be treated as repayment by the district of its share of construction costs, and it is immaterial that the contract does not specifically so direct. Any question as to this interpretation of section 9(e) must now be regarded as settled by a recent statute providing, among other things, that in administering sections 9(d) and 9(e), the Secretary of the Interior shall "credit each year to every party which has entered into or which shall enter into a long-term contract pursuant to said subsection (e) so much of the amount paid by said party on or before the due date as is in excess of the share of the operation and maintenance costs of the project which the Secretary finds is properly chargeable to that party. Credit for payments heretofore

4. Section 9(e) of the Reclamation Project Act provides as follows: "In lieu of entering into a repayment contract pursuant to the provisions of subsection (d) of this section to cover that part of the cost of the construction of works connected with water supply and allocated to irrigation, the Secretary, in his discretion, may enter into either short- or long-term contracts to furnish water for irrigation purposes. Each such contract shall be for such period, not to exceed forty years, and at such rates as in the Secretary's judgment will produce revenues at least sufficient to cover an appropriate share of the annual operation and maintenance cost and an appropriate share of such fixed charges as the Secretary deems proper, due consideration being given to that part of the cost of construction of works connected with water supply and allocated to irrigation; and shall require payment of said rates each year in advance of delivery of water for said year. In the event such contracts are made for furnishing water for irrigation purposes, the costs of any irrigation water distribution works constructed by the United States in connection with the new project, new division of a project, or supplemental works on a project, shall be covered by a repayment contract entered into pursuant to said subsection (d)." (53 U.S.Stat. 1193, 61 U.S.Stat. 501, 43 U.S.C.A. § 485h(e)

made under any such contract shall be established by the Secretary as soon after the enactment of this Act as it is feasible for him to do so. After the sum of such credits is equal to the amount which would have been [sic] for repayment by the party if a repayment contract under subsection (d) had been entered into, which amount shall be established by the Secretary upon completion of the project concerned or as far in advance thereof as is feasible, no construction component shall be included in any charges made for the furnishing of water to the contracting party and any charges theretofore fixed by contract or otherwise shall be reduced accordingly." Pub.L.No. 643, 84th Cong., 2d Sess. § 1(3), July 2, 1956, 70 U.S.Stat. 483–484 (1956), 43 U.S.C.A. § 485h–1.

It has been suggested that the 9(e) type of contract places the federal government in the role of a utility, a mere seller of water, and that district irrigators can never acquire permanent, appurtenant water rights thereunder. Such reasoning, however, overlooks the clear declaration which has appeared in the reclamation law since its enactment in 1902 that "the right to the use of water acquired under the provisions of this Act shall be appurtenant to the land irrigated, * * *." 32 U.S.Stat. 390, 43 U.S.C.A. § 372. It is not reasonable to suppose that anything in the provisions of section 9(e) has in any way altered this basic purpose of the reclamation law. Cf. State of Nebraska v. State of Wyoming, 325 U.S. 589, 614–615, 65 S.Ct. 1332, 89 L.Ed. 1815. Moreover, it is now expressly directed that the Secretary of the Interior, in administering sections 9(d) and 9(e), shall provide that the other party to any contract entered into pursuant to those sections "shall, during the term of the contract and of any renewal thereof and subject to fulfillment of all obligations thereunder, have a first right * * * to a stated share or quantity of the project's available water supply * * * and a permanent right to such share or quantity upon completion of payment of the amount assigned for ultimate return by the party subject to payment of an appropriate share of such costs, if any, as may thereafter be incurred by the United States in its operation and maintenance of the project works." The Secretary is expressly authorized to amend existing 9(e) contracts to make their language conform to this act. Pub.L.No. 643, 84th Cong., 2d Sess., §§ 1 (4), 2, July 2, 1956, 70 U.S.Stat. 483–484, 43 U.S.C.A. §§ 485h–1, 485h–2.

It has also been urged that neither section 9(e) nor the Ivanhoe contract contains a provision authorizing renewal of the water delivery provisions beyond 40 years and that the federal government is, therefore, under no obligation to continue to supply water beyond the 40-year period. The Department of the Interior has construed the reclamation law to mean that construction costs allocated to irrigation may be recovered by means of 9(e) contracts in any reasonable period within the useful life of the project, and the rates presently established for the Central Valley Project are calculated to effect full recovery of the costs of the major units by the year 2009. There is nothing in section 9(e) which requires the recovery of all construction costs within 40 years or which forbids the renewal of water delivery contracts for periods beyond that time. This interpretation must be regarded as settled by the provision recently added to the reclamation law which authorizes the Secretary, if requested by the other party thereto, to amend existing contracts entered into under section 9(e) to include a provision for renewal. The Secretary is also authorized, upon request, to amend existing 9(e) contracts to include a provision contemplating conversion of the 9(e) contract into a 9(d) type repayment contract at a time in the future when the amount remaining due the United States by the other party is so small that it can probably be discharged in annual installments within the period fixed by law for 9(d) contracts, i. e., at present, 40 years. Pub.L. No. 643, 84th Cong., 2d Sess. §§ 1(1, 2), 2, July 2, 1956, 70 U.S. Stat. 483–484.

There is no merit in the argument that the contract is defective because it fails to state that, upon repayment of all construction costs, the district shall succeed to whatever title the United States has acquired to property in the district in connection with the project. The contract provides that "Title to all of the Project works, including the distribution system constructed by the United States pursuant to this contract, shall be and remain in the name of the United States until otherwise provided for by the Congress, notwithstanding the transfer hereafter of any such works to the District for operation and maintenance." This provision is required by the reclamation law. 32 U.S. Stat. 389, 43 U.S.C.A. § 498. There is no reason why the parties cannot agree that title to the project works shall remain in the United States after repayment of construction costs. The provision is a reasonable method of assuring that the various properties of the project shall remain devoted to the purposes for which the federal funds were expended, and, in the absence of a showing that the provision violates the Constitution, or a statute or some rule of policy, we should not hold it to be invalid. There is nothing in the contract or in the reclamation law which precludes Congress from transferring title to project property to the district after all terms of the contract are performed, and it will be up to the district to press its claim thereto at such a time. It is not the business of the courts to determine whether the contract provision is a wise one from the standpoint of the district; the question is one of validity.

The conclusions expressed above make it unnecessary to consider whether the Second Validating Act of 1949, Stats.1949, p. 1511, is applicable to the contract.

I would reverse the judgment.

TRAYNOR, J., concurs.

CARTER, Justice.

I dissent.

The majority opinion is based upon at least two fundamental misconceptions of law. First, this case does not involve water rights in the ordinary sense. That is, it does not involve questions relating to the right to divert and use water from a stream or other source; questions of priority or riparian ownership or beneficial use of water as defined in our statutes and court decisions. It involves the validity of a contract between the government of the United States and an irrigation district organized and existing under the laws of this state.

Second, even if the law relating to water rights were involved, the theory enunciated in the majority opinion of title to all domestic water being held in trust by the state is fundamentally unsound and unsupported in law, tradition, history, public policy, practice or human experience.

A brief statement relative to the origin and development of the Central Valley Project and its objectives will demonstrate that the contract here involved was entered into in accordance with federal and state law and is therefore valid.

The Central Valley Project was originally authorized by the State of California for construction by its Water Project Authority under the Central Valley Project Act of 1933, Calif.Stats.1933, c. 1042, p. 2643, effective after referendum action, January 13, 1934, now Water Code, § 11100 et seq. No action was taken by the Water Project Authority for the construction of this project, but on September 10, 1935, President Roosevelt, by executive order, transferred $20,000,000 under the Federal Emergency Relief Appropriation Act of 1935 to the Department of the Interior, Reclamation Service, for construction of Friant Dam on the San Joaquin River. The project was thereafter constructed as a reclamation project pursuant to the Reclamation Act above referred to and acts amendatory thereto. There is no question but that the United States government complied with all of the provisions of the law of California in the acquisition of the water rights incident to this project and that the construction, operation and maintenance of the storage dams and facilities are in every re-

spect in accordance with the laws of this state. It is likewise clear that this project was constructed in accordance with the laws of the United States and that the authority exercised by the Reclamation Service in storing and distributing the water developed by said project is strictly in accord with both the laws of the United States and of the State of California. Such being the case, we must look to these laws to determine whether or not the state agency involved in this case had the authority to enter into a contract with the United States government for the purchase of the water developed by said project. There is no question but that both the federal and state laws authorize the execution of such contracts. So far as our state law is concerned, the contract here involved is expressly authorized by the Irrigation District Federal Cooperation Law, Water Code, § 23175 et seq., of this state which authorizes a state agency to contract with the United States for a water supply, Water Code, § 23196(a), and to deliver, distribute, and apportion this supply as required by federal law, Water Code, §§ 23197(a), 23200.

The contract here involved is also expressly authorized by the federal laws relating to the reclamation of arid lands of the west, and particularly by section 9(e) of the Reclamation Project Act of 1939, 53 Stat.1939, p. 1196, 43 U.S.C.A. § 485h (e), 1946 F.R.L.A. 600, and section 46 of the Omnibus Adjustment Act of 1926, 44 Stat. of 1926, p. 649, 43 U.S.C.A. § 423e, 1946 F.R.L.A. 318. These laws, in themselves, and in conjunction with the state laws do not deprive anyone of property without due process of law, nor deny to anyone equal protection of the laws, and do not derogate from the powers reserved to the state under the Tenth Amendment to the Constitution of the United States.

There is no provision of law in this state which imposes any restriction against an agency of this state from entering into a contract with the United States involving the subject matter of the contract here under consideration. The 160-acre limitation for the use of water from a reclamation project has been in existence since 1902 and this provision has never been successfully assailed as impinging any constitutional right of anyone who has been called upon to comply with the provisions of the Reclamation Act.

We are not here concerned with the social and economic philosophy which was the background of the inclusion of the 160-acre limitation in the Reclamation Act. It is not our province to declare whether this provision of law is good or bad. It was adopted by Congress after many years of debate, and although numerous assaults have been made against it, Congress has not only refused to delete it from the act but has on two occasions, once in 1926 and again in 1939, expressly reaffirmed their belief in the wisdom of this provision. Neither has the Legislature of California seen fit to disapprove the inclusion of this provision in the contracts which it has authorized state agencies to negotiate with the United States government for the distribution of water from reclamation projects. The fact that in the case here involved the inhabitants of the district which negotiated the contract containing the 160-acre limitation, voted overwhelmingly in favor of said contract, should be persuasive evidence that the provision is not detrimental to the social and economic welfare of the people affected by it.

With respect to the title to the unappropriated waters of this state, the statutes of his state declare that "The sovereignty of the State resides in the people thereof * * *" Govt.Code, § 100, and that "All property within the limits of the State, which does not belong to any person, belongs to the people" Govt.Code, § 182. Since the power of sovereignty is vested in the people, and all property within the limits of the state, which does not belong to any person, belongs to the people, it follows that the unappropriated waters of the state are owned by the people under their power of sovereignty. The people have, through the Constitution, delegated this power to the executive and legislative

branches of the government. The Legislature of this state has provided by law a comprehensive system for the appropriation, distribution and use of the waters of this state, including the impounding and storage of the seasonal run-off for distribution and use for beneficial purposes. I refer to the Water Code of this state adopted by the Legislature in 1943 which contains the following provisions (among others) with respect to the ownership, appropriation and use of the domestic waters of this state:

"102. All water within the State is the property of the people of the State, but the right to the use of water may be acquired by appropriation in the manner provided by law.

"103. In the enactment of this code the Legislature does not intend thereby to effect any change in the law relating to water rights.

"104. It is hereby declared that the people of the State have a paramount interest in the use of all the water of the State and that the State shall determine what water of the State, surface and underground, can be converted to public use or controlled for public protection.

"105. It is hereby declared that the protection of the public interest in the development of the water resources of the State is of vital concern to the people of the State and that the State shall determine in what way the water of the State, both surface and underground, should be developed for the greatest public benefit.

"106. It is hereby declared to be the established policy of this State that the use of water for domestic purposes is the highest use of water and that the next highest use is for irrigation." Water Code, §§ 102, 103, 104, 105, and 106.

In the adoption of the state Water Code, the Legislature has made it abundantly clear that anyone complying with the laws of this state may be granted a right to appropriate and use any unappropriated water which he can put to a beneficial use. The government of the United States, acting under valid acts of Congress, may become an appropriator of any of the unappropriated waters of this state the same as any other public or private corporation or individual who complies with the law of this state governing the appropriation and use of such waters.

After reviewing the history of the water law of California the majority opinion states: "It is therefore concluded that the title to the unappropriated domestic waters of the state is in the State of California in trust for the use and benefit of the beneficiaries of that trust; that the trust character of that title is anchored in the state by constitutional provisions, by statutes enacted in furtherance thereof, and by the decisional law of the state * * *." The majority opinion does not cite any constitutional or statutory provision or any decision of any court of this state which supports the foregoing statement. On the contrary there is not a single constitutional or statutory provision or decision of any court of this state from which it is possible to draw such conclusion. The words trust or trustee or trust relationship do not appear in any constitutional or statutory provision or any court decision of this state dealing with the title or ownership of water by the State of California.

The reasoning of the majority with respect to the right of the beneficiaries under the so-called trust to the beneficial use of water seems incoherent. It proceeds from the premise "* * * that the title to the unappropriated domestic waters of the state is in the State of California in trust for the use and benefit of the beneficiaries of that trust; * * * that the beneficiaries of that trust are the water users of the state who in a general sense *constitute all of the people of the state;* that the beneficiaries of the trust relationship whose rights are here under consideration are *those present or prospective users* who individually or in properly classified groups bring themselves within the orbit of the state law under which they may be in position to demand benefits without discrimination, and that

within that category are the landowners of the District." (Emphasis added.)

Under the foregoing line of reasoning no vested right may ever be acquired by any individual or group of individuals to appropriate and use a given quantity of water for a beneficial purpose even though they have complied with all the provisions of the statutory law of this state, as the state would have no power to grant a specific right to any individual unless every other individual who may have a use for water has received his share. The following practical example may demonstrate the absurdity of the reasoning of the majority. It is a matter of common knowledge that there are vast areas of land in this state which have no available water supply. Under existing law, however, an individual or group of individuals may acquire a right to develop a water supply from unappropriated waters (see, Water Code, §§ 1252, 1252.5, 1253, 1350, 1375, 1380, 1390, 1450, 1455) by pumping from wells or storage of run-off which may be adequate to supply the limited areas owned by those who develop such supply. However, there may be other areas in the same locality for which no water is available because of the prior appropriation and development of the supply made available to those who first obtained a permit and proceeded with the installation of facilities for the appropriation and use of the entire available supply. It is obvious that under the trust theory advanced in the majority opinion, the state could not grant a right to one user which would deprive another of his share even though the first appropriator was devoting all of the available water to a beneficial use on his land. In this connection the majority opinion states, "The trust relationship existing between the state and the beneficiaries of the trust must therefore be kept in mind in connection with any transactions between the state or any of its agencies and outside parties. It follows that when an outside party, such as the United States, by contract, legislation or otherwise, steps into the shoes of the state to administer that trust by the development, conservation and distribution of the trust res, it is bound by the same rules of law as surround and govern the State of California or any other purveyor of water of the state for the benefit of its water users. *The state may not therefore lawfully dispossess itself of the title to such water and may not surrender its control of the same in any way inconsistent with the administration of the trust under which the title is held.* The state by general law may and has in the main *prescribed the terms and conditions under which the several classes of water users may become secure in their right to the water and use thereof.*" (Emphasis added.) But the state has not classified water users nor prescribed the terms and conditions under which they may become secure in their right to the water and use thereof on any theory of trust relationship between it and the users. On the other hand the state has provided that an individual or group of individuals may obtain a permit to appropriate and use a specific quantity of water, and to the extent that such appropriation is prior in time, it is prior in right to other appropriations and constitutes a vested right protected by the due process clauses of both the state and federal Constitutions. See, Water Code, §§ 1450, 1455; Temescal Water Co. v. Department of Public Works, 44 Cal.2d 90, 280 P.2d 1. In this connection, the Water Code provides (see, Water Code, § 1252.5) that the government of the United States may acquire a water right by appropriation in the same manner as any individual or corporation. The foregoing provisions of the Water Code are in clear conflict with the so-called trust theory advanced in the majority opinion. It should be perfectly obvious that the provisions of the Water Code above cited which confer a vested right upon appropriators of water, including the United States, cannot stand in the face of the holding of the majority here that the state holds the title to all the unappropriated domestic waters of the state in trust for all of the water users of the state, as it cannot be denied that the effect of the provisions of the Water Code which authorize the granting of permits for the appropriation

and use of the unappropriated waters of the state by individuals and private and public corporations, including the United States, is to deprive some of the beneficiaries of the trust of their share of the trust res—water —by the first come, first served policy with respect to the appropriation of the unappropriated domestic waters of the state as declared in the Water Code. The majority opinion expressly states that "The state may not therefore lawfully dispossess itself of the title to such water [unappropriated domestic water] and may not surrender its control of the same in any way inconsistent with the administration of the trust under which the title is held." The inevitable conclusion which must be reached from the reasoning of the majority opinion is that all unappropriated domestic waters of the state are held in trust for the use of all of the people of the state who are in a position to put their respective shares of the water to a beneficial use and that such beneficiaries have the right to demand and receive their respective shares of such water as beneficiaries of said trust. In this connection the majority states "It is they who are in position to avail themselves of the right to beneficial use of the waters to be purveyed and to demand indiscriminate service."

It must be remembered that there is no provision in either the state or federal law which purports to allocate any portion of the water developed by the Central Valley Project to the plaintiff in this action or to any other agency, group or individual. The allocation and distribution of said water is a matter to be provided for by contract entered into pursuant to the provisions of the federal and state laws on this subject. After reviewing its trust relationship theory the majority opinion states "There is nothing in the foregoing declaration [trust relationship between state and present or prospective water users] which interjects anything new into the water law of this state. It is but a recognition and redeclaration of existing fundamental concepts of this phase of our law."

If the majority is aware of any prior declaration of this or any other court of this state invoking the trust relationship concept to state-owned water rights it has failed to disclose the source or location of such declaration. While it may not be new to the majority, it is both new and novel to me and is basically unsound.

The only authorities upon which the majority rely for the so-called trust relationship are the following: Merchants' Nat. Bank of San Diego v. Escondido Irr. Dist., 144 Cal. 329, 77 P. 937; Tulare Irrigation Dist. v. Collins, 154 Cal. 440, 97 P. 1124; Hall v. Superior Court, 198 Cal. 373, 245 P. 814; Lindsay-Strathmore Irrigation District v. Wutchumna W. Co., 111 Cal.App. 688, 296 P. 933; Allen v. Hussey, 101 Cal.App.2d 457, 225 P.2d 674. None of these cases even mentions the question of title or ownership of the unappropriated domestic waters of the State of California. They deal exclusively with the rights of landowners within irrigation districts to receive their respective proportions of the water which the irrigation district has acquired for the use and benefit of the lands within the district. It is obvious that in administering the distribution of water to landowners within an irrigation district, the district is acting as a trustee and the landowner a beneficiary, as the landowner supplies the funds which enable the district to acquire and distribute the water, and the district should be required to distribute available water to landowners on a fair and equitable basis so that there will be no discrimination between them. It is clear that the landowner within an irrigation district has no property right in any particular quantity of water, as the title to the water is vested in the irrigation district which is required to distribute it to the landowners in accordance with the latters' needs. The situation with respect to the ownership of unappropriated domestic water by the state is entirely different. The state does not undertake to distribute any particular quantity of water to anyone. It has established an agency (the Division of Water Resources) to determine the quantity of water available and to grant permits for the use of such water to those making application therefor in accordance

with the law. There is no provision of law requiring the Division of Water Resources to supervise the distribution of water covered by permits issued by said division, and if the right of the permittee is violated by a third person, he must resort to the courts for the enforcement of his right. The Water Code makes it crystal clear that anyone complying with its provisions may acquire the right to use water by appropriation in the manner provided by law. (See, Water Code, § 102.) The right so acquired is a property right and protected by the due process clauses of both the state and federal Constitutions.

The concept of the trust character of title to the domestic waters of this state being vested in the State of California as enunciated in the majority opinion is clearly out of harmony not only with the Constitution and statutes of this state but with the decisional law as well. This is demonstrated by the discussion in the majority opinion relative to the development of the law relating to water rights in this state. At the beginning of this discussion the majority opinion refers to the case of Lux v. Haggin decided by this court in 1886, 69 Cal. 255, 4 P. 919, 10 P. 674. Referring to the holding of this court in Lux v. Haggin, supra, the majority states: "The doctrine was declared to be that the owner of real property bordering such a river or stream had a right co-existent with the same rights of other landowners on the stream, to the use of its waters and the flow thereof as it was 'wont to do in the course of nature' unimpaired in quality and undiminished in quantity. This right was declared by this court in Lux v. Haggin, supra, 69 Cal. 255, 4 P. 919, 10 P. 674, to be a right appurtenant to the land, in fact a part and parcel of the land itself. Under this doctrine the riparian owner had the right to insist that the full flow of the stream continue to pass by his land in its natural state whether he needed the water or not. This riparian right as so defined was declared by this court to be a property right which vested in the riparian owner and as such was protected by the state and federal Constitutions. It could not be limited or impaired without due process of law and without just compensation." It is conceded by the majority that the rule announced in Lux v. Haggin, supra, continued to be the rule of decision in this state until 1933 when this court was persuaded by opinions prepared by the facile pen of Mr. Justice Shenk, see, Gin S. Chow v. City of Santa Barbara, 217 Cal. 673, 22 P.2d 5; Peabody v. City of Vallejo, 2 Cal. 2d 351, 40 P.2d 486, to hold that this doctrine was no longer applicable and was supplanted by the doctrine of reasonable use even as against appropriators. It should be noted that the theory of the trust character of title to water rights had not then been conceived by Mr. Justice Shenk as no mention was made of this theory until now. It would seem, however, that if the state ever held the title to the domestic waters of this state in trust, it did so from the beginning; that is, from the time the state was admitted into the union and became an entity capable of exercising ownership and possession of property. The majority here do not claim that this trust theory of title to water rights originated with the adoption of the Water Commission Act in 1913 or the adoption of the amendment to the Constitution in 1928, Calif. Const. art. XIV, § 3, or with the sweeping pronouncements contained in the decisions of this court in the Gin Chow and Peabody cases. This theory must have originated and come into being when the Constitution of 1849 was adopted and existed at the time this court decided Lux v. Haggin, supra, in 1886, and during all of the intervening years when this court was applying the doctrine announced in Lux v. Haggin. Such being the case, can it be said that the doctrine of Lux v. Haggin and all of the other decisions of this court in water rights cases between 1886 and the decision of the Gin Chow case in 1933 is compatible with the theory that the State of California held the title to the domestic waters of the state in trust for water users who are said to be the beneficiaries of the so-called trust. The answer is obvious. The declaration of the

riparian right doctrine in Lux v. Haggin, supra, is clearly repugnant to any trust concept. Under this doctrine the riparian owner got title to the riparian right when a patent was issued to him for his riparian land whether that patent came from the state or federal government. Under this doctrine the right to have the full flow of the stream past his land unimpaired in quality and undiminished in quantity except by the reasonable use of another riparian owner, was a vested right, a part and parcel of the land itself and protected by the due process clauses of both the state and federal Constitutions. Miller & Lux v. Madera Canal & Irrigation Co., 155 Cal. 59, 99 P. 502, 22 L.R.A.,N.S., 391. While the majority opinion does not purport to express or declare what was the genesis of the so-called trust title theory, there are declarations in said opinion from which an inference might be drawn that the Water Commission Act plus the 1928 constitutional amendment plus the doctrine announced in the Gin Chow and Peabody cases gave rise to such theory. After discussing the effect of the foregoing the majority opinion states: "It is thus apparent that the more recent changes in the constitutional and decisional law of this state, had the effect of making available for beneficial uses by appropriation and other means great volumes of unappropriated domestic waters of the state." I have difficulty attempting to rationalize the foregoing statement. If the state ever had title to the waters referred to, it never lost it. If it did not have title to said waters, the title must have been vested in others. If it was vested in others, the only manner in which it could acquire title thereto was by purchase or the exercise of its power of eminent domain unless the users voluntarily abandoned the waters and made them available for appropriation and use by others. Certainly, the Legislature could not by statute nor the people by the adoption of a constitutional amendment nor could this court by a valid rule of decision divest an owner of a valid title to a water right any more than any of those departments of government could validly divest an owner of private property of his title to lands or personal belongings. What really happened in this melee of incongruity is that this court saw fit to change the riparian right doctrine from that announced in Lux v. Haggin, supra, to the so-called reasonable use doctrine as announced in the Gin Chow and Peabody cases by holding that the Lux v. Haggin doctrine had become outmoded and was not adapted to the arid conditions existing in this state. What this court did in the said last mentioned decisions had the effect of overruling all of the former decisions of this court from Lux v. Haggin in 1886 to Herminghaus v. Southern California Edison Co., 200 Cal. 81, 252 P. 607, decided in 1926, as it is obvious that said rule could not be changed without overruling said cases which had held that the riparian right doctrine as announced in Lux v. Haggin was a vested property right protected by the due process clauses of both the federal and state Constitutions. What Mr. Justice Shenk did in the Peabody and Gin Chow cases was simply to ignore the holding of this court in Miller & Lux v. Madera Canal & Irrigation Co., 155 Cal. 59, 99 P. 502, 22 L.R.A.,N.S., 391, by holding that the doctrine of reasonable use even as against an appropriator did not violate the due process clauses of the federal and state Constitutions. I have heretofore stated that I would have arrived at the same conclusion by forthrightly overruling all of the decisions of this court applying the Lux v. Haggin doctrine as being unsound in principle and based upon a misapprehension of the law applicable to water rights. See dissenting opinion in City of Pasadena v. City of Alhambra, 33 Cal.2d 908, at page 938, 207 P.2d 17.

The majority opinion correctly states that the decision of this court in Lux v. Haggin, supra, was based upon the declaration contained in section 4468 of the Political Code which provided at that time as follows: "The common law of England, so far as it is not repugnant to or inconsistent with the Constitution of the United States, or the Constitution or laws of the State of

California, shall be the rule of decision in all the courts of this state." But the majority opinion is in error when it states: "This court took the general language of that declaration by its four corners and applied the English common law doctrine of riparian rights to the ownership, control and use of the waters of the rivers and streams of the state." While it is true that the majority of this court in its opinion in Lux v. Haggin, supra, assumed that the riparian right doctrine as there declared was based upon the common law of England, such assumption was erroneous and without foundation in fact or law as there now appears to be no doubt that the riparian right doctrine was not a part of the common law of England but a part of the civil law and the first reference to it is contained in the Code Napoleon, the French civil code, in the year 1804. The first decision announcing the riparian right doctrine in any common law country was the case of Tyler v. Wilkinson, 24 Fed.Cas.No. 14,312, page 472, 4 Mason 397, which was written by Mr. Justice Story of the Supreme Court of the United States while sitting as a circuit judge in the Rhode Island circuit in the June term of 1827. The first case involving the riparian right doctrine in England was decided in 1849 and referred to Tyler v. Wilkinson as its authority. My authority for the foregoing statement is an article written by Mr. Samuel C. Wiel of the California Bar, an eminent authority on water law, author of the text "Water Law in the Western States" and various other publications on water law. This article was published in the Harvard Law Review, Volume XXXIII, No. 2, in 1920.

The fallacy underlying the basis for the decision of this court in Lux v. Haggin, supra, has permeated numerous decisions of this court and is no doubt the reason for much of the confusion which has been brought about as the result of the judicial fumbling and bungling of the water laws of this state. See dissenting opinion in City of Pasadena v. City of Alhambra, 33 Cal.2d 908, at page 938, 207 P.2d 17.

Returning to the so-called trust title theory of water rights, the majority opinion does not purport to delineate the terms of the so-called trust. But in view of the position taken by the majority that the domestic waters, the title to which is held in trust by the state, must be administered in accordance with the statutory and decisional law of the state, we may assume that such law may be resorted to for the purpose of ascertaining the terms of the trust. If such is the case, it would seem that the terms of such trust may be changed at every session of the Legislature or during every period that a new group of justices constitutes a majority of the Supreme Court of this state. In other words this so-called trust character of the title to the domestic waters of this state, has no stability whatsoever and may be changed from decade to decade or from year to year as may be dictated by the political fortunes of those who declare and administer it.

The record in this case discloses that in the construction and operation of the units of the Central Valley Project the United States through its Bureau of Reclamation has acquired by purchase and the exercise of the power of eminent domain vast areas of privately owned lands and numerous water rights some of which were based upon filings of applications for the appropriation of unappropriated waters by the State of California and various agencies of the state such as irrigation districts and municipal water districts and also from many private individuals and corporations which claimed to own vested rights in the domestic waters of this state both as appropriators and riparian owners. Included among the agencies from which such rights were acquired by the United States are Madera Irrigation District, Tranquility Irrigation District, James Irrigation District, and the following private or quasi-public corporations: Miller & Lux, Inc., Gravelly Ford Canal Company, Kings River Canal and Irrigation Company, Columbia Canal Company, San Luis Canal Company, Firebaugh Canal Company, Gerlach Live Stock Company, Hollister Land and Canal Com-

pany, Chowchilla Farms, Inc., Edison Securities Company and many other corporations and individuals. While the consideration paid by the United States for the rights acquired from the above public agencies, corporations and individuals is not disclosed, it appears, that the sum of $2,450,000 was paid to Miller & Lux, Inc. for title to all of the waters of the San Joaquin River in excess of flows specified in schedules attached to the agreement of purchase (see Report Prepared Pursuant to Senate Concurrent Resolution No. 48, Legislature of 1951, introduced in evidence as Water Project Authority's Exhibit N.

If the majority is right in holding that the title to all of the water rights acquired by the United States in connection with the construction, development and operation of the Central Valley Project is held in trust for the water users of this state, such holding must be based upon the premise that all of the rights so acquired were held in trust by the owners of such rights who conveyed the same to the United States. This would apply to the vast riparian right holdings of Miller & Lux, Inc. which were adjudicated by numerous decisions of this court as being a part and parcel of the lands of said corporation, title to which was vouchsafed by the due process clauses of both the federal and state Constitutions.

While there can be no question that the Supreme Court of the United States has held in many cases that the matter of ownership, distribution and use of water, with few limited exceptions, is within the jurisdiction of the state and the determination of the right to appropriate and use water is controlled by state law, State of Kansas v. State of Colorado, 206 U.S. 46, 93–94, 27 S.Ct. 655, 51 L.Ed. 956; United States v. State of Arizona, 295 U.S. 174, 55 S.Ct. 666, 79 L.Ed. 1371; United States v. Gerlach Live Stock Co., 339 U.S. 725, 70 S.Ct. 955, 94 L.Ed. 1231, recent decisions of that court make it clear that there are certain fields in which the federal law prevails over the state and that the state's control of the waters within the state is not complete and unqualified. See, United States v. City & County of San Francisco, 310 U.S. 16, 60 S.Ct. 749, 84 L.Ed. 1050; First Iowa Hydro-Electric Coop. v. Federal Power Comm., 328 U.S. 152, 66 S.Ct. 906, 90 L.Ed. 1143; Henry Ford & Son v. Little Falls Fibre Co., 280 U.S. 369, 50 S.Ct. 140, 74 L.Ed. 483; Federal Power Comm. v. Niagara Mohawk Power Corp., 347 U.S. 239, 74 S.Ct. 487, 98 L.Ed. 686; Federal Power Comm. v. State of Oregon, 349 U.S. 435, 75 S.Ct. 832, 99 L.Ed. 1215; State of Washington Department of Game v. Federal Power Comm., 9 Cir., 207 F.2d 391; Alabama Power Co. v. Gulf Power Co., D.C., 283 F. 606; California Oregon Power Co. v. Superior Court, 45 Cal.2d 858, 291 P.2d 455. It seems clear, however, that in the construction and operation of the units of the Central Valley Project the United States proceeded under the provisions of the Reclamation Act, 43 U.S.C.A. § 371 et seq., and with full recognition of the water rights there involved having valid existence under state law. United States v. Gerlach Live Stock Co., 339 U.S. 725, 70 S.Ct. 955, 94 L.Ed. 1231.

It is a matter of common knowledge that there are thousands, probably millions of acres of land in California which are still in government ownership and vast water resources exist in these regions. As I read the recent decisions of the Supreme Court of the United States, I have little doubt that under the rules of law announced therein, the federal government may lawfully exercise exclusive control over the water resources which exist on lands and in areas owned and controlled by it. I refer to the national forests and the undeveloped areas of this state which remain almost exclusively in government ownership and control.

We may take judicial notice that the federal government is now engaged in the construction of another large reclamation project which will be annexed to and contribute to the water resources of the Central Valley Project. I refer to the Trinity River Project which contemplates the construction of a dam 465 feet high on the Trinity River near Weaverville in Trinity County, which will impound the run-off of the Trinity

River watershed and will have a capacity of approximately 2,500,000 acre feet of storage. More than 75% of the 450,000 acres of land embraced within this project is owned by the United States government. When this dam is completed and the water therefrom discharged into the Sacramento River basin, the United States government will no doubt proceed to dispose of it in accordance with the laws of the United States including the 160-acre limitation in the Reclamation Act. It does not seem reasonable and logical to me that this court should say to the government of the United States that you cannot impound the waters of the Trinity River basin which are now running to waste and causing immeasurable flood damage, and divert it into areas where it may be used for the irrigation and improvement of arid lands and other useful purposes unless you eliminate from your contracts for the distribution of this water the 160-acre limitation which the Congress of the United States has said must be included in such contracts. Yet, this requirement must flow from the holding of the majority here even though the water made available by said project is produced from a drainage basin, 75% of the area of which is owned by the United States.

It is my view that when the United States constructs a reclamation project by impounding water in compliance with both state and federal laws, it is the owner of that water and may dispose of it as provided by federal law, and it may exact any condition which the federal law sees fit to provide for in connection with the sale and distribution of that water. Of course this does not mean that Congress could impose restrictions in conflict with constitutional principles. It may be that the State of California by legislative action could so restrict the appropriation of its water resources that the federal government would not see fit to develop further reclamation projects in this state, but so long as the federal government complies with the law of the State of California in the construction, operation and maintenance of its reclamation projects, I am disposed to hold that it may sell and distribute the water developed by said projects under contracts of the type here involved which, in my opinion, do not violate any provision of the Constitution and laws of this state or the Constitution and laws of the United States.

We have here no controversy between the State of California and the United States. The Attorney General of California takes the position that the contracts here involved are valid. The agencies here involved have all accepted and approved these contracts both by their governing boards and the inhabitants of the districts affected thereby. The validity of these contracts is challenged only by individuals who claim that their property rights will be affected thereby. I do not agree.

At the outset of this opinion I stated that the majority opinion is based upon two fundamental misconceptions. I then called attention to the fact that the majority opinion is written upon the assumption that this is a case involving water rights and that the State of California holds title to all of the domestic waters of the state in trust. I think it proper to add another fundamental misconception on which the majority opinion is based; that is, that the so-called 160-acre limitation is in effect an excess land law. With this concept I do not agree. In an excellent article by Professor Paul S. Taylor, Professor of Economics, University of California, printed in the Yale Law Journal, Volume 64, No. 4, February, 1955, entitled "The Excess Land Law: Execution of a Public Policy," he states in part:

"A great confusion pervades discussion of the excess land law and threatens disaster to public policy regarding disposing of public domain. Congress has declared this policy to be the widespread distribution of benefits, and the curbing of monopoly and speculation, whether the domain is in form of land, water, or both. The excess land provision of the National Reclamation Act of 1902 is a means of attaining these ends in the public disposal of water.

"General and legal acceptance have joined to confer authority upon either of two descriptive titles—'excess land law' or '160-acre limitation'—both of them equally deceptive. The law is not really a *land* law, and it places no limitation whatsoever upon the *acreage* a man may own. The restraint is neither upon acreage of land nor upon water, but upon the *individual*. No individual is entitled to receive more than an equitable share of the water distributed under reclamation law. The maximum *individual* share is set at an amount of water necessary to irrigate 160 acres of land.

"Among the sources of this confusion of language, two are 'accidents'—one physical, the other historical. The first is the unequal geographical distribution of water. Water and land are two halves of a productive whole everywhere. East of the one hundredth meridian nature has joined them, and any description or analysis of agricultural land can assume water. West of the hundredth meridian water and land are separate. Man-made works—reservoirs and canals—are required to join them. Water and land, therefore, must be treated separately, whether as physical entities, objects of private ownership, or the concern of public policy. Water cannot be assumed as the natural, inevitable and permanent adjunct of land. *Land* ownership does not equal *water* ownership west of the hundredth meridian.

"The second source of confusion is an historical accident. Policy was debated and formulated in the nineteenth century when settlement was still east of the hundredth meridian, and water was not a concern. The great legislative landmarks in the nation's policy favoring actual settlers are land laws—the Pre-emption Act of 1841, 5 Stat. 453, and the Homestead Act of 1862, 12 Stat. 392. After these acts were passed, settlement crossed the hundredth meridian, and water became the primary concern. General policy was not altered with the movement to the arid belt, but the techniques and devices for implementing it had to change. The artificial union of land and water required more complex thought and language than was necessary where land and water are joined naturally. The means of applying public policy to water had to be declared separately, spelled out in new terms. Chief among the new techniques was the excess land law.

"It took something of a mental wrench to turn American lawmakers and administrators from land policy to water policy. The natural tendency was to carry over the language of earlier land problems to the more complex problems of water. A result of this inertia has been confusion in thought as well as in language west of the hundredth meridian, where thinking in terms of land policy overemphasizes land and underemphasizes water. Some persons have found it advantageous to exploit the confusion. Those who achieved what Major Powell called 'monopoly of land' utilize this habit of thinking in terms of *land* policy to confuse the public, to suggest that private landowners have a moral claim to water in proportion to their landholdings whatever their size, and to defeat the efforts of legislators who seek equitable distribution of water among individuals. Even administrators do not find it easy to remember that the essential question is not, who owns the land, but who gets the water.

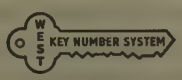
"The fact of importance above all others in federal reclamation is that the landowner calls upon the government to provide him with water. It is for Congress representing the general interest, and not for the landowner, to say upon what terms, in what amount, and in accord with what policy the public will supply water. This is a first principle inherent in a relationship between the public that gives and an individual who receives. The concern of the law is to distribute water equitably among individual landowners, not—except below 160 acres—in proportion to their holdings of land. This principle is accepted without question by most landholders seeking water under reclamation law; the few who object usually are holders of excess land."

I am in full accord with the views expressed by Professor Taylor and commend the reading of his article in full by those who are interested in this subject.

Since the majority opinion is based upon the wholly unsound and unsupported assumption that the title to the water rights acquired by the United States in the construction, development and operation of the Central Valley Project are held in trust for the use and benefit of the water users of California and that the title to such rights is therefore restricted to the extent that the United States may not dispose of such water pursuant to the Reclamation Act of 1902 and acts amendatory thereto containing the so-called 160-acre limitation, it follows that the conclusion reached by the majority that the contract here involved deprives certain landowners within the plaintiff irrigation district of vested rights without due process of law and without just compensation is equally unsound and unsupported.

For the reasons hereinabove stated I would reverse the judgment.

Rehearing denied: GIBSON, C. J., and CARTER and TRAYNOR, JJ., dissenting.



47 Cal.2d 699

The SANTA BARBARA COUNTY WATER AGENCY, Plaintiff and Respondent,

v.

ALL PERSONS AND PARTIES, etc., Defendants,

Maurice A. Balaam et al., Defendants and Appellants.

L. A. 22761.

Supreme Court of California.

In Bank.

Jan. 24, 1957.

Rehearing Denied Feb. 19, 1957.

Proceeding in rem by county water agency for determination of validity of act under which it was operating and contract between it and United States for financing of irrigation project with federal funds, operation of project by United States during period of repayment and furnishing by United States, during such time, of domestic water at a stipulated price. The Superior Court, Santa Barbara County, Charles F. Blackstock, J., assigned by Chairman of Judicial Council, rendered judgment prayed for and an appeal was taken. The Supreme Court, Shenk, J., held that the Santa Barbara County Water Agency Act was constitutional but that where proposed contract provided in accordance with federal statute that if any single owner owned lands in excess of stated amount in district, he could not receive irrigation for such excess lands unless landowner would agree to sell such excess land, proposed contract was in violation of constitution in limiting landowners' rights to waters held in trust by state on sole basis of amount of property which he owned.

Judgment affirmed in part and reversed in part.

Gibson, C. J., and Traynor, J., dissented in part.

Carter, J., dissented.

1. Judgment ⇐812(3)
Waters and Water Courses ⇐228½

In statutory in rem proceeding by county water agency for confirmation of validity of contract between it and United States for financing of irrigation project with federal funds and for federal operation of project during period in which federal government was being reimbursed, final judgment would foreclose further inquiry into matters to which it properly related, and, within its legitimate issues, would bind world at large. 43 U.S.C.A. § 423e; West's Ann.Water Code, Appendix, §§ 51–1 et seq., 51–11.10.

2. Waters and Water Courses ⇐228½

Under contract between county water agency and United States, for federal financing of irrigation project and federal

operation of such project until completion of repayment, domestic water appropriated for beneficial use could only be devoted to use consistent with purpose of appropriation and trust relationship existing between United States and water users, as beneficiaries, entitled to service within agency. 43 U.S.C.A. § 423e; West's Ann.Water Code, Appendix, § 51–1 et seq.

3. States ⇐119

A contribution from one public agency to another for purely local purpose of donee agency is violation of constitutional prohibition against gifts of public funds, but such a contribution is constitutional if it serves public purpose of donor agency, even though it is beneficial to local purposes of donee agency. West's Ann.Const. art. 4, § 31.

4. Municipal Corporations ⇐871

Provisions of agreement by Santa Barbara Water Agency in proposed contract with United States for financing of irrigation project with federal funds and for federal operation of project during repayment period, to pay United States for water furnished to agency's member units to stipulated amount annually, prorated among member units in accordance with their respective annual payments to the agency, and provisions of Santa Barbara County Water Agency Act authorizing it to make payments for liability assumed as principal, guarantor, or underwriter of any indebtedness were not violative of constitutional prohibitions against gifts of public funds. West's Ann.Water Code, Appendix, §§ 51–1 et seq., 51–10.2; West's Ann.Const. art. 4, § 31.

5. Waters and Water Courses ⇐183½

The limitations of constitutional prohibition against levying of taxes on public corporations for county, city, town, or other municipal purposes, do not prevent legislature from authorizing a water district to impose taxes for a state purpose or for a purpose which transcends boundaries of various municipalities that may be included within limits of a larger district. West's Ann.Const. art. 11, § 12.

6. Waters and Water Courses ⇐183½

The Santa Barbara County Water Agency Act which authorizes the agency to levy taxes to pay its obligations is valid within constitutional provision forbidding legislature to levy taxes on public corporations for municipal purposes but authorizing corporate authorities to collect taxes for such purposes. West's Ann.Water Code, Appendix, §§ 51–1 et seq., 51–10, 51–10.2, 51–10.3; West's Ann.Const. art. 11, § 12.

7. Waters and Water Courses ⇐183½

The provisions of the Santa Barbara Water Agency Act authorizing the levying by agency of special tax upon delinquent member units is not invalid under constitutional section prohibiting the legislature from levying taxes on public corporations or their property for municipal purposes. West's Ann.Water Code, Appendix, § 51–10.3; West's Ann.Const. art. 11, § 12.

8. Municipal Corporations ⇐861

Generally where scope of project transcends boundaries of municipality, it ceases to be for municipal purpose. West's Ann.Const. art. 11, §§ 6, 12.

9. Statutes ⇐90(3)

The Santa Barbara County Water Agency does not perform purely municipal function within meaning of constitutional prohibition against creation of corporations for municipal purposes by special laws, and the Santa Barbara County Water Agency Act is not invalid under that provision. West's Ann.Water Code, Appendix, § 51–1 et seq.; West's Ann.Const. art. 11, § 6.

10. Constitutional Law ⇐290(3)

Where legislature has created a district and authorized taxation of all land therein for purposes of district, property owners are not entitled to hearing on question of benefits to land included within district, but it is to be conclusively presumed that they have been heard through their representatives in legislature, although legislature's determination may not be arbitrary, capricious, or without factual basis.

11. Constitutional Law ⇐278(2)
Waters and Water Courses ⇐183½

The inclusion of all lands within Santa Barbara County in the Santa Barbara County Water Authority and the imposition of ad valorem taxes on all such lands on ground that they would benefit by operation of irrigation projects was matter for determination of legislature, and such inclusions did not constitute a taking without due process of law with respect to lands to which water would not be furnished. West's Ann.Water Code, Appendix, § 51–1 et seq.; U.S.C.A.Const. Amend. 14.

12. Waters and Water Courses ⇐228½

Where proposed contract, between United States and county water authority, providing for financing of irrigation project with federal funds and federal operation of project during repayment period, provided, in accordance with federal statute, that no more than stated number of acres of any single owner in district could receive irrigation, such proposed contract was in violation of constitution in limiting landowner's rights to waters held in trust by state on sole basis of amount of property which he owned. West's Ann.Water Code, § 23202; West's Ann.Water Code, Appendix, § 51–1 et seq.; 43 U.S.C.A. § 423e; U.S.C.A.Const. Amend. 14.

13. Waters and Water Courses ⇐228½

Under proposed contract between Santa Barbara County Water Agency and United States, for federal financing of irrigation project, for federal operation of system during period of repayment, and for furnishing of domestic water by United States as purveyor thereof at stipulated price, United States' acts would be in proprietary capacity and it would be bound to comply with laws of state with reference to rights of water users being served, and such a contract was invalid insofar as it provided that United States could arbitrarily discontinue distribution of water to those for whose benefit right to water was acquired in first instance. West's Ann. Water Code, § 23202; West's Ann.Water Code, Appendix, § 51–1 et seq.; 43 U.S. C.A. § 423e; U.S.C.A.Const. Amend. 14.

14. Waters and Water Courses ⇐228½

The intent of provision of Santa Barbara County Water Authority Act, stating that appeal in actions to test validity of contracts may be taken within 30 days after entry of judgment is doubtful and an appeal taken 35 days after entry of judgment would be entertained by Supreme Court. West's Ann.Water Code, Appendix, §§ 51–2(i), 51–11.10; West's Ann.Rules on Appeal, rule 2(a).

Sherman Anderson, Los Angeles, and W. P. Butcher, Santa Barbara, for appellants.

Brobeck, Phleger & Harrison, Herman Phleger, Alvin J. Rockwell and John M. Naff, Jr., San Francisco, as amici curiae on behalf of appellants.

Vern B. Thomas, Dist. Atty., and Lawrence M. Parma, Deputy Dist. Atty., Santa Barbara, for respondent.

Edmund G. Brown, Atty. Gen., B. Abbott Goldberg and Adolphus Moskovitz, Deputy Atty. Gen., as amici curiae on behalf of respondent.

SHENK, Justice.

This is an appeal from a judgment for the plaintiff Santa Barbara County Water Agency confirming the validity of a so-called "Master Contract" between the Agency and the United States, acting by and through the Bureau of Reclamation of the Department of the Interior, and five so-called "Member Unit Contracts" between the plaintiff and each of five public bodies, namely, the City of Santa Barbara, and the Carpinteria, Summerland, Montecito and Goleta County Water Districts.

[1] The plaintiff as petitioner commenced this proceeding on February 8, 1950, pursuant to section 11.10 of Santa Barbara County Water Agency Act, Act 7303, Stats. 1945, p. 2780, amended by Stats.1949, p. 18, West's Ann.Water Code Appendix, § 51–1 et seq., to secure a judicial determination of the legality of the establishment of the Agency and its member units, and the validity of the Master Contract and the five

Member Unit Contracts entered into by the Agency. Such a determination is required by article 35 of the Master Contract, by articles 36 of each of the Member Unit Contracts, and by federal law, Omnibus Adjustment Act of 1926, § 46, 44 Stat. 649, 650, 43 U.S.C.A. § 423e. It is a special proceeding in rem and summons was by publication. It was brought against all persons having or claiming to have any interest in the formation of the Agency, in the proceedings of the various contracting entities leading to the execution of the contracts, in the operation of the proposed contracts and in the property affected thereby. A final judgment will foreclose further inquiry into the matters to which the judgment properly relates, and within its legitimate issues it will be binding on the world at large. Ivanhoe Irrigation District v. All Parties and Persons, Cal., 306 P.2d 824 and cases there cited. The answering defendants are Maurice A. Balaam, Ted R. Holden, William G. Sudden, W. G. Moore, R. E. Sudden, Charles E. Sudden and L. H. Crandall. The default of all other defendants was duly entered on May 1, 1950.

The petition alleged six causes of action each seeking the confirmation of one of the contracts involved. The defendants demurred to each count on both general and special grounds. The demurrers were overruled. The defendants' answer denied the validity of the formation of the plaintiff Agency, certain proceedings of the board of directors of the Agency leading to and including the signing of the Master Contract, the Master Contract itself, the proceedings of the respective boards of directors of the different member units leading to and including the signing of the respective Member Unit Contracts and the validity of each of the Member Unit Contracts.

The defendants also pleaded nine affirmative defenses to each of the causes of action. In substance it is alleged: (1) that provisions in the Member Unit Contracts authorized by the Santa Barbara County Water Agency Act, whereby the Agency will levy ad valorem taxes on all property in the Agency to establish a fund from which contributions will be made to the member units, violate the constitutional provisions against legislative gifts and authorization of the imposition of local taxes by special legislation, § 31, Article IV, and § 12, Article XI of the State Constitution; (2) that the Santa Barbara Water Agency Act purports to give the Agency the power to levy ad valorem taxes on all property in the City of Santa Barbara and the various county water districts in violation of the constitutional prohibition of the imposition of taxes on individuals or property within public corporations for municipal purposes, § 12, art. XI of the State Constitution; (3) that the Santa Barbara Water Agency Act is unconstitutional in that it subjects the defendants to taxation and assessment on lands which cannot possibly be benefited from the construction of the project; (4) that any determination, legislative or otherwise, that the defendants' lands will be benefited by the project is arbitrary and contrary to any rational view based on evidence of investigation; (5) that the contracts provide for no distribution of water to parcels owned by a single person in excess of 160 acres, but that the excess lands are nevertheless subject to taxation for project purposes; (6) that the contracts are impossible of performance and lacking in consideration; (7) that the contracts (except the City of Santa Barbara Member Unit Contract) purport to prohibit the exclusion from the district of lands not benefited by the project, without the consent of the Secretary of the Interior; that section 23202 of the Water Code condones such provisions, and that both the contracts and section 23202 violate the Fourteenth Amendment of the Federal Constitution and constitute an unlawful delegation of legislative power under the State Constitution, § 1, art. IV; (8) that the provisions of section 9(c)(2) and 9(e) of the Reclamation Project Act of 1939, 53 Stats. 1187, 43 U.S.C.A. § 485h, pursuant to which the contracts purport to have been executed, constitute an

unconstitutional delegation of power to the Secretary of the Interior, and (9) that those provisions of the contracts which provide that the United States is entitled to all waste, seepage, and return flow water derived from water supplied under the contracts to the member units through the Agency, are invalid under the federal reclamation laws and the law of the state which make such waters appurtenant to the lands irrigated.

The Agency demurred generally to each of the affirmative defenses and the demurrers were sustained.

The causes were tried on November 14, 1951, and a judgment was entered on October 22, 1952. The judgment declared (a) the legality of the organization and existence of the Agency, the City of Santa Barbara and the four county water districts, (b) the due execution of the six contracts, (c) the lawfulness of the contracts, and (d) that the defendants had waived and were estopped from asserting the illegality or unconstitutionality of the Agency and of the Santa Barbara County Agency Act. The defendants have appealed from all portions of the judgment. The Attorney General of the State of California has appeared as amicus curiae in support of the judgment, and the Di Giorgio Fruit Corporation has appeared as amicus curiae asserting the invalidity of the contract.

[2] The County of Santa Barbara is situated in a semiarid portion of southern California. It has no common source of water supply that can serve the entire county but contains numerous non-contiguous watersheds. The county has grown greatly in population and developed an economy requiring full utilization and development of all available water supplies. For many years the county made investigations and engineering surveys of its water resources utilizing private, public and United States engineers for that purpose. Pursuant thereto, in June, 1945, a comprehensive water development plan for the county was submitted by the Bureau of Reclamation, and the Santa Barbara County Water Agency was formed by the Legislature in 1945 to carry out the plan. The Agency's boundaries are co-extensive with those of the county and the lands served by all member units lie within its boundaries.

Commencing in 1946 the Agency began negotiations for a water supply from the Cachuma Unit of the Santa Barbara County Project, described in House Document No. 587 of the 80th Congress, 2nd Session of April 1, 1948. That document reveals that the Cachuma Unit will consist of the Cachuma Dam and Reservoir on the Santa Ynez River, the Tecelote Transmountain Diversion Tunnel and the South Coast Conduit; that it is to be constructed, operated and maintained by the Bureau of Reclamation, pursuant to federal reclamation laws; that the water to be diverted for purposes of the project is unappropriated water to be appropriated under state law, and that the estimated cost of construction of the Cachuma Unit, exclusive of irrigation distribution works, is $28,610,000. This amount is to be reimbursed to the United States by payments for water in excess of the costs of upkeep, operation and maintenance over a period calculated not to exceed fifty years. It is apparent that what we have said in Ivanhoe Irrigation Dist. v. All Parties and Persons, Cal., 306 P.2d 824, is equally true in the present case, namely, that the relationship between the parties is that of debtor and creditor, contemplating a state project to be eventually owned and operated locally, and that the domestic water herein appropriated for beneficial use must be and can only be devoted to a use consistent with the purpose of the appropriation and the trust relationship existing between the United States and the water users entitled to service within the Agency.

The contracts in question are for the furnishing of domestic water by a purveyor thereof at a stipulated price. They do not involve the construction of distribution systems, as in the Ivanhoe and Madera cases. Ivanhoe Irrigation District v. All Parties and Persons, Cal., 306 P.2d 824; Madera Irrigation District v. All Persons, Cal., 306

P.2d 886. The Master Contract contemplates a supply of water for irrigation, municipal, domestic, industrial and other uses to be furnished and delivered to each member unit of the Agency for a period of forty years, specifying delivery points, time of delivery and maximum rates for various classes of water. The Agency is charged with the payments for all water delivered to member units. Provisions other than those specifically objected to by the defendants in their affirmative defenses provide for the storage of water, availability of excess water, responsibility for water shortage, the recognition by the Bureau of existing water rights, transfers of water by member units, defaults in payments, inspection of books and records by the Bureau and other provisions not here material.

The Member Unit Contracts, identical in form, are in general repetitions of the Master Contract except as to the contracting parties and the changes made necessary by the substitution thereof. Payments for water to be delivered are to be made by member units to the Agency. Those features of the Master Contract which are objected to are contained also in each of the Member Unit Contracts.

A preliminary question relates to the validity of the Santa Barbara Water Agency Act and the existence of the contracting entities. The contracts require that the Agency and the member units initiate legal proceedings which seek not only the confirmation of the contracts but also the confirmation of the legality of the organization of the Agency and the member units. As previously noted the defendants contend in their first affirmative defense that the act violates section 31 of article IV of the Constitution, which prohibits legislative authorization for the donation of public funds. Section 10.2 of the act provides in part that the Agency shall have the power to expend any or all of the funds or contributions in aid of: (a) the construction or payment of the cost of works; (b) the purchase or obtaining of water or a water supply; and (c) the payment of any liability "assumed as principal, guarantor, or underwriter on any indebtedness in connection with such construction, payment, purchase or obtaining; if such works are constructed or said water or water supply is obtained for or on behalf of the agency or its member units * * *." In accordance with the above and other provisions of the act (see § 5.1) the Agency has agreed in its contracts to pay for water furnished to member units to the extent of $100,000 annually, pro-rated among the member units in accordance with their respective annual payments to the Agency. This, it is contended, constitutes a gift of public funds and a violation of section 31, article IV.

[3] It is the general rule that a contribution from one public agency to another for a purely local purpose of the donee agency is in violation of the constitutional prohibition, but that such a contribution is legal if it serves the public purpose of the donor agency even though it is beneficial to local purposes of the donee agency. Pacific Mutual Life Insurance Co. v. County of San Diego, 112 Cal. 314, 41 P. 423, 44 P. 571. Thus in City of Oakland v. Garrison, 194 Cal. 298, 228 P. 433, payment by the County of Alameda to the City of Oakland to improve a street entirely within the city was held to be proper where the county board of supervisors found it would be for the general good of the county. And in County of Los Angeles v. Riley, 6 Cal. 2d 625, 59 P.2d 139, 106 A.L.R. 903, it was held that the state could impose a statewide tax on motor vehicles and then apportion some of the proceeds to the counties for local use because a statewide public purpose was being served. "The determination of what constitutes a public purpose is primarily a matter for legislative discretion [citations] which is not disturbed by the courts so long as it has a reasonable basis [citations]. This court has frequently upheld the expenditure of funds by the state or its subdivisions for the benefit of individuals as for a 'public purpose' and, hence, not within section 31 of article IV." County of Alameda v. Janssen, 16 Cal.2d 276, at page 281, 106 P.2d 11, at page 14, 130 A.L.R. 1141; see also County of Los

Angeles v. La Fuente, 20 Cal.2d 870, 876, 129 P.2d 378; California Employment Stabilization Comm. v. Payne, 31 Cal.2d 210, 216, 187 P.2d 702.

[4] That the conservation and beneficial use of the domestic waters of this state serve a public purpose is without question. § 3, Art. XIV of the Constitution. The legislative determination that those provisions of the act whereby the Agency could expend funds in assistance to member units in furtherance of the public purposes served by the act is entitled to a strong presumption of constitutionality and nothing appears herein to dispel that presumption. The financial assistance of the Agency in making the over-all plan economically feasible to the member units is a proper means of effecting the public purpose for the general good of the whole of the area served by the Agency.

It is next contended by the defendants in both their first and second affirmative defenses that the act creating the Agency is in violation of Article XI, section 12 of the Constitution, which forbids the Legislature to levy taxes on public corporations, or upon the property thereof, "for county, city, town, or other municipal purposes, but may, by general laws, vest in the corporate authorities thereof the power to assess and collect taxes for such purposes * * *."

[5, 6] The limitations of section 12 do not prevent the Legislature from authorizing a district to impose taxes for a state purpose, Joint Highway District No. 13 of California v. Hinman, 220 Cal. 578, 588, 32 P.2d 144, nor for a purpose that transcends the boundaries of the various municipalities that may be included within the limits of a larger district. Henshaw v. Foster, 176 Cal. 507, 511, 169 P. 82; Pixley v. Saunders, 168 Cal. 152, 141 P. 815. In view of the declaration of section 3, Article XIV of the Constitution, that "because of the conditions prevailing in this State the general welfare requires that the water resources of the State be put to beneficial use to the fullest extent of which they are capable, and that the waste or unreasonable use or unreasonable method of use of water be prevented, and that the conservation of such waters is to be exercised with a view to the reasonable and beneficial use thereof in the interest of the people and for the public welfare * * *," it is contended by the Agency that it serves more than a "county, city, town, or other municipal purpose" within the meaning of section 12, and that the constitutional prohibition is therefore inapplicable in the present situation. This contention has support in the legislative and decisional law of the state. In spite of numerous enactments for the conservation of water wherein the power to levy taxes and assessments was conferred on an Agency of the state, and in numerous cases where the constitutionality of such enactments was questioned on various grounds, no case is referred to or has been found wherein a specially created district with taxing powers similar in scope to those of the present Agency has been held to be unconstitutional by reason of section 12. (Cf. Municipal Home Rule in California, John C. Peppin, 34 Calif.L.Rev. 644.)

[7] It is also contended that section 12 of Article XI invalidates the power given the Agency by section 10.3 of the act by levying a special tax solely within the defaulting member unit to cure the defaulted financial obligation owing the Agency. But a larger district, in assessing benefits, can establish zones for that purpose in different portions of the District. See Los Angeles County Flood Control District v. Hamilton, 177 Cal. 119, at page 128, 169 P. 1028, at page 1031. The levy prescribed by section 10.3 of the act is a protection for the Agency, is not local as to the member units but transcends their boundaries and does not violate the "municipal purpose" clause of section 12 of Article XI. Pixley v. Saunders, supra, 168 Cal. 152, 141 P. 815; City of Pasadena v. Chamberlain, 204 Cal. 653, 269 P. 630; County of Los Angeles v. Hunt, 198 Cal. 753, 247 P. 897.

It is also contended, although not specifically set out in any of the affirmative defenses, that the special enactment of the Santa Barbara County Water Agency Act is in violation of section 6, Article XI of the Constitution, which provides in part: "Corporations for municipal purposes shall not be created by special laws; but the Legislature shall, by general laws, provide for the incorporation, organization, and classification, in proportion to population, of cities and towns * * *." The question is whether the Agency has been created for "municipal purposes" within the meaning of the above section.

It would appear from a reading of the section that the term "municipal purposes" has reference to the purposes of "cities and towns." Such a construction was applied by the court in Turlock Irrigation District v. White, 186 Cal. 183, 198 P. 1060, 17 A.L.R. 72. There the court had before it the meaning of "municipal corporation" as employed in section 1 of Article XIII of the Constitution. In defining that expression as not to include an irrigation district the court referred to section 6, Article XI, and stated at page 188 of 186 Cal., at page 1062 of 198 P.: "At the same election, article 11, § 6, was amended by the people. This section restricts the power of the Legislature in the formation of municipal corporations, to providing by general law for their formation, and prohibits the formation of such corporations by special statute. That section uses the term 'municipal corporation,' as synonymous with 'cities and towns.'" See also Laguna Beach County Water District v. Orange County, 30 Cal.App.2d 740, 743, 87 P.2d 46; People ex rel. Williamson v. Rinner, 52 Cal.App. 747, 751, 199 P. 1066.

[8] Generally it is true that where the scope of a project transcends the boundaries of a municipality it ceases to be for a municipal purpose. See Pixley v. Saunders, supra, 168 Cal. 152, 141 P. 815; County of Los Angeles v. Hunt, supra, 198 Cal. 753, 247 P. 897; Gadd v. McGuire, 69 Cal.App. 347, 231 P. 754. In City of Pasadena v. Chamberlain, supra, 204 Cal. 653, 269 P. 630, 633, involving the constitutionality of the Metropolitan Water District Act, St. 1927, p. 694, with respect to Article XI, section 6, this court held that in the combined operations of several municipalities under the act, "the municipalities engaged therein could not be held to be engaged in the conduct of a merely municipal affair." A similar conclusion was reached in Van de Water v. Pridham, 33 Cal.App. 252, 259, 164 P. 1136, relative to drainage ditches constructed partly within a city under the Drainage Act of 1903, St.1903, p. 354; and in Pasadena Park Imp. Co. v. Lelande, 175 Cal. 511, 166 P. 341, relating to a protection district, Stats.1895, p. 248, to protect against floods and including city lands. Numerous cases have established that special legislation in the creation of various types of districts dealing with water problems is not in contravention of the "municipal purpose" clause of section 6 of Article XI. People ex rel. Silva v. Levee Dist. No. 6, 131 Cal. 30, 63 P. 676 [levee district]; People ex rel. Chapman v. Sacramento Drainage Dist., 155 Cal. 373, 103 P. 207 [drainage district]; Reclamation District No. 70 v. Sherman, 11 Cal.App. 399, 105 P. 277, and Peterson v. Board of Supervisors, 65 Cal.App. 670, 225 P. 28 [reclamation districts]; Barber v. Galloway, 195 Cal. 1, 13, 231 P. 34 [combined irrigation, drainage and water distribution district, i. e., Palo Verde Irrigation District].

[9] It is noted that the cases have made distinctions between the meaning to be given to the terms "municipal corporations" or "municipal purposes," depending upon the particular section of the Constitution to which the definition relates. See dissenting opinion by Chief Justice Beatty in County of San Mateo v. Coburn, 130 Cal. 631, at page 637, 63 P. 78, 621. It is concluded that the Agency is not performing a purely municipal function within the meaning of section 6 of Article XI and the decisional law thereon.

[10] The invalidity of the act is also urged by the defendants in their third and fourth affirmative defenses on the ground,

generally, that the only lands receiving benefits thereunder are those within the member units; that considerable portions of land within the boundaries of the Agency are not within any member unit and therefore are not benefited by the act, and that the levy of an ad valorem tax on all lands within the Agency authorized by the act is a taking of property without due process of law. This contention has often been litigated under similar circumstances. The basic question relates to a proper finding of a benefit conferred on lands not directly served. In the present case the Agency was created by a special act of the Legislature wherein it was determined what lands were to be assessed for the benefit of the public improvement. In such circumstances "the property owners are not entitled to a hearing on the question of benefits to the land included within the district, for they are conclusively presumed to have been heard through their representatives in the Legislature." In re Orosi Public Utility District, in Tulare County, 196 Cal. 43, 50, 235 P. 1004, 1007. Such a determination, however, cannot be arbitrary, capricious or without factual basis.

[11] The basis of proper legislative determination of benefits conferred on all lands within a district is dealt with exhaustively in Los Angeles County Flood Control District v. Hamilton, supra, 177 Cal. 119, 169 P. 1028, and that case is determinative of the contentions in the present case. There claims of lack of direct benefit of all lands within the district were the same for all material purposes as those urged by the defendants in their third and fourth affirmative defenses. Beginning at page 123 of 177 Cal., at page 1030 of 169 P., this court stated: "The warrant and justification for charging the cost of such improvement upon designated lands is to be found, in theory at least, in the benefit to be derived by the lands assessed from the contemplated work. Reclamation Dist. [No. 70] v. Birks, 159 Cal. 233, 241, 113 P. 170. * * * The fixing of the district which is to bear the expense of a local improvement, and the mode in which such expense is to be borne and distributed, are, primarily, legislative questions. * * But since the imposition of such costs finds its ground of sanction in the benefits conferred upon the lands charged, it may well be that the legislative conclusion should not be upheld where the court can see that it is contrary to any rational view of the facts, and that lands have been included that 'plainly could not by any fair or proper view of the facts be benefited.' * * *" The court proceeded to examine the facts, noting that the district contained "several separate and unconnected watersheds"; that it "comprise[d] a considerable area of mountainous land"; that much of the district lay "above the plane of any flood waters that are to be anticipated", and that other lands were beyond the area of possible floods. Conceding that such lands could not be directly benefited, the court held that "the benefit which would justify the inclusion of land within the district need not be so direct and immediate as is assumed in the argument of counsel opposing the validity of the act." In referring to numerous cases involving problems closely related to the present one, the court concluded that an "examination of these cases will show that the courts have regarded an incidental or indirect benefit as sufficient to justify the imposition of a part of the burden of the improvement. Such indirect benefit may result from the improvement of neighboring and surrounding land, and the consequent increase in the value of all land within the district. * * * The proper maintenance of the harbors by protecting them from flood damage, the preservation of the means of communication between the different parts of the district by guarding against damage to highways and bridges—these are purposes whose execution may well be of substantial and immediate benefit to all of the lands included within the district." As to the imposition of an ad valorem tax, the court had this to say, beginning at page 124 of 177 Cal., at page 1030 of 169 P.; "It is thoroughly settled that the Legislature may apply the *ad valorem* method of as-

sessment, without any judicial inquiry into, or determination of, the extent of benefits. Recognizing that absolute equality cannot be attained under any system of taxation or assessment, the courts hold that constitutional requirements are satisfied by that approximation to equality which may fairly be thought to result from an assessment of the cost upon the property benefited in proportion to its ascertained value. Burnett v. Mayor, etc., of [City of] Sacramento, 12 Cal. 76, 84, 73 Am.Dec. 518; In re Madera Irr. Dist., 92 Cal. 296, 28 P. 272, 675, 14 L.R.A. 755, 27 Am.St. Rep. 106; Thomas v. Pridham, 171 Cal. 98, 104, 153 P. 933; Fallbrook Irr. Dist. v. Bradley, supra [164 U.S. 112, 17 S.Ct. 56, 41 L.Ed. 369]."

From the foregoing it is apparent that the inclusion of all of the lands within the agency and the imposition of an ad valorem tax on all of these lands on the ground that they would benefit by the operation thereof was a matter properly determined by the Legislature. It is noted that among the purposes for which the Agency was created are "controlling and conserving storm, flood and other surface waters for any beneficial use and for the protection of life and property in said district." Stats.1945, p. 2780. Those indirect benefits referred to in Los Angeles County Flood Control District v. Hamilton, supra, and conferred upon all of the lands within the Agency, appear to be well within the legitimate scope of the act.

[12, 13] In their fifth affirmative defense the defendants raise issues which have been discussed and disposed of in Ivanhoe Irrigation District v. All Parties and Persons, Cal., 306 P.2d 824, and in Madera Irrigation District v. All Persons, Cal., 306 P.2d 886. In accordance therewith it is concluded that the excess land provisions of the contracts involved here, which are substantially the same as those in the Ivanhoe and Madera contracts, are inapplicable and if not declared to be so would deprive the landowners of the member units of their property rights without due process of law and constitute a denial of the equal protection of the laws; that the United States is acting in its proprietary capacity as a purveyor of the domestic waters of the state to the Agency and its member units; that it is bound to observe and comply with the laws of the state with reference to the rights of the water users being served, and that the contract is invalid insofar as it, by implication or otherwise, provides that the United States can arbitrarily cause to be discontinued the distribution of water to those for whose benefit the right to the water was acquired in the first instance.

Numerous other grounds for the invalidity of the contracts are asserted. It is stated in the defendants' sixth affirmative defense that the contracts are lacking in consideration and are impossible of performance, in their seventh and eighth affirmative defenses that provisions in the contracts authorized by the Water Code, § 23202, and the Reclamation Act of 1939, §§ 9(c) (2), 9(e), 53 Stats.1187, delegate legislative power to the Secretary of the Interior in violation of the Fourteenth Amendment of the Federal Constitution and provisions in the State Constitution, § 1, art. IV, and in the ninth affirmative defense that the provisions entitling the United States to all waste, seepage and return flow are invalid. These contentions are insufficiently supported when considered with what has been said herein and in the Ivanhoe and Madera cases as to the matters concerning which the parties may properly contract.

Questions have been raised as to the sufficiency of certain proceedings leading to the execution of the contracts and the notice of elections for their confirmation. Such questions need not be determined in this case for the reason that upon a submission of any further proposed contracts the alleged defects need not recur.

[14] The Attorney General appearing as amicus curiae in behalf of the State of California in support of the judgment, questions the right of the appellants to prosecute this appeal. It appears that the

notice of appeal was filed some 35 days after entry of the judgment. Section 11.10 of the Santa Barbara County Water Agency Act provides in part that any "party may appeal at any time within 30 days after the entry of the judgment." It is contended that the failure to appeal within the time specified requires that the appeal be dismissed by the court of its own motion, even if no objection has been made by any party to the proceeding. In re Horowitz, 33 Cal.2d 534, 537, 203 P.2d 513; In re Estate of Hanley, 23 Cal.2d 120, 123, 142 P.2d 423, 149 A.L.R. 1250.

The appellants assert that the 30-day period within which an appeal "may" be taken in pursuance of Section 11.10 of the act is permissive and not mandatory. Section 2(i) of the act provides that "may" is permissive and "shall" is mandatory. Section 11.10 of the act, after setting forth the special provision for the time in which to appeal, states further that the "rules of pleading and practice not inconsistent with the provisions of this section are applicable to all actions or proceedings provided for by this section." Rule 2(a) of the Rules on Appeal provide that "Except as otherwise specifically provided by law, notice of appeal shall be filed within 60 days from the date of entry of the judgment * * *."

The appellants contend that as the special provision is permissive only, it is not inconsistent with the Rules on Appeal and that the latter should control. In support thereof they refer to the following declaration in section 11.10 of the act: "In a contest provided for by this section, the court shall disregard any irregularity or omission which does not affect the substantial rights of the parties." They claim that no substantial right of the respondent has been adversely affected. Furthermore, it is argued, that when the law is doubtful as to the right of appeal, the cause will be heard on its merits. People v. Bryant, 207 Cal. 450, 452, 278 P. 1025; City and County of San Francisco v. Certain Real Estate, 42 Cal. 513. In People v. Bank of San Luis Obispo, 152 Cal. 261, at page 264, 92 P. 481, at page 482, it is said: "The right of appeal is remedial, and in doubtful cases the doubt should be resolved in favor of the right whenever the substantial interests of a party are affected by a judgment."

The intent of the so-called "permissive" appeal provisions of section 11.10 at best is doubtful and in accordance with the foregoing no good reason appears why the appeal should not be entertained.

It is concluded that the judgment insofar as it declares the validity of the Santa Barbara Water Agency Act and the existence of the Agency and its member units must be and hereby is affirmed. Insofar as the judgment confirms and declares valid the Master Contract and the five Member Unit Contracts it is reversed, the appellants to recover costs on appeal.

SCHAUER, SPENCE and McCOMB, JJ., concur.

GIBSON, Chief Justice (concurring and dissenting).

I concur in the views expressed in the portion of the majority opinion which relates to the validity of the Santa Barbara Water Agency Act and the existence of the Agency and its member units. For the reasons stated in my dissenting opinion in Ivanhoe Irrigation Dist. v. All Parties & Persons, Cal., 306 P.2d 855, I disagree with the majority opinion insofar as it reverses the judgment of the trial court.

TRAYNOR, J., concurs.

CARTER, Justice (dissenting).

This is a companion case to Ivanhoe Irrigation District v. All Parties and Persons, Cal., 306 P.2d 864, and for the reasons stated in my dissenting opinion in that case, I would affirm the judgment of the trial court here.

Rehearing denied: GIBSON, C. J., and CARTER and TRAYNOR, JJ., dissenting.

47 Cal.2d 681

MADERA IRRIGATION DISTRICT,
Plaintiff and Appellant,

v.

ALL PERSONS, etc., Defendants and Respondents,

The People of the State of California, Defendant and Appellant,

The State Engineer of the State of California, Defendant and Appellant.
Sac. 6489.

Supreme Court of California,

In Bank.

Jan. 24, 1957.

Rehearing Denied Feb. 19, 1957.

Proceeding in rem by irrigation district for confirmation of proposed contract between it and United States, for, inter alia, construction of irrigation facilities with federal funds and operation of irrigation project by United States during period of repayment of funds by district. From a judgment of the Superior Court, Madera County, Benjamin C. Jones, J., assigned by Chairman of Judicial Council holding contract invalid, plaintiff appealed. The District Court of Appeal, Shenk, J., held, inter alia, that proposed contract was invalid in that it sought to deprive persons owning more than 160 acres of land right to irrigate more than such quantity of land.

Judgment affirmed as modified.

Gibson, C. J., Traynor and Carter, JJ., dissented.

1. Waters and Water Courses ⇐228½

Where proposed contract between United States and an irrigation district for financing of irrigation project with federal funds provided, in accordance with federal statute, that no single owner could receive water for irrigation for lands in excess of stated quantity, unless landowner would agree to sell such land, proposed contract was in violation of constitution in limiting landowner's rights to waters held in trust by state on sole basis of amount of property which he owned. 43 U.S.C.A. § 423e; West's Ann.Water Code, §§ 21925–21935, 22670 et seq., 23220–23222, 23225, 24253; West's Ann.Civ. Code, §§ 1414–1421.

2. Waters and Water Courses ⇐228½

Contract between irrigation district and United States for, inter alia, construction of irrigation project with federal funds and operation of project by United States during period of repayment of loan was invalid in that it purported to grant to United States right to distribute water for irrigation at price without compliance with laws of state relating to distribution of its domestic water. 43 U.S.C.A. § 423e; West's Ann.Water Code, §§ 21925–21935, 22670 et seq., 23220–23222, 23225, 24253.

3. Waters and Water Courses ⇐228½

Contract between irrigation district and United States for, inter alia, construction of irrigation project with federal funds and operation of project by United States during period of repayment of loan was invalid in that it attempted to reserve to United States right to determine at its own discretion whether to continue distribution of water to district and landowners therein after termination of instant contract. 43 U.S.C.A. § 423e; West's Ann.Water Code, § 21925–21935, 22670 et seq., 23220–23222, 23225, 24253; West's Ann.Const. art. 14, § 3.

4. Waters and Water Courses ⇐228½

Contract between irrigation district and United States for, inter alia, construction of irrigation project with federal funds and operation of project by United States during period of repayment of loan was invalid in that it by implication failed to recognize debtor-creditor relationship of parties for repayment of costs of construction of storage and distribution system. 43 U.S.C.A. § 423e; West's Ann.Water Code, §§ 21925–21935, 22670 et seq., 23220–23222, 23225, 24253; West's Ann.Const. art. 14, § 3.

5. Waters and Water Courses ⇐133

An application for appropriation of unappropriated water from particular

source results in no vested right to permanent supply of water from that source but gives only an incomplete, incipient and conditional right in and to water applied for. West's Ann.Civ.Code, §§ 1414–1421, West's Ann.Water Code, §§ 1240, 1450, 1455, 1600–1677; St.1913, p. 1012, § 1 et seq.

6. Waters and Water Courses ⇐133

Filing of application for water under present law is of like effect to posting and recording of notice or commencement of actual construction work under rules which previously prevailed. West's Ann.Civ.Code, §§ 1414–1421, West's Ann.Water Code, §§ 1240, 1450, 1455, 1600–1677; St.1913, p. 1012, § 1 et seq.

7. Waters and Water Courses ⇐144

Issuance of permit for appropriation of water, following application, does not confer upon permittee a fully perfected and vested right to such water, but real basis, measure and limit of appropriative right is actual beneficial use of water. West's Ann. Civ.Code, §§ 1414–1421, West's Ann.Water Code, §§ 1240, 1450, 1455, 1600–1677; St. 1913, p. 1012, § 1 et seq.; West's Ann. Const. art. 14, § 3.

8. Waters and Water Courses ⇐133

An irrigation district by filing application for appropriation of waters from river acquired only an inchoate and incomplete right thereto, subject to defeasance upon failure to perfect right in accordance with law. West's Ann.Civ.Code, §§ 1414–1421, West's Ann.Water Code, §§ 1240, 1450, 1455, 1600–1677; St.1913, p. 1012, § 1 et seq.; West's Ann.Const. art. 14, § 3.

9. Waters and Water Courses ⇐228½

A landowner within an irrigation district does not possess, as part of his freehold estate, a proportionate ownership in assets of district. West's Ann.Civ.Code, §§ 1414–1421, West's Ann.Water Code, §§ 1240, 1450, 1455, 1600–1677; St.1913, p. 1012, § 1 et seq.; West's Ann.Const. art. 14, §§ 1, 3.

10. Constitutional Law ⇐278(1)

Where, at time United States and irrigation district entered into contract under which district conveyed a dam and other interest to United States, certain lands were excluded from the district on petition of landowners involved who wished to establish separate irrigation district and United States proportionately reduced portion of water allotted to district, United States' action, when it entered into subsequent contract with such irrigation district, in refusing to confer upon such landowners whose land was excluded, that reduced portion of the water under prior contract did not deny such landowners due process of law. West's Ann.Civ.Code, §§ 1414–1421, West's Ann.Water Code, §§ 1240, 1450, 1455, 1600–1677; St.1913, p. 1012, § 1 et seq.; West's Ann.Const. art. 14, §§ 1, 3.

11. Waters and Water Courses ⇐224

Trust under which water rights and other property of irrigation district is held by district is for benefit of particular class of individuals who are the equitable owners, and individual owners within that class can demand services to which they are entitled as long as they qualify as members of that class. West's Ann.Civ.Code, §§ 1414–1421, West's Ann.Water Code, §§ 1240, 1450, 1455, 1600–1677; St.1913, p. 1012, § 1 et seq.; West's Ann.Const. art. 14, §§ 1, 3.

David E. Peckinpah, Denver C. Peckinpah, Fresno, Harold M. Child, Selma, and L. N. Barber, Fresno, for plaintiff and appellant.

Edmund G. Brown, Atty. Gen., B. Abbott Goldberg and Adolphus Moscovitz, Deputy Attys. Gen., Henry Holsinger, Principal Atty., Division of Water Resources, and Gavin M. Craig, Senior Atty., Sacramento, for defendants and appellants.

Roy A. Gustafson, Dist. Atty., and James E. Dixon, Deputy Dist. Atty., Ventura, as amici curiae on behalf of appellants.

Harry W. Horton, Horton & Knox, El Centro, Denslow Green, Green, Green & Plumley, Madera, Chester R. Andrews, Fresno, Mason A. Bailey, Coffee & Wolfe, Madera, and Dowell & Thompson, Lindsay, for respondents.

Brobeck, Phleger & Harrison, Herman Phleger, Alvin J. Rockwell and John M. Naff, Jr., San Francisco, as amici curiae on behalf of respondents.

SHENK, Justice.

This is an appeal by the plaintiff Madera Irrigation District and certain of the defendants from a judgment refusing to confirm a proposed contract between the United States, acting by and through the Bureau of Reclamation of the Department of the Interior, and the plaintiff District. The contract is substantially the same as that considered in the companion case of Ivanhoe Irr. Dist. v. All Parties and Persons, Cal., 306 P.2d 824. Except as to certain matters hereinafter referred to the issues are also the same as in that case.

As in the Ivanhoe contract the United States undertook to deliver water for irrigation purposes from the Central Valley Project to the District and to expend funds for the construction of a distribution system within the District. This proceeding, also an in rem special proceeding to obtain the confirmation of the proposed contract, was brought by the District pursuant to the provisions of sections 22670 et seq. and section 23225 of the Water Code. The federal law, Omnibus Adjustment Act of 1926, § 46, 44 Stat. 649, 650, 43 U.S.C.A. § 423e, Federal Reclamation Laws Annotated 318–319, and article 36 of the contract require the validity or invalidity thereof to be determined by a court of competent jurisdiction. The contract in question was entered into on May 14, 1951, by the District acting under the Irrigation District Federal Cooperation Law. Water Code, § 23175 et seq. On the 26th of March, 1951, the California Districts Securities Commission, with reservations, approved the contract, Water Code, §§ 23222, 24253, and the electors of the District subsequently approved it by a vote of 1979 to 755, Water Code §§ 23220, 23221, 21925–21935. The District commenced this proceeding on the 21st day of May, 1951. Eighty-six landowners within the District, and four landowners outside of the District filed answers in which they opposed the confirmation of the contract. The State of California and the Water Project Authority of the State of California, by and through the Attorney General, filed a joint answer. The state prayed that the contract be validated and a separate prayer recited that the Water Project Authority "is not taking any position upon the validity of the contract" and requested the court to declare that its decree "does not purport to be an adjudication of the right or interest of the State of California or its agencies * * *, or of the right or interest of the United States or its agencies * * * in or to the water or water rights * * * involved in the Central Valley Project."

After the statutory time for filing an answer had expired, leave of the court was granted the State Engineer of the State of California, acting in his capacity as such and ex-officio as Chief of the Division of Water Resources, Department of Public Works, to file a separate answer by counsel for the Division of Water Resources. The State Engineer took no position as to the validity of the contract, stating that his object was to protect the state law relating to water use and control. Regional counsel for the Bureau of Reclamation of the Department of the Interior were granted leave by the court to appear as amici curiae and as such participated throughout the proceedings in the trial court in support of the confirmation of the contract.

Judgment was ordered in favor of the objecting defendants and the court specifically directed that findings of fact and conclusions of law be prepared in accordance with the views of the same court in the Ivanhoe case. However, additional findings and conclusions hereinafter referred to were made on issues not involved in the Ivanhoe case. The judgment included injunctive provisions similiar to those in the Ivanhoe case except that it expressly provided that "The delivery of water by the United States to the plaintiff District at charges not to exceed $3.50 per acre foot for Class 1 water and $1.50 per acre foot for Class 2 water, and the collection of funds therefor, and the payment for the costs thereof by plaintiff District to the United States is not enjoined."

The appellants are the State of California represented by the Attorney General who seeks a reversal of the judgment, the plaintiff District which seeks a reversal, and the State Engineer as Chief of the Division of Water Resources of the Department of Public Works who asserts the invalidity of the contract but contends that the trial court erred in a determination that a right to the use of water is acquired by duly filing an application to appropriate water without perfecting it. The respondents, who seek an affirmance of the judgment, are supported by the Di Giorgio Fruit Corporation as amicus curiae. The Ventura County Flood Control District has appeared as amicus curiae in support of the appellants and seeks to establish that the trial court's determination that water rights involved have become appurtenant to the lands upon which water is being or is to be used is not in accordance with existing law.

The Madera Irrigation District is located in Madera County. It now has an area of approximately 112,000 acres, of which about 85,000 acres have been developed for irrigation. Before project water became available 90 percent of the acreage irrigated was supplied with water pumped from an underground water supply. During the 25-year period from 1922 through 1946 the demand on that supply exceeded the natural supply by an average of 27,200 acre feet annually and resulted in a net lowering of the water table by 21.7 feet. The need of a supplemental supply of water was thus apparent. Shortly after its organization the District in 1920 developed preliminary plans for the construction of a storage dam on the San Joaquin River near Friant and a canal to deliver water stored therein to lands within the District. It acquired a suitable dam site and gravel needed in the construction. It filed applications with the Division of Water Resources to appropriate unappropriated water of the San Joaquin River. Plans for construction of the dam were never completed by the District apparently because litigation between Miller & Lux and the Madera Irrigation District established that there was insufficient unappropriated water in the San Joaquin River to sustain the proposed project.

In May, 1939, the District entered into a contract with the United States whereby it transferred its dam site, gravel lands and applications to the United States for use in connection with the Central Valley Project. In exchange the District received $300,000 and a permanent priority right to contract for an annual supply of water from the project. Part A of the contract now under consideration is in partial recognition of that right.

The contract in Part A provides for a designated water supply for the District from the Friant Dam and the Madera Canal for a period of forty years, commencing with the year in which the initial delivery date occurs. The United States agrees to furnish to the District, and the District agrees to accept and pay for the water supplied at rates whose maximum limits are fixed by the contract. Part B of the contract provides that, to the extent that funds may be available by appropriation, the United States will construct a distribution system to cost not exceeding $8,320,000. The system will be constructed so as to provide facilities for the delivery of water from the Madera Canal to each unit of irrigable land within the District, each unit in no event to comprise more than 160 acres of land. The District agrees to convey to the United States without cost the unencumbered fee simple title to any land owned by the District, or perpetual easements therein, required for right of way purpose for the distribution system. Title to all the project works, including the distribution system, is to be and remain in the name of the United States until otherwise provided for by the Congress, notwithstanding the transfer of any such works to the District for operation and maintenance. The District must repay to the United States the actual cost of the distribution system. The obligation is to be paid in forty successive, equal annual installments, the first of which shall become due in the year following a two

year development period after the year in which the system shall become available for use. At the commencement of the development period the District will take over and at its own expense operate and maintain the distribution system, subject to the right of the United States to take possession of the system upon the failure of the District to perform its contractual obligations.

The above provisions of the contract with reference to cost, work, land limitation and payment by the District are substantially the same as those in the Ivanhoe contract. There are, however, two additional provisions in the contract here involved which recognize and modify the terms of the 1939 contract, by which the District conveyed the Friant Dam site and other interests to the United States. Article 2 of the present contract modifies and adjusts the amount of water to which the District might have asserted a priority right under the 1939 contract, and Article 4 states that the present contract is in satisfaction of this right only for its 40-year term, after which it may be extended, as distinguished from the Ivanhoe contract wherein the United States did not undertake to supply water beyond the 40-year term of the contract.

[1–4] For reasons stated in the Ivanhoe case the contract in the present case is ineffective in that it purports to deprive the landowners of the plaintiff District of vested rights as members of the class who are the beneficiaries of the trust under which the United States acquired appropriative rights to the domestic waters of this state; in that it seeks to deprive so-called "large landowners" of rights to waters for their lands in excess of 160 acres although such landowners are qualified members of the class who are the beneficiaries under the declared trust, and who are denied thereby due process and equal protection of the laws; in that it, by implication or otherwise, purports to grant to the United States the right to distribute water for irrigation at a price without compliance with the laws of this state relating to the distribution of its domestic water; in that it, or to the extent that it, by implication or otherwise, reserves to the United States the right to determine at its own discretion whether to continue the distribution of water to the plaintiff District and landowners therein after the termination of the present contract, and in that it by implication or otherwise fails or refuses to recognize the debtor-creditor relationship of the parties for repayment of costs of construction of the storage and distribution system.

In addition to the foregoing there are other issues which are not included within the determinations in the Ivanhoe case. The first of these relates to the nature of rights which accrue by the filing of an application to appropriate water, and particularly whether the District and its landowners have additional rights arising from the District's applications for the appropriation of water on the San Joaquin River at the time it contemplated construction of a dam at Friant. The applications, filed in the 1920's, were never perfected; no works pursuant thereto were ever built, no water was ever diverted, and no permit or license was ever obtained.

[5] As a part of its judgment the trial court in several instances held that an application for the appropriation of unappropriated water from a particular source resulted in a vested right in the applicants to a permanent supply of water from that source. In the Ivanhoe case it was concluded that the rights acquired under an application by the state or its assignee or by the United States to appropriate the domestic waters of the state for a beneficial use did not confer a vested right in the persons for whose benefit the application was made in the sense that such right became a part and parcel of the freehold estate. It is contended by the State Engineer in the present case that the right created by the application itself is an incomplete, incipient and conditional right in and to the water applied for. With this contention we agree.

Prior to legislation upon the subject, no priority of right to the use of water could be acquired in advance of the taking of the first definite step to divert water to beneficial use. When work was finally completed and the water applied to beneficial use, a right vested in and to the use of the water which "related back" for priority to the time when the claim was made, the location was selected, and work was commenced looking toward the conveyance of a definite amount of water from a defined source to the place of its intended use. Nevada County & Sacramento Canal Co. v. Kidd, 37 Cal. 282; Osgood v. El Dorado Water and Deep Gravel Mining Co., 56 Cal. 571. From the time of the commencement of the work to the time of beneficial use the right was considered as incipient and conditional. The provisions of the Civil Code enacted in 1872 were substantially declaratory of the rules laid down in the early decisions. Civil Code, §§ 1414–1421. In Inyo Consolidated Water Co. v. Jess, 161 Cal. 516, at page 520, 119 P. 934, at page 936, the court declared that the purpose of the code sections was "to afford a more perfect protection for such rights and to facilitate the subsequent acquisition of the title to the use. Previously, the incomplete right could be acquired only by some open visible work to that end, upon the ground, accompanied by a declaration of the intent. Disputes would naturally arise as to priority between different diversions from the same stream at places far apart. The Code endeavors to avoid this by providing for the posting of a notice at the proposed dam, and declaring that such notice secures a prior right, without any work, for the period of 60 days thereafter. Wells v. Mantes, 99 Cal. 583, 34 P. 324. Thus there is given that which it is said did not exist before (Kelly v. Natoma Water Co. [6 Cal. 105]), a constructive right to the use of water, a right existing only by publicly declared intent, and which may be made a perfect nad complete title, as against all except prior users and riparian owners, by beginning the work within 60 days, diligently prosecuting it to completion, and thereupon actually using the water. This incomplete right, although not as yet a title, is an interest in the realty." See also Merritt v. City of Los Angeles, 162 Cal. 47, 120 P. 1064.

[6] The Water Commission Act of 1913, St.1913, p. 1012, and the existing provisions of the Water Code changed the mechanics of the procedure for initiating and completing an appropriation of water, but they do not change the attributes of the water rights acquired thereunder. The filing of an application under the present law is comparable and of like effect to the posting and recording of notice or commencement of actual construction work under the rules which had previously prevailed. In Yuba River Power Co. v. Nevada Irr. Dist., 207 Cal. 521, 279 P. 128, 130, the court had before it the character of the water rights acquired under the Water Commission Act. In speaking of Inyo Consolidated Water Co. v. Jess, and Merritt v. City of Los Angeles, it is stated in the Yuba River Power Company case that, "We cannot distinguish these cases from the situation before us. The right being protected and administered is the same. A period of priority was provided, and the protection given there was during such statutory period and prior to any actual construction of diversion works." Under the facts appearing in the Yuba River Power Company case the plaintiff was entitled to the issuance of a permit, although his rights were as yet unperfected. It was held that he had a right protected from impairment by other claimants, although his right was as yet incomplete and conditional. There is nothing in the Yuba City Power Company case to indicate that it stands for the proposition that the Water Commission Act conferred upon an applicant thereunder a greater right than had previously been conferred upon one who filed notice under the former rules. The Water Code provides that the effect of filing an application confers, for all practical purposes, a priority only. Section 1450 states: "Any application properly made gives to the applicant a priority of right as of the date of the application until such application is approved or rejected. Such pri-

ority continues only so long as the provisions of law and the rules and regulations of the department are followed by the applicant."

[7] The issuance of a permit following application still does not confer upon the permittee a fully perfected right. Section 1455 of the Water Code states: "The issuance of a permit continues in effect the priority of right as of the date of the application and gives the right to take and use the amount of water specified in the permit until the issuance or the refusal of issuance of a license for the use of the water." The final procedural step in perfecting a water right is the issuance of a license as prescribed in sections 1600 through 1677 of the Water Code. But the real basis, measure and limit of the appropriative right is the actual beneficial use of the water. This is inherent in the Constitutional Amendment of 1928, art. 14, § 3, and in section 1240 of the Water Code, which provides: "The appropriation must be for some useful or beneficial purpose, and when the appropriator or his successor in interest ceases to use it for such a purpose the right ceases."

[8] It appears from the foregoing that neither the Madera Irrigation District nor any other applicant acquired a vested right to a permanent supply of water appurtenant to the lands of the District by the mere filing of applications for the appropriation of water on the San Joaquin River. Such right as was acquired was inchoate and incomplete and subject to defeasance upon the failure to perfect it in accordance with the law.

As noted, certain defendants appeared who were not landowners in the plaintiff District. These defendants were landowners within the District at the time the District contracted with the United States for the conveyance of the Friant Dam site and other interests. It appears that subsequently on their own petition the lands of these defendants, comprising some 19,500 acres, were excluded from the District; that these landowners intended to form an independent irrigation district and sought to obtain from the plaintiff District a proportionate share of the benefits under the 1939 contract, particularly a share of the priority right to contract for project water. Under the present contract the amount of priority water to which the Madera Irrigation District was entitled under the 1939 contract was reduced in proportion to the reduction of acreage in the District since the 1939 contract. But the excluded landowners assert that the United States has refused to confer upon them that reduced portion of the priority right under the 1939 contract, and that to refuse to do so constitutes a deprivation of property without due process of law. Their claim was asserted as an additional ground for the invalidity of the present contract, and the trial court so held.

Whatever may be the rights of the excluded landowners under the 1939 contract, it does not appear that they have individual rights which may be asserted under the contract sought to be validated or to any of the property or rights held by the District. Since 1879 the Constitution has provided in section 1, Article XIV, that the use of all waters "appropriated * * * for sale, rental, or distribution, is hereby declared to be a public use * * *." No statement is there made as to the appurtenance of such waters to the lands involved. Under that section of the Constitution the use of waters involved in the present case is a public use. The nature of the water right to which a landowner entitled to service from an entity which has appropriated waters devoted to a public use, has been the subject of prior litigation in this state. In Leavitt v. Lassen Irrigation Co., 1909, 157 Cal. 82, 106 P. 404, 29 L.R.A.,N.S., 213, a landowner sought to reserve to his private ownership a portion of waters he had appropriated for a public use. In holding that he could not establish an outright private ownership of waters appropriated for a public use, the court relied on the constitutional provision above set forth. It was stated at pages 89 and 90 of 157 Cal., at page 407 of 106 P.: "In McCrary v. Beaudry, 67 Cal. 120, 7 P. 264, is con-

tained the first statement of this court in construction of the constitutional provision: 'Whenever water is appropriated for distribution and sale, the public has a right to use it; that is, each member of the community, by paying the rate fixed for supplying it, has a right to use a reasonable quantity of it, in a reasonable manner.' And in the late case of Hildreth v. Montecito Creek Water Co., 139 Cal. 22, 72 P. 395, it was said by Mr. Justice Shaw, speaking for the court in bank, in defining the public use declared by the Constitution: 'In the case of a public use, the beneficiaries do not possess rights to the waters which are, in the ordinary sense, private property. A public use "must be for the general public, or some portion of it, and not a use by or for particular individuals, or for the benefit of certain estates." McQuillen v. Hatton, 42 Ohio St. 202. * * * The right of an individual to a public use of water is in the nature of a public right possessed by reason of his *status* as a person of the class for whose benefit the water is appropriated or dedicated. All who enter the class may demand the use of the water, regardless of whether they have previously enjoyed it or not.' "

In Miller v. Railroad Commission, 9 Cal. 2d 190, at page 199, 70 P.2d 164, at page 169, 112 A.L.R. 221, in passing on the nature of the right held by one entitled to participate in the distribution of irrigation water devoted to a public use, the court stated: "This right is simply a right of service, a right to be furnished with water by the utility upon payment of the price, and not a water right in the ordinary sense of 'a private freehold interest in the real estate of the distributing company.' Glenn-Colusa Irr. Dist. v. Paulson, supra [75 Cal. App. 57, 242 P. 494]."

[9, 10] From the foregoing it is established that a landowner within an irrigation district does not possess as a part of his freehold estate a proportionate ownership in assets of the district. The concept of ownership existing in the relationship between a district and a landowner therein was further considered in Jenison v. Redfield, 149 Cal. 500, 87 P. 62, 63, wherein a landowner sought damages from the district for refusing to deliver to him his pro rata share of the district's water supply, which he proposed to use on land owned by him outside the district. The court in denying relief used the following language: "It is apparent that to sustain the claim of plaintiff, it must be held that the effect of our statutes relative to irrigation districts, is to make each owner of land within a district the absolute owner of the proportionate share of the water of the district to which his land entitles him, to do with as he sees fit * * *. It seems very clear that such a conclusion would be opposed to the whole plan or scheme of the legislation for irrigation districts, converting a district * * * into a mere agency for the distribution of its water to individuals for use by them outside the district for any purpose whatever. * * * Such a construction of the provisions of the irrigation act entirely ignores the object of its enactment." Although the above case dealt with lands which never had been within a district, and the present case with lands which were once within the plaintiff District and later excluded, there is nothing in the law which would justify the conclusion that the owners of properly excluded lands were possessed of rights which attached to their lands.

[11] Nothing said herein is inconsistent with the cases which hold that the members of an irrigation district are the beneficial owners of the water rights of the district. Merchants' Nat. Bank of San Diego v. Escondido Irr. Dist., 144 Cal. 329, 77 P. 937, and cases there cited. The trust under which water rights and other property of an irrigation district is held by the district is for the benefit of a particular class of individuals. Those individuals are the equitable owners. Individual members within that class can demand services to which they are entitled if they qualify and as long as they qualify as members of that class.

Questions are raised as to the sufficiency of the notice of election whereby the electors of the District were called upon to ap-

prove or disapprove the proposed contract. The trial court concluded that the contract was invalid for lack of proper notice. Water Code, § 23223. These questions need not be determined on this appeal for the reason that upon the submission of any further proposed contract to the voters in the District, the alleged defects need not recur.

In accordance with the views expressed herein and in Ivanhoe Irrigation District v. All Parties and Persons, Cal., 306 P.2d 824, the judgment is modified by striking therefrom (a) that portion which holds that by the mere application for the appropriation of water for a public use within the District or by actual use by landowners in the District of water being furnished by the United States pending negotiations for a contract, the landowners of the District acquired a vested right appurtenant to their lands entitling them to perpetual service as a part of the freehold; (b) that portion which holds that an individual landowner, a member of the class entitled to the benefits of an irrigation district, acquires any permanent right to such benefits appurtenant to his lands when he ceases to be a member of that class; (c) those portions of the judgment which hold that the following provisions of the contract designed to secure repayment of construction costs to the United States are invalid: (1) that part withholding water from lands in default of proper charges although the District may not be in default as to the United States, (2) that part reserving to the United States the right to repossess waste, seepage and return flow which escapes or is discharged beyond the District boundaries, (3) that part limiting changes in boundaries, consolidations, mergers and dissolutions during the term of the contract and (4) that part subjecting all lands within the District to *ad valorem* taxes to defray charges imposed by the District.

As so modified the judgment is affirmed, the respondents to recover costs on appeal

SCHAUER, SPENCE and McCOMB, JJ., concur.

GIBSON, Chief Justice (dissenting).

For the reasons stated in my dissenting opinion in Ivanhoe Irrigation District v. All Parties and Persons, Cal., 306 P.2d 855, I would reverse the judgment.

TRAYNOR, J., concurs.

CARTER, Justice (dissenting).

This is a companion case to Ivanhoe Irrigation District v. All Parties and Persons, Cal., 306 P.2d 864, and for the reasons stated in my dissenting opinion in that case, I would reverse the judgment.

Rehearing denied: GIBSON, C. J., and CARTER and TRAYNOR, JJ., dissenting.



47 Cal.2d 695

Phillip ALBONICO and Jane E. Albonico, his wife, Petitioners and Respondents,

v.

MADERA IRRIGATION DISTRICT, a Corporation, and John M. Allen, C. A. Ridgeway, Allen T. Roberts, Dee V. Romans, John A. Franchi, Directors of the Madera Irrigation District, Respondents and Appellants.

Sac. 6460.

Supreme Court of California,

In Bank.

Jan. 24, 1957.

Rehearing Denied Feb. 19, 1957.

Proceeding for writ of mandate to compel irrigation district to vacate resolution denying exclusion from district of petitioners' lands in excess of 320 acres sought on ground that proposed irrigation contract between district and United States would limit to 160 acres the land of any one owner which could be irrigated. The Superior Court, Madera County, Arthur C. Shepard, J., assigned by Chairman of Judicial Council, rendered judgment for petitioners, and defendants appealed. The District Court

of Appeal, Shenk, J., held that since court had held that district could not enter into valid contract under stipulation that no more than 160 acres belonging to any single landowner could receive water for irrigation purposes, mandate was unnecessary.

Judgment affirmed as modified.

Gibson, C. J., and Traynor and Carter, JJ., dissented.

Waters and Water Courses ⇐228½, 251

All of a landowner's lands within irrigation district are entitled to fair, ratable portion of water distributed by district for irrigation purposes, and the district may not enter into valid contract with United States for federal operation of such a project, under stipulation that no more than 160 acres belonging to any single landowner could receive water for irrigation purposes. West's Ann.Code Civ.Proc., § 1085; West's Ann.Water Code, §§ 22250, 26728, 26729.

David E. Peckinpah, Denver C. Peckinpah, Fresno, Harold M. Child, Selma, and L. N. Barber, Fresno, for appellants.

Edmund G. Brown, Atty. Gen., B. Abbott Goldberg and Adolphus Moskovitz, Deputy Attys. Gen., Horton & Knox, Harry W. Horton, R. J. Knox, Jr., El Centro, Frank E. Jenney, Los Angeles, Ronald B. Harris, Fresno, P. J. Minasian, Oroville, and Martin McDonough, Sacramento, as amici curiae on behalf of appellants.

Green, Green, Plumley & Kuney, Denslow B. Green, Madera, and Kenneth A. Kuney, Tulare, for respondents.

Brobeck, Phleger & Harrison, Herman Phleger, Alvin J. Rockwell and John M. Naff, Jr., San Francisco, as amici curiae on behalf of respondent.

SHENK, Justice.

This is an appeal from a judgment for the petitioners Phillip and Jane E. Albonico, husband and wife, in a proceeding for the writ of mandate to compel the respondent Madera Irrigation District to vacate its resolution denying the exclusion from the District of the petitioners' lands in excess of 320 acres. Exclusion is sought on the ground that such excess lands would not be benefited by the operations of the District. Water Code, §§ 26728, 26729; Code Civ.Proc. § 1085.

A brief history of the Madera Irrigation District from the time of its inception is set forth in the companion case, Madera Irrigation District v. All Persons, Cal., 306 P.2d 824. That case involved the validity of a contract entered into by and between the District and the United States acting through its Bureau of Reclamation of the Department of the Interior for the sale and distribution of water for irrigating purposes to the landowners in the District. Among other provisions of the contract considered in that case were the so-called acreage limitations and enforced sales provisions. In substance it was provided that a single person owning in excess of 160 acres and a married couple in excess of 320 acres are "large land owners"; that large landowners shall, within 30 days after notice to do so, select the 160 or 320 acres, as the case may be, of his or their lands to be deemed non-excess; that if a large landowner fails to make such selection the District may do so for him and if the District does not do so, the Secretary of the Department of the Interior of the United States may do so, and that no water may be furnished by the District to excess lands unless and until the non-excess portions thereof have been selected and the landowner has executed a recordable contract to sell or authorize the Secretary of the Interior to sell within ten years the excess lands at an appraised sum which the landowner has no voice in determining and without regard to water rights involved in the irrigation project contemplated by the District and the United States.

Following a hearing on the 15th of April, 1951, at which the action of the board of directors of the District was reviewed and

other evidence was received, the court made findings to the effect that the entire operations of the District in relation to the lands of the petitioners would be pursuant to the contract with the United States which, by sections 28, 29 and 30, did not contemplate the delivery of water to the petitioners' excess lands unless they agreed to sell such lands; that "except as to 320 acres thereof, the said lands of the petitioners sought to be excluded would not be benefited by the operations of the Madera Irrigation District"; that "no evidence was introduced" tending to show that such lands would be benefited, and that at the hearing before the board of directors of the District prior to its resolution denying the petition for exclusion there "was no evidence * * * to support [its] finding of fact that lands of the petitioners would be benefited by the operations of the Madera Irrigation District."

Judgment was entered in the alternative, first, "that if the general plan of operation of the Madera Irrigation District, as adopted and applied by the Board of Directors of the District, should continue or require compliance with the excess land conditions or limitations set forth in paragraph 28, 29 or 30 of the Contract between the Madera Irrigation District and the United States * * * as a condition to petitioners receiving for all of their land their fair, ratable portion of the water distributed by the District for irrigation purpose, then, in that event, a peremptory writ of mandate shall issue from this Court directing and compelling the Board of Directors of the Madera Irrigation District to make its order vacating and setting aside its previous order of April 12, 1951, denying petitioners' petition for exclusion, and to make its order excluding from the Madera Irrigation District the lands of petitioners, except as to 320 acres thereof." In the alternative it was ordered that if the District's plan of operation should "supply all of the lands of petitioners their fair, ratable portion of the water distributed by the district for irrigation purposes, without imposition of the excess land conditions or limitations set forth in paragraphs 28, 29, or 30 of the Contract * * * then and in that event, the writ herein prayed for shall be denied * * *."

In view of our decisions in Ivanhoe Irr. Dist. v. All Parties and Persons, 306 P.2d 824, and in Madera Irr. Dist. v. All Persons, Cal., 306 P.2d 886, wherein it was held that excess land provisions in similar contracts were improperly included therein, it must be concluded in this proceeding that the District may not impose on landowners within the District the land limitations contained in sections 28, 29 and 30 of the contract in question, and that all of the petitioners' lands within the District are entitled to their fair, ratable portion of the water distributed and to be distributed by the District for irrigation purposes. § 22250, Water Code. As the petitioners' lands will thus be benefited by the lawful operations of the District under a proper contract for a supply of water to the District a writ of mandate to compel the exclusion thereof from the District is inappropriate and unnecessary. §§ 26728, 26729, Water Code.

The judgment is therefore modified by striking therefrom the first alternative by which the petitioners' land might be conditionally excluded and by affirming the second alternative pursuant to which the lands of the petitioners are entitled to their proportionate water supply.

As so modified the judgment is affirmed, the respondents to recover costs on appeal.

SCHAUER, SPENCE, and McCOMB, JJ., concur.

GIBSON, Chief Justice (dissenting).

For the reasons stated in my dissenting opinion in Ivanhoe Irrigation District v. All Parties and Persons, Cal., 306 P.2d 855, I would reverse the judgment.

TRAYNOR, J., concurs.

CARTER, Justice (dissenting).

This is a companion case to Ivanhoe Irrigation District v. All Parties and Persons, Cal., 306 P.2d 864, and for the reasons stated in my dissenting opinion in that case, I would reverse the judgment.

Rehearing denied: GIBSON, C. J., and CARTER and TRAYNOR, JJ., dissenting.



Winston N. SALSBERY and Helen S. Salsbery, Plaintiffs and Appellants,

v.

Tex RITTER et al., Defendants,

Tex Ritter, Kenneth D. Holland, Stanley Sevilla, George A. Cutright, Jango Nishemine and Custom Craft Sheet Metal Products, a Corporation, Defendants and Respondents.

Winston N. SALSBERY and Helen S. Salsbery, Plaintiffs and Appellants,

v.

Tex RITTER et al., Defendants,

Eugene W. Biscailuz, Sheriff of Los Angeles County, George J. Barbour, Clerk of the Municipal Court of Los Angeles Judicial District, and Municipal Court of the Los Angeles Judicial District, Defendants and Respondents.

L. A. 24012, 24013.

Supreme Court of California.

In Bank.

Feb. 15, 1957.

As Modified March 12, 1957.

Action for declaration of rights, determination of conflicting claims to realty and nullification of a judgment and execution sale of realty pursuant thereto. From a judgment of the Superior Court, Los Angeles County, Bayard Rhone, J., sustaining general demurrer to complaint without leave to amend, plaintiffs appealed. The Supreme Court, Traynor, J., held that complaint was sufficient to show that controversy existed between plaintiffs and some of the defendants and was sufficient to state a cause of action for declaratory relief.

Affirmed in part and reversed in part and remanded for further proceedings.

Opinion, 300 P.2d 230, vacated.

1. Declaratory Judgment ⇐325, 385

Where complaint in action for declaratory relief shows existence of an actual controversy among parties, a general demurrer to the complaint should be overruled and plaintiff is entitled to a declaration of rights, whether declaration is favorable to him or not.

2. Declaratory Judgment ⇐182

Where action was brought for declaration of rights arising from two purported redemptions of realty, although remedy against sheriff might appropriately have been a petition for mandate, since controversy with respect to redemptions revolved around the meaning of statute, action for declaratory relief was not inappropriate. West's Ann.Code Civ.Proc., § 703.

3. Mandamus ⇐1

Where action was brought for declaratory relief with respect to rights arising from two purported redemptions of realty, although remedy against sheriff might appropriately have been a petition for mandate, as against general demurrer complaint could be construed as an application for mandate.

4. Declaratory Judgment ⇐318

In action for declaration of rights arising from two purported redemptions of real estate, complaint was sufficient to show existence of an actual controversy between plaintiffs and certain of the defendants respecting validity of judgment and subsequent execution sale and purported redemptions, and was sufficient to state a cause of action for declaration of rights.

5. Declaratory Judgment ⇐393

Supreme Court decision that complaint was sufficient to state a cause of action for declaration of rights did not resolve controversy shown to exist, and court would pass upon questions of law that had to be decided in order to reach a final determination of case. West's Ann.Code Civ.Proc., § 53.

6. Process ⇐45

There is to be outstanding in a single county only one summons at a time, and it is improper to issue second alias summons without return of first alias summons or without affidavit that the first one had been lost. West's Ann.Code Civ.Proc., §§ 406, 408.

7. Judgment ⇐447(1)

Irregularity in process due to clerk's issuance of a second alias summons without return of first alias summons or affidavit that the first one had been lost would not annul subsequent judgment when attacked by an independent suit in equity instituted more than a year after entry of such judgment and without an allegation of a meritorious defense to the original action. West's Ann. Code Civ.Proc., §§ 406, 408.

8. Process ⇐45

Service of a second alias summons on person while first one is still outstanding gave the court jurisdiction over the person. West's Ann.Code Civ.Proc., §§ 406, 408.

9. Execution ⇐293

A judgment obtained after sale of judgment debtor's property on execution under a different judgment qualifies holder of later judgment lien to become a redemptioner. West's Ann.Code Civ.Proc., § 701.

10. Homestead ⇐55

Where judgment was obtained after sale of property on execution under a different judgment, redemption of property by later judgment creditors would not be invalidated because judgment debtor homesteaded property subsequent to later judgment but prior to redemption. West's Ann. Code Civ.Proc., § 701, West's Ann.Civ. Code, §§ 1240, 1241.

11. Execution ⇐299

Where subsequent judgment creditor redeemed property of judgment debtor sold on execution sale under a different judgment, in order for judgment debtor to redeem property from judgment creditor, he was required to pay lien on property acquired by subsequent judgment creditor. West's Ann.Code Civ.Proc., § 703.

12. Execution ⇐291

One of the primary purposes of statutory redemption is to force purchaser at execution sale to bid property in at price approximating its fair value. West's Ann. Code Civ.Proc., §§ 701–703.

13. Execution ⇐296, 299

Under statute providing that upon redemption from execution purchaser, redemptioner must pay creditor having a prior lien to that of the redemptioner, liens that must be paid are those prior to that upon which the current redemptioner seeks to redeem, and the rule is the same upon redemption from a prior redemptioner. West's Ann.Code Civ.Proc., § 702.

14. Bankruptcy ⇐433(1)

Lien acquired on real property owned by bankrupt prior to adjudication of bankruptcy was not discharged by bankruptcy. West's Ann.Code Civ.Proc., §§ 675b, 703.

15. Execution ⇐300

If no person seeks to re-redeem property sold on execution sale within statutory period, failure of redemptioner to file notice of redemption as required by statute would have no effect at all. West's Ann. Code Civ.Proc., § 703.

16. Execution ⇐300

If, as a consequence of redemptioner's failure to record notice of redemption, a subsequent redemptioner should, without notice, pay the wrong person, the good faith redemption would be effective as against the faulty one. West's Ann.Code Civ.Proc., § 703.

17. Execution ⇐299

Where a person eligible to redeem, without notice of any intervening redemption, tenders to sheriff or last redemptioner of record a sum of money, which but for lien of undisclosed redemptioner would be sufficient to effect a redemption, that tender is sufficient, unless person seeking to redeem is notified of the pertinent facts by the sheriff or last redemptioner of record, and intervening redemptioner who has failed to record notice of redemption is precluded from demanding as a prerequisite to re-

demption from him the amount of his lien. West's Ann.Code Civ.Proc., § 703.

18. Declaratory Judgment ⇐315

In action for declaration of rights, complaint was sufficient to state a cause of action for declaration as to meaning of statute respecting filing of notice of redemption. West's Ann.Code Civ.Proc., § 703.

Edward H. Blixt, Los Angeles, for appellants.

Stanley Sevilla, Los Angeles, in pro. per., Harold W. Kennedy, County Counsel, William E. Lamoreaux, Deputy County Counsel, Los Angeles, and Kenneth D. Holland, Monrovia, for respondents.

TRAYNOR, Justice.

On June 20, 1955, plaintiffs filed an amended complaint consisting of three counts in which they sought (1) a declaration of rights, (2) a determination of conflicting claims to realty, and (3) the nullification of a judgment and an execution sale of realty pursuant thereto.

On June 29, defendants Biscailuz, sheriff of Los Angeles County; the Municipal Court of the Los Angeles Judicial District; and Barbour, clerk of the Municipal Court, filed a demurrer attacking each count of the amended complaint as insufficient to state a cause of action. The court sustained the demurrer without leave to amend and entered judgment of dismissal for those defendants.

On September 19, after plaintiffs had filed a fourth amended complaint, defendants Ritter and Holland filed a demurrer, and a separate demurrer was filed by defendants Custom Craft, Cutright, Nishemine, and Sevilla. Each of these demurrers was upon the ground that the fourth amended complaint failed to state a cause of action. Both demurrers were sustained without leave to amend, and judgment of dismissal was also entered for those defendants. Plaintiffs appeal.

The ultimate issue on appeal is whether or not the facts alleged by plaintiffs show a right to relief. The fourth amended complaint is identical to the amended complaint insofar as defendants Barbour, Biscailuz, and the Municipal Court are concerned, and since the count for declaratory relief contains substantially all of the allegations found in the other counts, only that count will be discussed.

In substance these are the facts alleged: Defendant Custom Craft obtained a judgment against plaintiffs, Winston and Helen Salsbery, for $150.09 and costs. In the action an original summons was issued and returned. An alias summons was issued, and without the return of the first alias summons or an affidavit that it had been lost, a second alias summons was issued by the clerk. While the first alias summons was still outstanding, service of the second alias summons was made upon Helen, and judgment was entered by default.[1]

Pursuant to the Custom Craft judgment a writ of execution issued and was levied upon the interests of plaintiffs in certain described realty. On May 4, 1954, the sheriff sold plaintiffs' interests to defendants Cutright, Nishemine, and Sevilla for $51.70 and issued and recorded a certificate of sale.

On June 14, 1954, defendants Ritter and Holland obtained a judgment against plaintiffs for $1,500,[2] which was recorded June 25, 1954.

On April 21, 1955, plaintiffs homesteaded their interest in the realty.

On April 28, 1955, defendants Ritter and Holland purported to redeem the property by paying to the sheriff $51.70 plus interest and costs. Ritter and Holland did not record a notice of redemption as required by section 703 of the Code of Civil Procedure.

1. The fact that the judgment was taken by default is not alleged in the complaint but is disclosed by plaintiffs' petition. This deficiency could have been cured by amendment.

2. Holland is Ritter's attorney, and he vigorously disclaims any personal interest in this judgment. This point, however, is not properly raised by a general demurrer to the complaint.

On April 29, 1955, plaintiffs served upon the sheriff a notice of redemption, filed a copy of the notice with the county recorder, and deposited with the sheriff $61.80, which is still on deposit with him. The sheriff, Ritter and Holland have demanded that plaintiffs deposit with the sheriff an additional sum equal to the amount of the judgment in favor of Ritter and Holland, plus interest and costs. The sheriff refuses to issue a certificate of redemption to either plaintiffs or Ritter and Holland on the ground that he does not know who is legally entitled to the certificate.

On June 1, 1955, plaintiffs filed "* * * two petitions in bankruptcy * * * discharging all of the aforementioned judgments and indebtedness."

[1] In an action for declaratory relief, when the complaint shows the existence of an actual controversy among the parties, a general demurrer to the complaint should be overruled. The plaintiff is entitled to a declaration of his rights whether the declaration is favorable to him or not. Maguire v. Hibernia S. & L. Soc., 23 Cal.2d 719, 728 et seq., 146 P.2d 673, 151 A.L.R. 1062. Two exceptions to this general rule have been recognized, Bennett v. Hibernia Bank, 47 Cal.2d 540, 305 P.2d 20, but neither exception is involved in this case.

[2–4] It is readily apparent that the complaint shows the existence of an actual controversy between plaintiffs and defendants Custom Craft, Cutright, Nishemine, and Sevilla with respect to the validity of the Custom Craft judgment and the subsequent execution sale. Likewise, a controversy is shown to exist between plaintiffs and defendants Ritter and Holland with respect to rights arising from the two purported redemptions. Although the remedy against the sheriff might appropriately be a petition for mandate, see Lawler v. Gleason, 130 Cal.App.2d 390, 279 P.2d 70, an action for declaratory relief is not inappropriate, since the controversy with respect to the redemptions revolves around the meaning of section 703 of the Code of Civil Procedure (see discussion infra). California Physicians' Service v. Garrison, 28 Cal.2d 790, 172 P.2d 4, 167 A.L.R. 306. Furthermore, as against a general demurrer the complaint may be construed as an application for mandate. Boren v. State Personnel Board, 37 Cal.2d 634, 638, 234 P.2d 981. It was error therefore to sustain the demurrers, and the judgments must be reversed. Maguire v. Hibernia S. & L. Soc., supra.

[5] Our decision that controversies are shown to exist, however, does not resolve them, and we must therefore pass upon the questions of law that must be decided to reach a final determination of the case. Code Civ.Proc. § 53.

Validity of the Custom Craft Judgment

Plaintiffs contend that the clerk was without authority to issue a second alias summons without the return of the first alias summons or an affidavit that the first had been lost, that therefore the service upon Helen of the second alias summons did not subject her to the jurisdiction of the court, and that consequently the judgment against her and the subsequent execution sale are void.

[6] This contention was considered by the Appellate Department of the Superior Court of Los Angeles County in reversing a judgment of nonsuit in an unlawful detainer action brought by Ritter against the Salsberys. Ritter v. Salsbery, 142 Cal.App.2d Supp. 847, 853, 298 P.2d 166, 170. The court held that there was no error in serving the second alias summons, saying, "* * * there is nothing in section 408, Code of Civil Procedure which prohibits the issuance of an alias summons while a previously issued alias is outstanding. * * * It * * * provides, without further qualification or condition, that 'As many alias summonses as are necessary may be issued within such time' * * *." In our opinion section 408 alone does not provide a solution to the problem. Although it authorizes the issuance of several alias summonses, the question remains whether they may be issued concurrently or whether the preceding summons must be

returned or lost before a new summons may issue.

Section 406 of the Code of Civil Procedure provides for the issuance of only one original summons for each county in which one of the defendants resides. Section 408 provides that an alias may issue only when the original has been returned or lost. Reading these sections together we conclude that there is to be outstanding in a single county only one summons at a time. This conclusion finds further support in the fact that at common law it was thought that the return of the preceding writ was a prerequisite to the issuance of an alias or pluries writ. See Alderson on Judicial Writs and Process (1895), pp. 154–157.

[7, 8] The question then arises whether the irregularity in process of which plaintiffs complain is a sufficient reason to annul the subsequent judgment when the attack comes in an independent suit in equity more than a year after the entry of judgment and plaintiffs do not allege that they had a meritorious defense to the original action. The answer is that it is not. Even at common law failure to return the preceding writ did not render the alias or pluries writ void. Alderson, supra, at 155–156. In Williams' Administrator v. Welton's Administrator, 28 Ohio St. 451, under statutes very similar to our own, it was held that service of a second alias summons while the first was still outstanding gave the court jurisdiction over the person. The court said at page 471: "The object of a summons is to give the party notice, and as each of these writs was in due form, one was as effectual, as a notice, as the other to the party served." We agree with this statement and hold, therefore, that the Custom Craft judgment is not void.

The Purported Redemptions

[9, 10] Plaintiffs advance several arguments in support of their contention that Ritter and Holland never effectively redeemed. They urge that since the Ritter-Holland judgment was not obtained until after the sale of the property on execution, Ritter and Holland acquired no lien and were not eligible to redeem the property. See Code Civ.Proc. § 701. This contention is without merit. Clark v. Cuin, 46 Cal.2d 386, 295 P.2d 401; McMillan v. Richards, 9 Cal. 365, 412–413. Plaintiffs also contend that since they homesteaded the property prior to the Ritter-Holland redemption, the redemption was invalid as a forced sale of exempt property. See Civ.Code, § 1240. This argument is likewise without merit, for even were we to hold that a redemption is equivalent to a forced sale, section 1241 of the Civil Code provides that the homestead is subject to sale in satisfaction of a judgment that constituted a lien upon the premises before the declaration of homestead was filed for record. Such is the fact in this case. The homestead was not declared until April 21, 1955. The Ritter-Holland judgment was recorded June 25, 1954, and under the rule of Clark v. Cuin, supra, at that time the Ritter-Holland judgment became a lien upon the interest plaintiffs retained in the realty.

[11] Plaintiffs urge that even if Ritter and Holland validly redeemed, the $61.80 deposited by plaintiffs with the sheriff was sufficient to effect a redemption by the plaintiffs. Section 703 of the Code of Civil Procedure governs redemption from a prior redemptioner. It provides in part: "If the judgment debtor redeem, he must make the same payments as are required to effect a redemption by a redemptioner * * *."[3] What payments must a redemptioner make? The section provides:

> "If property be so redeemed by a redemptioner, another redemptioner may, within sixty days after the last redemption, again redeem it from the

3. Section 701, which lists the classes of persons eligible to redeem, makes a distinction between the judgment debtor or his successor and "redemptioners." This distinction is maintained with variable consistency throughout sections 702 and 703.

last redemptioner on paying the sum paid on such last redemption, * * and, in addition, the amount of any liens held by such redemptioner prior to his own, with interest; but the judgment under which the property was sold need not be so paid as a lien."

As plaintiffs read the statute, "liens * * * prior to his own" means liens held by the prior redemptioner that are prior to the lien created by the judgment that the prior redemptioner personally recovered against the debtor, i. e., "his own." They argue that since only liens prior to "his own" must be paid, "his own" judgment lien need not be paid. The contrary argument is, of course, that "liens * * * prior to his own" means liens prior to that upon which the current redemptioner seeks to redeem.

Lawler v. Gleason, 130 Cal.App.2d 390, 397–400, 279 P.2d 70, 75, is cited as authority contrary to the construction advanced by plaintiffs. In that case, however, the prior redemptioner held in addition to "his own" judgment lien a lien "prior to his own," and the ambiguity pointed out here was not discussed.

It is clear that the statutory words "such redemptioner" refer to the words "last redemptioner" (see original phraseology, Stats.1851, ch. 5, p. 88, § 232), and it is equally clear that the words "last redemptioner" refer not to the current redemptioner but to the prior redemptioner. As thus interpreted the pertinent part of the section would read, "* * * and, in addition, the amount of any lien held by the prior redemptioner prior to his own. * * *" The juxtaposition of the words "such redemptioner," meaning prior redemptioner, and the phrase "prior to his own" without intervening punctuation would seem to indicate that the phrase "liens * * * prior to his own" means liens held by the prior redemptioner that are prior to the lien created by the judgment that the prior redemptioner personally recovered against the debtor. The purpose for which the statute was apparently enacted, however, and the language found in section 702 of the same code, relating to redemption from the execution sale purchaser, indicate that "liens * * * prior to his own" means liens prior to the lien upon which the current redemptioner seeks to redeem.

Chancellor Kent discussed the development of the right to redeem from sale upon execution in his monumental "Commentaries." 14th ed., v. 4, pp. 493–515. He recounts that at common law, real property was not subject to execution, but that for the benefit of English creditors the statute of 5 George II, ch. 7 was enacted in 1732, making real estate in the English colonies subject to execution. For a long time it was the practice to sell the real estate absolutely, without possibility of redemption, but "* * * sales of land on execution had been attended with so much oppressive speculation upon the necessities of the debtor, * * *", p. 431, that several states enacted statutes providing for redemption.

[12] It thus appears that one of the primary purposes of statutory redemption is to force the purchaser at the execution sale to bid the property in at a price approximating its fair value. See 23 Mich.L.Rev. 825, 839–841. This purpose is apparent in our statute from the provisions in section 702 and 703 that any deficiency between the purchase price at the sale and the amount of the lien upon which the property was sold need not be paid upon a subsequent redemption. To effectuate its purpose the statute must be construed to encourage redemption and make the property answer for existing liens up to its fair value. Redemption would not be encouraged by a construction that would permit a subsequent lienor to re-redeem without paying to the prior redemptioner the amount of his judgment. Under such a construction the current redemptioner would take subject to the lien of the prior redemptioner. The prior redemptioner would then be entitled to levy execution upon the property, and the process would begin anew. Such a result would be absurd.

[13] Section 702 of the Code of Civil Procedure provides that upon redemption from the execution purchaser, the redemptioner must pay the purchase price and certain other items "* * * and if the purchaser be also a creditor, having a *prior lien to that of the redemptioner,* other than the judgment under which said purchase was made, the amount of such lien with interest * * *." (Italics added.) Here the meaning is clear. The liens that must be paid are those prior to that upon which the current redemptioner seeks to redeem, and the rule must be the same upon redemption from a prior redemptioner.

Even so, plaintiffs contend that their tender was sufficient. They point out that while their $61.80 remained in the hands of the sheriff, the Ritter-Holland judgment was discharged in bankruptcy. This fact, they argue, made it unnecessary for them to tender the amount of that judgment. It should be noted in this respect that plaintiffs' pleading of the asserted discharge is somewhat faulty. The allegation is that the petitions in bankruptcy were "filed," "discharging" the judgment. Obviously, the mere filing of the petitions did not serve to discharge the judgment, but the deficiency could have been corrected by amendment. We have concluded, however, that discharge of the judgment would not reduce the amount required for redemption.

[14] Since section 703 requires the payment of liens, not judgments, we are concerned with the effect upon the Ritter-Holland lien of the discharge in bankruptcy of the Ritter-Holland judgment. Section 675b of the Code of Civil Procedure provides that when a judgment was a lien on real property owned by the bankrupt prior to the time he was adjudged a bankrupt, the lien remains unaffected though the judgment be discharged in bankruptcy. The Ritter-Holland judgment was recorded June 25, 1954. Plaintiffs did not file their petitions in bankruptcy until June 1, 1955. The Ritter-Holland lien was therefore unaffected by the bankruptcy proceedings.

Plaintiffs' principal argument against the efficacy of the Ritter-Holland redemption and in support of the sufficiency of their own tender is that Ritter and Holland did not file a notice of redemption with the county recorder as required by section 703 of the Code of Civil Procedure. The pertinent part of section 703 reads:

> "Written notice of redemption must be given to the sheriff and a duplicate filed with the recorder of the county, and if any taxes or assessments are paid by the redemptioner, or if any sum for fire insurance, maintenance, upkeep, or repair * * * is paid by the redemptioner, or if he has or acquires any lien other than that upon which the redemption was made, notice thereof must in like manner be given to the sheriff and filed with the recorder; and if such notice be not filed, the property may be redeemed without paying such tax, assessment, sum, or lien."

In Ritter v. Salsbery, supra, 142 Cal. App.2d Supp. 847, 850, 298 P.2d 166, it was held that a notice need be filed for recordation only if the redemptioner, subsequent to his redemption, makes expenditures for the items enumerated in the section or acquires another lien. That interpretation of the section is erroneous. Section 703 refers to two distinct notices, a notice of redemption and a notice of subsequent expenditures or after-acquired liens. Only the former notice is involved in this case.

The question then arises as to the effect of a redemptioner's failure to file a notice of redemption with the county recorder. Section 703 provides: "* * * if such notice be not filed, the property may be redeemed without paying such tax, assessment, sum, or lien." Although a contrary argument might be made, the reference to "tax, assessment, sum, or lien" indicates that the specified penalty pertains only to a failure to record a notice of subsequent expenditures or after-acquired liens, not to a failure to record a notice of redemption. Resort must therefore be had to the reasons

underlying the requirement that a notice of redemption be recorded.

One reason may be deduced from the fact that redemption may be effected by paying the requisite amount either to the officer who sold the property or directly to the purchaser or prior redemptioner. Code Civ. Proc. § 704. Recordation of a notice of redemption diminishes the possibility that a subsequent redemptioner will make payment to some person who because of an undisclosed intervening redemption no longer has any interest in the property.

Another reason is that persons eligible to re-redeem are entitled to know the amount of money required to effect a redemption so that they may act intelligently with respect to the property. See Corporation of America v. Eustace, 217 Cal. 102, 107, 17 P.2d 723; see also Code Civ.Proc. § 705. The Legislature has provided that notice of subsequent expenditures and after-acquired liens must be recorded and, failing that, that their repayment may not be demanded as a prerequisite to redemption. Code Civ.Proc. § 703. To know the amount required for redemption, however, one must know not only the amount of subsequent expenditures but also the amount of the lien upon which the prior redemption was made, since the amount of that lien must be paid to effect a redemption. The recordation of a notice of redemption gives notice of the amount of that lien.

[15–17] The effect of a failure to record would seem to depend upon the events following the omission. For instance, if no person sought to re-redeem within the statutory period, the failure to record would have no effect at all. If as a consequence of the failure to record, a subsequent redemptioner should, without notice, pay the wrong person, the good faith redemption would be effective as against the faulty one. When a person eligible to redeem, without notice of any intervening redemption, tenders to the sheriff or the last redemptioner of record a sum of money, which but for the lien of the undisclosed redemptioner would be sufficient to effect a redemption, that tender is sufficient unless the person seeking to redeem is notified of the pertinent facts by the sheriff or the last redemptioner of record, and the intervening redemptioner who has failed to record is precluded from demanding as a prerequisite to redemption from him the amount of his lien. This result gives effect to the purpose for which recording is required and parallels the result dictated by section 703 when the omission is the failure to record a notice of subsequent expenditures or after-acquired liens. In view of the legislative requirement that persons eligible to redeem be informed of the amount of money necessary to redeem, it is immaterial that the innocent subsequent redemptioner can reclaim his money.

[18] The pleadings in the instant case do not disclose whether or not plaintiffs had actual notice of the Ritter-Holland redemption when they tendered their $61.80 to the sheriff. Of course they must show that they had no such notice before they will be entitled to a favorable declaration, and technically they should have pleaded that fact. It appears from the foregoing discussion, however, that even without that allegation plaintiffs stated a case for a declaration of the meaning of the statute.

Since it does not appear from plaintiffs' pleadings that any controversy exists between plaintiffs and the Municipal Court of the Los Angeles Judicial District or George J. Barbour, its clerk, or that plaintiffs are entitled to any relief against those defendants, the judgment of dismissal is affirmed as to them. As regards the other defendants, both judgments of dismissal are reversed for further proceedings consistent with this opinion. Plaintiffs shall bear their own costs on appeal and the costs on appeal of the Municipal Court of the Los Angeles Judicial District, of George J. Barbour, its clerk, and of defendants Custom Craft Sheet Metal Products, Jango Nishemine, George A. Cutright, and Stanley Sevilla. Each of the other parties shall bear his own costs on appeal.

GIBSON, C. J., and SHENK, CARTER, SCHAUER, SPENCE and McCOMB, JJ., concur.

148 Cal.App.2d 500

Mildred DANIELS and Sybil June Daniels, a minor, by her guardian ad litem and trustee, Mildred Daniels, Petitioners,

v.

INDUSTRIAL ACCIDENT COMMISSION of the State of California and Turlock Irrigation District, a Municipal Corporation, and State Compensation Fund, Respondents.

District Court of Appeal, Third District, California.

Feb. 13, 1957.

Rehearing Denied April 10, 1957.

Proceeding to review finding of Industrial Accident Commission that death of trouble shooter employed by irrigation district resulting from heart attack after he had climbed pole in employment did not arise out of and in course of employment and to review subsequent decision denying award. The District Court of Appeal, Peek, J., held that substantial evidence supported Commission's finding.

Order affirmed.

1. Workmen's Compensation ⇐1357

In order to be entitled to award, petitioners must show a causal connection between employment and injury.

2. Workmen's Compensation ⇐1939

Where there is substantial evidence to sustain its finding, determination of Industrial Accident Commission is conclusive.

3. Workmen's Compensation ⇐1536

In proceeding to recover compensation for death, caused by heart attack to trouble shooter employed by irrigation district, sustained after he had climbed a pole in employment, substantial evidence supported finding by Industrial Accident Commission that death did not arise out of and in course of employment.

4. Workmen's Compensation ⇐1703

Where, in compensation proceeding before Industrial Accident Commission, after direct examination of insurer's doctor, hearing was adjourned, and at next session doctor was not produced, claimants' counsel made no objection but agreed to submit case on record but thereafter wrote to Commission requesting right to examine such doctor if Commission was to enter adverse decision, but, due to clerical error, request did not reach Commission until after it had entered adverse award, claimants' counsel had either waived right to cross-examine or had made only a conditional request to do so, and fact that he was not permitted to do so did not justify reversal of award.

Gilbert Moody, Turlock, for petitioners.

E. A. Corten and Daniel C. Murphy, San Francisco, for respondent Industrial Accident Commission.

Donald Gallagher and Loton Wells, San Francisco, for respondent State Compensation Fund.

PEEK, Justice.

Petitioners, the surviving widow and daughter of Jesse Daniels, seek review of a finding of the Industrial Accident Commission that his death did not arise out of the course of his employment and of the subsequent decision denying them an award.

Daniels was employed by the Turlock Irrigation District as a trouble shooter. His duties included the repair of his employer's facilities such as transformers, meters, etc., as well as all types of electrical appliances and occasionally included the climbing of poles. On a windy and quite cold afternoon he and a co-worker were engaged in climbing poles about 35 or 40 feet above the ground and pulling lines so as to take the slack out of the primary wires. While on the third pole, Daniels began coughing and then vomited blood. The co-worker saw Daniels' body go limp and fall "back in his safety belt." He was removed from the pole and transported to a hospital in Turlock where he died that same evening.

A doctor who had treated Daniels for a stomach disorder in 1953 found no indication of heart trouble when he gave him a

physical examination at that time. On the day of his death he told his wife that he hadn't felt better in weeks, and a few minutes before he became ill he told his coworker that "he felt better than he felt for several days."

The attending physician was unable to make a definite diagnosis, but noted that the possibilities included acute coronary thrombosis or acute pulmonary embolism. An electrocardiogram showed changes suggesting the possibility of acute coronary thrombosis. Since the cause of death was not definitely established, a post mortem was performed by the coroner, Dr. Ransom. He testified that he found that the lungs were dark and passive congested. He stated the cause of death was a ruptured tricuspid valve which in his opinion was due to strain imposed on the heart by the congestion of the lungs. He also said that the physical strain of work was a factor in the lung congestion. The death certificate stated the cause of death to be "Rupture of Tricuspid Valve from massive passive congestion of complete lung tissue."

A Dr. Smith who was called by the insurer testified that a diagnosis was not possible on the information available. He was of the opinion that if the valve had ruptured, it was a diseased valve. He suggested that further pathological examination would be of value to determine the cause of death. At the conclusion of Dr. Smith's direct examination, the hearing was adjourned without cross-examination by petitioners' counsel.

Some time later the body was exhumed and a second autopsy performed. The autopsy report concluded: "The cause of death is a thrombosis of the right coronary artery which is quite recent. The changes in the myocardium which consisted largely of hyperemia and some interstitial hemorrhage was all that was found that would indicate that the occlusion was very recent. There is marked edema and congestion of the lungs. Careful examination of all the heart valves and especially the tricuspid valve showed no evidence of rupture or previous disease."

At the next hearing, a Dr. Thompson, in response to a hypothetical question, testified that in his opinion the death was due to a coronary occlusion, but he did not believe it was work-connected. The opinion was qualified to the extent that if Mr. Daniels only climbed poles occasionally, then it might have been precipitated by his work.

After Dr. Thompson's testimony, Mrs. Daniels testified that climbing poles was not a part of her husband's normal duties, and that he only did so occasionally.

On the basis of the testimony and the medical reports filed, the referee made a finding that the injury arose out of and was in the course of the decedent's employment, and an award was made in favor of petitioners.

Upon motion of the insurance carrier, reconsideration was granted by the Commission, and the matter was submitted to Dr. Meyer Friedman, who reviewed the record and submitted a report. He stated therein that the cause of death was a thrombus occluding the right coronary artery near the site of old atherosclerotic deposits, and that following this occlusion there was necrosis and loss of function of certain areas of the left ventricle of the heart, which interfered with the pumping action of the left side of the heart so that blood dammed up in the pulmonary circulation, causing the type of chronic passive congestion that was found. The report included the statement that in view of the fact that the thrombus was composed of blood, the statistical odds favored the formation of the clot in the lumen of the coronary vessel, and if so formed physical exercise had nothing to do with it. The report further stated: "If the law is liberal enough to take cognizance of the fact that occasionally such clots result from a hemorrhage within the wall of the coronary artery * * * then the work could be considered as contributory because the excessive work demanded of the heart could

have led to its violent contractions, with a contortion of the coronary vessels and a consequent small hemorrhage of one of the vessels within the wall of the coronary artery itself. But as I stated, I think there well might have been some histological evidence of such a hemorrhage which *were* was not in Dr. Purvis's report." (Dr. Purvis performed the second autopsy.) As a result the Commission annulled the previous award.

[1–3] Petitioners first contend that the evidence is insufficient to sustain the finding that decedent did not sustain injury arising out of his employment. In order to be entitled to an award, petitioners must show a causal connection between the employment and the injury. Associated Indem. Corp. v. Industrial Acc. Comm., 120 Cal.App.2d 423, 261 P.2d 25. And where there is substantial evidence to sustain the finding, the determination of the I.A.C. is conclusive. Quail v. Industrial Acc. Comm., 138 Cal.App. 412, 32 P.2d 402. On the basis of Dr. Friedman's report, we are constrained to say that the decision is supported by substantial evidence.

Although there is language in at least two California cases which indicates that strain plus heart attack equals award, Liberty Mut. Ins. Co. v. Industrial Acc. Comm., 73 Cal.App.2d 555, 563, 166 P.2d 908; Lumbermen's Mut. Cas. Co. v. Industrial Acc. Comm., 29 Cal.2d 492, 496–497, 175 P.2d 823, neither of the cited cases has eliminated the question of causal connection. That issue is one of fact and, as the court in the Liberty Mutual case observed, until the Legislature, by statute, compels a more consistent policy on the part of the Commission, the courts must affirm the Commission wherever there is competent substantial evidence to support its findings. 73 Cal.App.2d at page 560, 166 P.2d at page 911.

[4] Petitioners' second contention is that they were denied an opportunity to cross-examine Dr. Smith. The record shows that after the direct examination the hearing was adjourned and at the subsequent hearing Dr. Smith was not produced. Counsel for petitioners made no objection, and in fact agreed to submission of the case on the record. He now asserts that he agreed to submission without considering the fact that the case might be submitted to an independent medical examiner who would use Dr. Smith's report and his testimony. Counsel states that when he received a copy of Dr. Friedman's report which was filed on December 13, 1955, he wrote a letter dated December 28, 1955, to the Commission requesting that if their decision was to be adverse to him he would like an opportunity to cross-examine Dr. Smith. The letter was received by the I.A.C. on December 30, 1955. The Commission, however, had signed the order adverse to petitioners on December 29, 1955. Petitioners then asked for reconsideration. Through a clerical error, petitioners' letter of December 28, 1955, was not brought to the attention of the Commission when it considered the petition for reconsideration. The report of the Commission denying reconsideration read in part: "Since counsel for applicant submitted his case without requesting an opportunity to cross-examine Dr. Edmund L. Smith and has not thereafter sought such permission, until after the issuance of an adverse decision, any application at this time should be denied." The Commission was in error that the request was not made before an adverse decision was made. However, we are inclined to hold that petitioners waived any right to cross-examine Dr. Smith. At best, counsel's request to cross-examine was qualified and conditional. In other words he only desired to do so if the Commission's decision was going to be adverse. Since the right to cross-examine can be waived, see Wigmore on Evidence, section 1371, counsel should have foreclosed submission unless and until he did so cross-examine.

The order is affirmed.

VAN DYKE, P. J., and SCHOTTKY, J., concur.

148 Cal.App.2d 410

Elsworth A. DAVIS, Plaintiff and Appellant,

v.

John W. EWEN, Defendant and Respondent.

Argonaut Insurance Exchange, an Inter-Insurance Exchange, Plaintiff in Intervention and Appellant.

Civ. 8925.

District Court of Appeal, Third District, California.

Feb. 8, 1957.

Action by automobile passenger for injuries against motorist whose vehicle struck rear end of automobile in which passenger was riding. The Superior Court, San Joaquin County, George F. Buck, J., entered judgment for defendant and passenger appealed. The District Court of Appeal, Schottky, J., held that evidence presented a jury question as to negligence of defendant in striking rear end of vehicle in which passenger was riding.

Affirmed.

1. Automobiles ⇐245(15)

In passenger's action for personal injuries against motorist whose vehicle was proceeding in congested traffic directly behind automobile in which passenger was riding and struck automobile in rear, evidence presented jury question as to negligence of defendant.

2. Damages ⇐208(1)

In automobile passenger's action for personal injuries against motorist whose vehicle struck passenger's automobile in rear, evidence presented a jury question as to whether or not passenger claiming a snapped neck was injured at all.

3. Appeal and Error ⇐1002

Where the evidence is in conflict, verdict of jury is binding upon reviewing court.

4. Automobiles ⇐246(60)

In automobile passenger's action for personal injuries received when motorist's following vehicle struck rear of automobile in which passenger was riding, in view of the conflicting evidence as to whether automobile had made a sudden stop without warning and whether passenger was injured at all as result of accident, there was no error in refusing to give passenger's requested instruction respecting applicability of res ipsa loquitur doctrine.

5. Appeal and Error ⇐1064(1)

In automobile passenger's action for alleged injuries sustained when automobile was struck from rear by vehicle being driven by defendant motorist, no prejudicial error was committed by court in giving instruction on unavoidable accident.

Ralph E. Kingston, Stockton, for plaintiff-appellant.

Partridge, O'Connell & Whitney, San Francisco, for plaintiff in intervention-appellant.

Jones, Lane, Weaver & Daley, Stockton, for defendant-respondent.

SCHOTTKY, Justice.

This is an appeal from a judgment entered on a jury verdict in favor of defendant and against plaintiff, Elsworth A. Davis, and plaintiff in intervention, Argonaut Insurance Exchange, in a personal injury action.

As grounds for reversal of the judgment appellants make the following major contentions: (1) There was no substantial evidence to support the verdict as a matter of law. (2) The court erred in failing to give instruction requested by the appellant on the doctrine of res ipsa loquitur. (3) The court erred in giving an instruction on the doctrine of unavoidable accident where such an instruction was not supported by the evidence.

The record shows that on October 25, 1954, Davis was a construction laborer working for the S. M. McGaw Company, and at approximately 7:30 a. m. was riding with another laborer in the cab of a pick-

up truck driven by a third McGaw employee, the foreman, being transported from the McGaw offices to the place of work. Davis was seated in the middle of the seat. The weather was clear, it was daylight and the streets were dry. The traffic going west on Miner Avenue in the City of Stockton was congested and stopped at the railroad crossing east of Miner Avenue. The vehicle which respondent was driving was immediately behind that in which appellant Davis was riding. After starting up, the traffic moved in this congested state at about 25 miles per hour up to where the collision took place. Upon approaching more closely to the intersection of Miner Avenue and Wilson Way, where traffic was controlled by traffic lights, according to the testimony of appellant Davis the driver of the vehicle in which he was riding brought the vehicle to a gradual stop about 8 feet to 10 feet behind the stopped vehicle ahead of him. At that time the respondent was following the vehicle in which said plaintiff was riding by approximately 20 feet and traveling about 20 to 25 miles per hour. When the respondent saw the vehicle ahead stop, he applied his brakes and stopped as fast as he could. His brakes were in excellent condition and he laid down 10 feet of skid marks up to the point of impact of the front end of the respondent's vehicle with the rear end of the pickup truck. Appellant testified that the vehicle in which he was riding was struck just as it "got stopped still." Respondent testified that the vehicle ahead stopped without warning and that the event happened so fast that respondent couldn't turn either way. Respondent contends that he was surprised and bases this contention on the following testimony:

"Q. Well, Mr. Ewen, you knew that the traffic was in more or less a start and stop condition as you were driving along there, didn't you? A. Absolutely.

"Q. So you weren't surprised to find that automobile stopping ahead of you, were you? A. No, I wasn't—I was surprised, yes, at this time I was surprised, but ordinarily I make the stop like everybody else. I was trying to make the light, too.

"Q. And when you say you were trying to make the light you were referring to the light—A. The light on Wilson Way."

However, the appellants argue that the surprise of respondent amounted to his being surprised that he was again required to stop.

The driver of the vehicle in which appellant Davis was riding testified that the only damage to his vehicle was "a very slight dent" in the left rear fender. The respondent expressed some doubt as to whether he had made the dent in the fender and stated that meeting the pickup truck squarely with the front end of his automobile as he did, it could not possibly get to the fenders past the pickup bumper because the fenders are ahead of the bed of the body of the pickup truck.

The impact, so far as appellant Davis was concerned, and according to his testimony, was sudden and unexpected, and it snapped his head forward and backwards quickly. Appellant testified that this caused him to have a headache and pain in the back of his neck immediately after the impact, but believing that he was not seriously injured, he worked at his regular work for the balance of that week, at which time he was laid off for reasons not connected with any claimed injury. He testified that during that time the pain became steadily worse.

Appellant made no complaint to his foreman at the time of the accident as to pain in his knee, shoulders or back, nor did he make any complaint the rest of the week. After the accident, on Monday, appellant was engaged in heavy construction work involving use of jackhammers, loading broken concrete, and digging ditches with shovel and pick, and he continued this type of work until he was laid off on Friday. Appellant's wife testified that appellant

complained of pain in his neck on the evening of the day the accident occurred.

On Monday following the layoff, appellant came to the plant of his employer and talked to the superintendent and complained about an injury to his arm which had occurred a week or two previous when a compressor was claimed to have rolled upon it. The superintendent advised that he had no report on this injury. Appellant made no complaint at this time about pain in his neck or shoulders. Two days later the complaint in this action was filed.

Appellants' first contention is that the evidence is insufficient as a matter of law to support the verdict in favor of respondent. Appellants argue that the undisputed testimony of respondent himself shows that he was following too closely, that his automobile was in perfect operating condition, and that he failed to use due caution under the circumstances of the instant case.

Appellate courts have consistently held that rear-end collisions usually present questions of fact and not of law. The general rule is well stated in Lowenthal v. Mortimer, 125 Cal.App.2d 636, at page 638, 270 P.2d 942, at page 943, as follows:

> "It is now well established that when one motor vehicle runs into the rear of another vehicle, negligence is a question of fact and not of law. Turkovich v. Rowland, 106 Cal.App. 2d 445, 447, 235 P.2d 123; Wohlenberg v. Malcewicz, 56 Cal.App.2d 508, 133 P.2d 12. It is also the province of the jury to determine the proximate cause of an accident. Turkovich v. Rowland, supra.
>
> "Cases involving rear-end collisions are legion. Although the contention is made often that the leader alone, or the follower alone, is guilty of negligence, in general it has been held that the case as presented by each party creates a question of fact for the jury and not a question of law for the court. Donahue v. Mazzoli, 27 Cal.App.2d 102, 80 P.2d 743.
>
> "The appellant relies upon Gornstein v. Priver, 64 Cal.App. 249, 221 P. 396. The court, 64 Cal.App. at page 255, 221 P. at page 399, there held that 'The mere fact that he does run down the vehicle ahead of him furnishes some evidence that he either was traveling at too high a rate of speed for a highway crowded with other vehicular travel or that he was following too closely the machine ahead of him. See O'Connor v. United Railroads, 168 Cal. [43] 47, 141 P. 809.' But it concluded that 'whether in any particular case the operator of the rear vehicle is negligent if he drives his machine so as to cause a collision with the one ahead depends upon all the circumstances surrounding the happening of the accident, and almost invariably presents a question of fact for the decision of the jury. * * *'
>
> "The reasonableness of the speed at which defendant operated his vehicle, whether plaintiff gave a hand signal indicating an intention to stop, see Mazgedian v. Swift & Co., 22 Cal. App.2d 570, 71 P.2d 833, whether the stop was sudden, whether defendant was driving too closely behind plaintiffs' vehicle, whether defendant was inattentive, all were questions of fact.
>
> "The jury resolved those factual elements in favor of defendant. The evidence supports that finding, just as it would have supported a contrary finding."

[1] In the instant case the evidence would support a jury finding that the pickup truck, in which appellant was riding, in a long line of cars, stopped suddenly without warning; that respondent immediately applied his brakes; that he had no opportunity to turn left or right; that his brakes were in good operating condition; that he had almost stopped his car when it struck the pickup, causing "a very slight dent" in its fender. Appellant's testimony that the driver of the pickup did not make a sudden stop created only a conflict in the

evidence, its credibility being for the jury. The question as to whether respondent was following too closely was presented to the jury under proper instructions to which appellant takes no exception. Thus, the evidence presented a conflict upon the issue of negligence, which was resolved against appellant by the jury verdict.

[2] Furthermore, the issue as to whether appellant Davis was injured at all in this accident was vigorously contested by respondent. The performance of heavy manual labor for a period of five days including the day of the accident, without complaint to his employer, permits an inference of non-injury. After his discharge, and one week after the accident, he complained to his employer about a claimed arm injury received some weeks before, but did not mention any injury from the instant accident. His lawsuit was filed within the next day or two. The evidence of traumatic injury produced by appellant merely created a conflict upon this issue. It cannot now be determined whether the jury verdict was based upon absence of negligence or upon a lack of proof of traumatic injury.

[3] In view of the conflict in the testimony we are unable to agree with appellants' contention that the evidence is insufficient as a matter of law to support the verdict of the jury. It was for the jury to weigh the evidence and resolve the conflicts therein, and where, as in the instant case, the evidence is in conflict, under well-settled rules of appellate procedure, the verdict of the jury is binding upon us.

[4] A more serious question is raised by appellants' next contention that the court erred in failing to give the instruction requested by appellant on the doctrine of res ipsa loquitur. Appellant offered two instructions on res ipsa loquitur, the first (No. 18) reading as follows:

> "From the happening of the accident involved in this case, as established by the evidence, there arises an inference that the proximate cause of the occurrence was some negligent conduct on the part of the defendants. That inference is a form of evidence, and if there is none other tending to overthrow it, or if the inference preponderates over the contrary evidence, it warrants a verdict for the plaintiff. Therefore, you should weigh any evidence tending to overcome that inference, bearing in mind that it is incumbent upon the defendants to rebut the inference by showing that they did, in fact, exercise ordinary care and diligence or that the accident occurred without being proximately caused by any failure of duty on their part. BAJI 206 B."

The second (No. 19) was the so-called educational instruction, BAJI 206 C, which explains the circumstances under which the doctrine of res ipsa loquitur may be applied.

Appellants cite the case of Merry v. Knudsen Creamery Co., 94 Cal.App.2d 715, 211 P.2d 905, in which the driver of an automobile sustained injuries when his vehicle, stopped for a traffic light, was struck from the rear by the defendant's truck due to a complete failure of its brakes. At page 721 of 94 Cal.App.2d, at page 909 of 211 P.2d, the court said:

> "In many cases it has been held that a collision between a moving automobile and a standing automobile, whether a parked vehicle or one momentarily at a standstill, calls for the application of the doctrine of res ipsa loquitur. Bauhofer v. Crawford, 16 Cal.App. 676, 117 P. 931; Slappey v. Schiller, 116 Cal.App. 274, 2 P.2d 577; Creamer v. Cerrato, 1 Cal.App.2d 441, 36 P.2d 1094. See also authorities collected in 151 A.L.R. 878. To apply the rule is simply to say that the circumstances of the particular accident justify an inference of negligence. Such a case was here presented."

In reply respondent contends that the language of Merry v. Knudsen which appears to extend the "parked car" rule to

a car "momentarily at a standstill" is dictum and points out that no instruction on res ipsa loquitur was given in that case. Respondent points out also that the cases cited in the Merry case in support of the above quotation were true "parked car" cases where the doctrine of res ipsa loquitur was applied in favor of a driver parked at the side of a road or street and there was no question as to the instrumentality causing the damage.

In view of the conflict in the evidence as to whether the pickup truck in which appellant Davis was riding made a sudden stop without warning, whether respondent had an opportunity to stop his automobile in time to avert running into the rear of the pickup truck, and whether appellant was injured at all as a result of the accident, we do not believe that it would have been proper to have given the instruction offered by appellant that "from the happening of the accident, as established by the evidence, there arises an inference that the proximate cause of the occurrence was some negligent conduct on the part of the defendant." And in the instant case we believe that such an instruction would have been confusing to the jury for the jury was fully and correctly instructed as to negligence and proximate cause and was further given the following instructions offered by appellants:

> "You are instructed that section 531 of the Vehicle Code of the State of California, in full force and effect at the time of the accident under consideration provided as follows: 'The driver of a motor vehicle shall not follow another vehicle more closely than is reasonable and prudent, having due regard for the speed of such vehicle and the traffic upon, and the condition of, the roadway."

> "If a party to this action violated the statute just read to you, a presumption arises that he was negligent. This presumption is not a conclusive one. It may be overcome by other evidence showing that under all the circumstances surrounding the event the conduct in question was excusable, justifiable and such as might reasonably have been expected from a person of ordinary prudence.

> "To prove that a violation of a statute such as that charged in this case, was excusable and justifiable, so as to overcome the presumption of negligence, the evidence must support a finding that the violation resulted from causes or things beyond the control of the person charged with the violation."

Thus the jury was told that if respondent was following the pickup truck in which appellant Davis was riding more closely than was reasonable or prudent, a presumption arose that he was negligent and that to overcome the presumption he must produce evidence that the violation resulted from causes beyond his control. So, in view of the evidence in the instant case, as hereinbefore set forth, we are unable to agree with appellants' contention that the instructions offered by them on res ipsa loquitur should have been given, and we are also unable to agree that any prejudice resulted to appellants by the failure to give said instructions.

[5] Appellants' final contention is that the trial court erred in giving an instruction on the doctrine of unavoidable accident because there was no evidence to support such an instruction. After giving the usual instruction on unavoidable accident the court on its own motion gave the following additional instruction:

> "Bear in mind, however, that if the defendant failed to exercise ordinary care, and if that failure was a proximate cause of the accident in question, then, whether or not such conduct was the sole cause, the accident was not unavoidable, and the defense of unavoidability may not be maintained by that defendant."

In the case of Merry v. Knudsen Creamery Co., supra, the trial court gave an instruction on unavoidable accident and a

further instruction that the mere happening of an accident did not create an inference of negligence. Upon appeal the court said, 94 Cal.App.2d at page 720, 211 P.2d at page 908:

"Neither of the two instructions complained of can be held to be improper, under the circumstances presented by this case, in view of the fact that these instructions were immediately followed by an instruction in the language of 670(a) of the Vehicle Code concerning the requirement of adequate brakes, and the jury were told that a violation of the section requires a presumption of negligence which could be overcome by a showing that the conduct in question was excusable."

In Parker v. Womack, 37 Cal.2d 116, at pages 120, 121, 230 P.2d 823, at page 825, the court said:

"* * * Otherwise stated, and incorporating both factors which relieve one from liability, an accident is inevitable or unavoidable when it is not proximately caused by negligence. As recently defined by this court, '* * the so-called defense of inevitable accident is nothing more than a denial by defendant of negligence or a contention that his negligence, if any, was not the proximate cause of the injury.' * * *

"'* * * But if the accident was inevitable or unavoidable that is the same thing as to say that the defendant was not negligent, or that his negligence, if any, did not cause the accident. In other words, it is to say that the plaintiff has failed in his proof.'"

And in Turkovich v. Rowland, 106 Cal. App.2d 445, 235 P.2d 123, a rear-end collision case, plaintiff, a passenger in the front car, argued on appeal that the trial court erred in giving an instruction on unavoidable accident. The court said, 106 Cal.App. 2d at page 448, 235 P.2d at page 124:

"Plaintiff complains of the giving of the usual instruction relative to unavoidable accident. Since plaintiff had the burden of proof to show that the accident was caused by negligence of the defendant driver, this instruction cannot be said to have been harmful to plaintiff's case. Parker v. Womack, 37 Cal.2d 116, 230 P.2d 823."

We are satisfied that no prejudicial error was committed by the giving of the instructions on unavoidable accident.

The judgment is affirmed.

VAN DYKE, P. J., and PEEK, J., concur.



148 Cal.App.2d 521

James E. DOYLE, doing business under the firm name and style of Doyle Draying Company, Plaintiff and Appellant,

v.

Earl MATHERON and Matheron Salvage and Trucking Company et al., Defendants and Respondents.

Civ. 17127.

District Court of Appeal, First District, Division 1, California.

Feb. 15, 1957.

Action was brought to recover money paid under mistake, and defendants filed a cross-complaint for moneys allegedly owed by plaintiff. The Superior Court, County of Contra Costa, Norman A. Gregg, J., entered judgment adverse to plaintiff, and plaintiff appealed. The District Court of Appeal, Peters, P. J., held that evidence sustained finding that defendants substantially changed their position in reliance on total payments made by plaintiff and that it would be unjust, unfair, and inequitable to compel defendants to refund alleged overpayment.

Judgment affirmed.

1. Payment ⇐85(7)

Money paid under mistake of fact may be recovered back, however negligent the party paying may have been in making the mistake, unless payment has caused such a change in position of the other party that it would be unjust to require him to refund.

2. Payment ⇐89(5)

In action to recover money paid under mistake, evidence sustained finding that defendants had substantially changed their position in reliance on total payments received from plaintiff, and that therefore plaintiff was not entitled to recover.

Thomas F. McBride, Martinez, for appellant.

John L. Garaventa, Concord, for respondents.

PETERS, Presiding Justice.

Appellant Doyle had a contract with the federal government to haul certain government freight. Doyle did not have the trucking facilities to carry all of the freight involved. Doyle entered into an agreement with Matheron to the effect that Matheron would sub-haul some of the freight in return for a percentage of the amount received by Doyle from the federal government. Admittedly, Doyle kept the books, computed the rates, and billed the government for the services rendered. Doyle then remitted to Matheron the agreed upon percentages that he was to receive. This arrangement between Doyle and Matheron continued for approximately three years, and was then terminated, the percentages received by Matheron varying as the arrangement between them was from time to time modified. After the Doyle-Matheron contract had been terminated, a government audit showed that Doyle had overcharged the government. Doyle paid back to the government the amount of these overcharges. Admittedly, Doyle was negligent in billing the government, and such overcharges were proximately caused by Doyle's negligence. Many months after repaying the government, Doyle brought this action to recover from Matheron the sum of $3,821.27, being the proportion of the overcharge that Doyle claimed that he overpaid to Matheron. Matheron denied liability, and cross-complained for certain moneys claimed owing to him by Doyle. The trial court gave judgment in favor of Matheron on both the complaint and cross-complaint. Doyle appeals only from the adverse judgment on his complaint.

[1] The rule of law applicable to the problem here involved is not in dispute. Both parties agree that the following statement of the law in National Bank of California v. Miner, 167 Cal. 532, 537, 140 P. 27, 29, is correct:

> "The rule governing such transactions received extended consideration in Crocker-Woolworth [Nat.] Bank v. Nevada Bank, 139 Cal. 564, 73 P. 456, 63 L.R.A. 245 * * *. There, amongst other quotations and citations of authority, the following language from the National Bank of Commerce v. National Mechanics Association, 55 N.Y. [211], 213, * * * is repeated: 'It is now settled, both in England and in this state, that money paid under a mistake of fact may be recovered back, however negligent the party paying may have been in making the mistake, unless the payment has caused such a change in the position of the other party that it would be unjust to require him to refund.'"

In the present case the trial court found: "That the said defendants * * *, by reason of the facts hereinbefore set forth, were caused to and did so substantially change their position that it would now be unjust, unfair and inequitable to compel the said defendants * * * to refund the said alleged overcharges to the said plaintiff * * *."

Although several other points are argued by counsel, the basic question involved is

whether the quoted finding is supported by the evidence. If so, the judgment must be affirmed.

The evidence most favorable to respondent shows that Matheron had no contract with Doyle for any fixed period. Matheron could have quit at any time. He relied upon Doyle to do the rating for the jobs and the billing of the government, and to pay him his percentage. In fact, Matheron did not know how the bills were computed. Several times during the three-year period involved he told Doyle that he could not operate profitably at the percentages he was receiving, and these percentages were modified to his advantage by agreement of the parties. It is a reasonable inference that unless he received substantially what he did receive he would have terminated the arrangement, and that he continued to carry goods for Doyle not in reliance upon the percentages, but in reliance upon the amounts he was actually receiving. These amounts, of course, were computed by Doyle. Matheron also testified that, during the three-year period he worked for Doyle, he purchased some expensive equipment in order to be able to handle the government hauling in an adequate manner. Included within this equipment was a Diesel tractor for $13,000, another tractor for $7,100, and a truck and trailer. During the period he was sub-hauling for Doyle he bought $27,700 worth of new equipment. He terminated his arrangement with Doyle in June of 1952, and, at the time of trial (November, 1954), he was using this equipment in his then business. In November, 1954, he owned this equipment free and clear of all liens, but when he purchased the new equipment he encumbered it in order to make the purchases. In order to make the payments on this equipment he was forced to sell another business in which he was engaged, and a material portion of the encumbrance was paid off from income other than that which was received from the Doyle business. Matheron would not have bought the new equipment had it not been for the Doyle business, because his old equipment was adequate to handle the hauling he was doing before he started to sub-haul for Doyle.

It should also be mentioned that when Doyle was informed that he had negligently overcharged the government and the government made its claim for a return of some of the moneys, he did not inform Matheron, nor ask Matheron to assist in the negotiations with the government. He alone carried on these negotiations. It was not until fifteen months after he learned of the overcharges that he first informed Matheron and made the claim against him.

[2] Reference could be made to other relevant evidence, but enough has been set forth to demonstrate that the finding that Matheron "substantially" changed his position in reliance on the total payments received by him, that it would be "unjust, unfair and inequitable" to compel him to now refund the claimed overcharges, is amply supported by the record. Since the existence or non-existence of an estoppel is a question of fact, Pacific Gas & Elec. Co. v. State Bd. of Equal., 134 Cal.App.2d 149, 285 P.2d 305, this holding is determinative of all the issues involved on this appeal. The other errors urged by Doyle are not material and need not be discussed, nor need we discuss the other points raised by Matheron in support of the judgment.

The judgment appealed from is affirmed.

BRAY and FRED B. WOOD, JJ., concur.

148 Cal.App.2d 304

Maurice ANGE, Plaintiff and Appellant,

v.

Willard THRASHER, Robert S. Hicks et al., Defendants and Respondents.

Willard THRASHER, Cross-Complainant and Respondent,

v.

Maurice ANGE, Cross-Defendant and Appellant,

Robert S. Hicks, Cross-Defendant.

Civ. 8918.

District Court of Appeal, Third District, California.

Feb. 5, 1957.

Action by passenger in overtaken automobile against overtaken and overtaking motorists for injuries received when overtaking automobile struck overtaken automobile after overtaken automobile had made turn onto highway in front of overtaking automobile. Overtaken motorist cross-complained against passenger and overtaking motorist for damages to overtaken automobile. The Superior Court, San Joaquin County, George F. Buck, J., sitting without jury, entered judgment against passenger on his complaint and for overtaken motorist on his cross-complaint against overtaking motorist, and passenger appealed from that part of judgment which denied him relief against overtaken motorist. The District Court of Appeal, Peek, J., held that question whether host motorist was negligent was for trier of fact.

Judgment affirmed.

1. Automobiles ⇐245(24)

In action by automobile passenger against host motorist and other motorist for injuries received when other motorist's automobile struck rear of host automobile after host motorist had turned onto highway in front of other motorist on foggy morning, question whether host motorist, who had completed his turn before the collision, was negligent was for trier of fact. West's Ann.Vehicle Code, § 552.

2. Automobiles ⇐171(5, 13)

Motorist, who had stopped at entrance to a through highway, had yielded right of way to vehicles approaching so closely as to constitute immediate hazards but, having so yielded, could proceed, and drivers of other vehicles approaching the intersection on the through highway would have to yield right of way to him. West's Ann.Vehicle Code, § 552.

3. Trial ⇐91

Fact that defense counsel failed to object before plaintiff's answer, which was a pure conclusion, was in would not make striking of such testimony error.

Russell Cook, Stockton, for appellant.

Honey, Mayall & Hurley by John J. Hurley, Stockton, for respondents.

PEEK, Justice.

Plaintiff Ange, a passenger in a car driven by the defendant Thrasher, sought damages for personal injuries received by him as the result of a collision between the Thrasher car and one driven by the defendant Hicks. Thrasher cross-complained against Ange and Hicks for damages to his car. Before trial the action against Hicks was dismissed without prejudice upon a covenant not to sue. At the conclusion of the trial before the court sitting without a jury, judgment was entered against plaintiff on his complaint and in favor of defendant Thrasher on his cross-complaint against Hicks. Plaintiff now appeals from that portion of the judgment which denied him relief as against Thrasher.

The facts show that on the morning of the collision there was a fog of varying density and that visibility, according to witnesses, ranged from 100 to 220 feet. Ange and Thrasher were on their way to work at an army depot near Stockton. With Thrasher driving, they proceeded easterly along Edison Street in the city of Manteca. Upon reaching Highway 99, a main arterial which at that point runs north and south, Thrasher stopped his car a few feet from

the westerly edge of the highway. He observed traffic approaching from the north, or his left, and after waiting for it to pass looked to his right, and, seeing no vehicles approaching from that direction, he proceeded into the intersection, turning to his left, or north. While the car was in the westerly half of the highway, Ange exclaimed, "Here comes one." Thrasher continued on, completed his left turn and proceeded north on the highway. At a point approximately 80 feet north of the center line of Edison Street, and while he was driving approximately 15 or 20 miles an hour, the rear of his car was struck by the car being operated by the defendant Hicks. The force of the impact was sufficient to drive Thrasher's car 34 feet forward and into a telephone pole which was completely sheared off. The collision occurred in a 35-mile-an-hour zone. From the evidence so summarized the court found that the sole and proximate cause of the injuries sustained by plaintiff resulted from the negligence and carelessness of the defendant Hicks.

[1, 2] We find no merit in plaintiff's contention that the defendant Thrasher was guilty of negligence as a matter of law. While it is true that under the provisions of section 552 of the Vehicle Code, a driver of a vehicle which has stopped at the entrance to a through highway must yield the right of way to other vehicles which are approaching so closely as to constitute "an immediate hazard", nevertheless, having so yielded, he may then proceed and "the drivers of all other vehicles approaching the intersection on the through highway shall yield the right of way" to him. Under the facts summarized, the question of negligence was one for the trial court, as the trier of fact, to decide. Such facts could well sustain the implied finding that Thrasher reasonably believed the Hicks car was not an immediate hazard and the direct finding that the sole and proximate cause of the collision and the resulting injuries was the negligent operation by Hicks of his automobile. Stickel v. San Diego Elec. Ry. Co., 32 Cal.2d 157, 195 P.2d 416.

[3] Counsel for appellant, in his statement of facts, also indirectly attacks the action of the trial court in striking certain testimony given by plaintiff. Such contention is not set forth as a ground for appeal, nor is it again mentioned except for a terse reference thereto in plaintiff's reply brief. Apparently plaintiff's only cause for complaint in this regard is that defense counsel should have objected before the answer, a pure conclusion on the part of plaintiff, was in. The contention, if it be such, is wholly devoid of merit.

The judgment is affirmed.

VAN DYKE, P. J., and SCHOTTKY, J., concur.



148 Cal.App.2d 516

The PEOPLE of the State of California, Plaintiff and Respondent,

v.

Eddie RENIER, Defendant and Appellant.

Cr. 2719.

District Court of Appeal, Third District, California.

Feb. 14, 1957.

Prosecution on information charging defendant with robbery and on information charging him with violation of Vehicle Code and for burglary. Burglary count in second information was dismissed and upon defendant's plea of not guilty to both informations, and over his objection after hearing, the Superior Court, Sacramento County, Raymond T. Coughlin, J., ordered consolidation of both informations, and after trial entered judgment of guilty and defendant appealed. The District Court of Appeal, Schottky,

J., held that although consolidation of the two informations was improper, where the evidence was so overwhelming against defendant on both charges, no substantial prejudice resulted to him.

Judgment and order affirmed.

1. Indictment and Information ⇐130

Statute permits joinder in an accusatory pleading where there are two or more different offenses connected together in their commission, where the offenses charged against the defendant are of the same class, and if there is a common element of substantial importance in their commission. West's Ann.Pen.Code, § 954.

2. Criminal Law ⇐619

Consolidation of two informations, one charging defendant with robbery and the other charging violation of Vehicle Code, was improper where there was no connection between the offense of robbery and the offense of driving an automobile of another without permission nor could offenses be said to have arisen out of the same transaction. West's Ann.Vehicle Code, § 503; West's Ann.Pen.Code, §§ 954, 995.

3. Criminal Law ⇐620(1)

Where there was no reasonable evidence that any gun was used in violation of Vehicle Code, fact that same gun, used in a robbery, was found in automobile was not a common element of sufficient substantial importance in both offenses to justify consolidation for trial purposes of two informations, one charging defendant with robbery and the other charging violation of Vehicle Code. West's Ann.Vehicle Code, § 503; West's Ann.Pen.Code, §§ 954, 995.

4. Criminal Law ⇐1166(1)

In prosecution on information charging defendant with robbery and on an information charging theft and with violation of Vehicle Code, although consolidation of the two informations for trial purposes was improper, where evidence against defendant was overwhelming on both charges, consolidation did not result in substantial prejudice to him. West's Ann.Vehicle Code, § 503; West's Ann.Pen.Code, §§ 954, 995.

Robert W. Cole, Public Defender, Floyd V. Gibbert, Asst. Public Defender, Sacramento, for appellant.

Edmond G. Brown, Atty. Gen., by Doris H. Maier, Lloyd Hinkelman, Deputies Atty. Gen., for respondent.

SCHOTTKY, Justice.

By an information numbered 21517, filed on April 11, 1956, appellant was charged with the robbery of Thomas Gonzales, occurring on March 22, 1956. In a second information, numbered 21518, also filed on April 11, 1956, appellant was charged in Count 1 with a violation of Section 503 of the Vehicle Code (theft and unlawful driving or taking of a vehicle), occurring on March 22, 1956, and in Count 2 with the offense of burglary, occurring on March 22, 1956.

On April 17, 1956, after arraignment on the first information and a plea of not guilty, the matter was set for trial on May 8, 1956. Also on April 17, arraignment on the second information was had. After further hearings on a motion to dismiss under section 995 of the Penal Code, and on April 30, the court denied the motion to dismiss as to Count 1 on the violation of section 503 of the Vehicle Code and granted the motion as to Count 2. Upon a plea of not guilty as to Count 1, the matter was set for trial on May 8, 1956.

Over appellant's objection and after a hearing on this point, the court ordered the consolidation of both informations for trial. The trial proceeded on May 8th and 9th, and appellant's motion for mistrial based upon improper consolidation of informations was denied. The jury rendered its verdict of guilty as to both informations. Appellant's motions for probation

and for a new trial were denied and judgment was pronounced. Appellant appeals from the judgment and from the order denying his motion for new trial.

According to the evidence a Mr. Gonzales was robbed by four youths on the corner of 8th and U Streets in Sacramento at about 9:45 p. m. on March 22, 1956. One of the youths held Mr. Gonzales' arms and placed a sharp object against his side while another youth confronted Mr. Gonzales with a .410 gauge shotgun pistol. Mr. Gonzales described the individual who held his arms as wearing gloves, levis and a red jacket, and identified appellant as that individual. The youths took Mr. Gonzales' wallet which contained 15 cents.

The appellant and the three youths, Butcher, Helton and Gilbert, had gone to Ryde, California, during the day of March 22, 1956, and while visiting the Houston household Butcher stole Mrs. Houston's .410 gauge shotgun pistol and shells.

Some time between the robbery and midnight of March 22, 1956, Helton removed a 1956 Mercury automobile belonging to Lieutenant White, which was parked in the locked, enclosed area behind Lundstrom's Paint Shop at 13th and U Streets, which is five blocks from the scene of the Gonzales robbery. Appellant admits driving the stolen vehicle to the Stockton city limits.

On the return trip from Stockton and while in the Sacramento city limits, the youths were approached by a police car. Appellant tried to make a run for it in the stolen vehicle but failed to make a turn at Q and 21st Streets and struck a post and wrecked the stolen vehicle.

Gilbert managed to escape from the scene of the accident, but appellant and the other two youths were apprehended and taken to the police station where they were booked and searched. Mr. Gonzales' wallet was found in appellant's front trouser pocket. A knife was also found in appellant's pocket. Mr. Gonzales identified appellant in a lineup and in court, but was unable to identify the other youths. Mrs. Houston's .410 gauge shotgun pistol, which was found in the stolen vehicle, was also identified by Mr. Gonzales as the gun used on him during the holdup on March 22nd.

The appellant spent most of the day and evening with Gilbert, Helton and Butcher. There were four persons who robbed Mr. Gonzales and there were four persons in the stolen vehicle.

Appellant does not question the sufficiency of the evidence to support judgment of conviction.

The principal, and in fact the only major contention of appellant, is that the trial court erred in joining and consolidating for trial the charge of robbery as contained in Information 21517 with the charge of violation of section 503 of the Vehicle Code as contained in Information 21518 to the substantial prejudice of the appellant.

Section 954 of the Penal Code provides, in part as follows:

> "An accusatory pleading may charge two or more different offenses connected together in their commission, or different statements of the same offense or two or more different offenses of the same class of crimes or offenses, under separate counts, and if two or more accusatory pleadings are filed in such cases in the same court, the court may order them to be consolidated."

[1] The language of section 954 has been construed by the courts to permit joinder where there are two or more different offenses connected together in their commission, Rodriguez v. Superior Court, 27 Cal.2d 500, 165 P.2d 1, or where the different offenses grew out of the same transaction. People v. Ames, 61 Cal.App.2d 522, 143 P.2d 92. The courts have also held joinder permissible where the offenses charged against the defendant are of the same class. People v. McMahon, 116 Cal.App.2d 883, 254 P.2d 903. The court, in the case of People v. Scott, 24 Cal.2d 774, 151 P.2d 517, held that joinder of offenses was permis-

sible if there is a common element of substantial importance in their commission.

Appellant points out that when the matter was presented before the court on objection to consolidation, the prosecution moved for consolidation on the grounds that the offenses were connected together in their commission and made certain oral statements in support of his argument for consolidation. Appellant argues that the cases hold that where multiple charges are made, whether in separate counts in one information or by multiple informations, that to consolidate for trial the pleader must allege that the offenses are connected in their commission, and, upon trial, prove that allegation, or the counts or information must show clearly that section 954 of the Penal Code is complied with; that the trial court, on demurrer or motion for consolidation, is bound by what appears on the face of the pleadings; that statements of the prosecution as to what it intends to prove at trial will not support consolidation over objection of the defendant; that the consolidation for trial cannot be upheld by the evidence produced at trial; that further, the evidence produced at the trial does not show the charges to be connected in their commission.

Respondent in reply states that the motion for consolidation was based on the fact that the gun used in the robbery was the same as that found in the stolen vehicle, the presence of the gun in both crimes being sufficient to constitute a common element of substantial importance in both offenses, and that the trial judge indicated he felt the element of flight was present and granted the prosecution's motion for consolidation on this premise. Respondent argues that consolidation was justified under the theory of connected offenses, offenses arising out of the same transaction, and the theory of a common element of substantial importance. Respondent does not contend that the offenses charged in the two informations are "two or more different offenses of the same class of crimes or offenses."

[2-4] We are unable to agree with respondent that the consolidation of the two informations for trial was proper in the instant case. For as we read the record there is no connection between the offense of robbery and the offense of driving an automobile of another without permission, nor can they be said to arise out of the same transaction. Nor is the fact that the same gun that was used in the robbery was found in the stolen vehicle a common element of sufficient substantial importance in both offenses, for there is no evidence that any gun was used in the charged violation of section 503 of the Vehicle Code.

We are therefore of the opinion that the court erred in ordering the consolidation but we do not believe that the error justifies a reversal of the judgment and order. For as stated in People v. Aguinaldo, 3 Cal.App.2d 254, at page 260, 39 P.2d 505, at page 508:

> "We have reached the conclusion, that while the order consolidating the two cases for trial was erroneous, it was an error of procedure only and subject to the provisions of section 4½ of article 6 of the Constitution. Having reached this conclusion it remains for us to determine whether or not it resulted in a miscarriage of justice."

See also People v. Shepherd, 14 Cal.App. 2d 513, 58 P.2d 970; People v. Davis, 42 Cal.App.2d 70, 108 P.2d 85; People v. Winston, 46 Cal.2d 151, 293 P.2d 40; People v. Leete, 130 Cal.App.2d 725, 279 P.2d 769; In re Pearson, 30 Cal.2d 871, 186 P.2d 401.

A careful examination of the entire records convinces us that the evidence against appellant on both charges was so overwhelming that the consolidation of the charges for trial could not have resulted in substantial prejudice to him. Therefore, we are of the opinion that the error complained of has not resulted in a miscarriage of justice.

The judgment and order are affirmed.

VAN DYKE, P. J., and PEEK, J., concur.

148 Cal.App.2d 495

George KALAJIAN, Plaintiff and Respondent,
v.
Henry NASH et al., Defendants,
Henry Nash, Defendant and Appellant.
Civ. 8915.

District Court of Appeal, Third District, California.
Feb. 13, 1957.

Action for slander of title to timber rights in land. The Superior Court, Trinity County, C. A. Paulsen, J., rendered judgment awarding damages, and one of the defendants appealed. The District Court of Appeal, Peek, J., held that the evidence supported findings and that such findings supported judgment.

Judgment affirmed.

1. Appeal and Error ⇐760(1)

Where appellant's statement of facts made no reference to the record, as provided by rules on appeal, reviewing court would disregard such statement of facts and review the record in light of the statement contained in respondent's brief which was adequately supported by appropriate references. West's Ann.Rules on Appeal, rule 15(a).

2. Conspiracy ⇐19
Libel and Slander ⇐139
Principal and Agent ⇐23(5)

In action for slander of title to timber rights in land, resulting in inability of plaintiff to sell such timber because contract, by which he acquired timber, due to mutual mistake, indicated that his rights thereunder had expired, evidence sustained findings that defendant, who had in meantime purchased such timber from subsequent purchasers of the land and codefendant through whom she purchased the timber were acting as agents of third defendant, that all three had knowledge of mutual mistake in plaintiff's contract and that all three conspired to slander plaintiff's title.

3. Libel and Slander ⇐130

One publishing, without privilege or justification, untrue matter disparaging another's property in land, chattels or intangibles under circumstances which would lead reasonable man to foresee that third person's conduct as purchaser or lessee thereof might be determined by such publication is liable for owner's pecuniary loss caused by resulting impairment of vendibility.

4. Libel and Slander ⇐139

Judgment awarding damages for slander of plaintiff's title to timber rights in land was supported by findings that defendants with full knowledge of mutual mistake as to termination date for removal of timber stated in contract of sale thereof to plaintiff, purchased such timber from subsequent purchasers of the land prior to expiration of plaintiff's timber rights, and caused their contract of purchase to be recorded and notice thereof given plaintiff, thereby preventing sale of timber by plaintiff to his damage in specified sum.

5. Libel and Slander ⇐130

That true owner of timber rights in land disclosed to prospective purchasers false claim of title to such rights asserted by defendants did not bar recovery of damages by owner for slander of his title to timber rights on ground that publication of matter disparaging plaintiff's title was attributable to plaintiff.

Frederick L. Hilger, Eureka, for appellant.

Carlton & Shadwell by Daniel S. Carlton, Redding, for respondent.

PEEK, Justice.

In an action for slander of title to certain timber rights in land, plaintiff was awarded damages against the defendants Nash, Johnson and Pepper. Their motion for new trial was denied, and the defendant Nash alone has appealed.

[1] Since appellant's statement of facts fails to make any reference whatsoever to

the record as provided by rule 15(a) of Rules on Appeal, we have chosen to disregard the same and have reviewed the record in light of the statement contained in respondent's brief which is adequately supported by appropriate references.

The record discloses that in April, 1952, Kalajian, a sawmill operator, entered into a written contract with a Mr. and Mrs. Douglas for the purchase of all the merchantable timber on certain real property owned by them. The termination date for the removal of the timber was agreed to be June, 1953, but through a mutual mistake in the final draft of the contract, the date was erroneously stated to be June, 1952. During the month of June, and while the plaintiff was in possession of the real property, it was sold, subject to his rights, by the Douglases to Hayes C. and Lulu Goe. In October of that year plaintiff's mill was destroyed by fire. At that time he estimated he had approximately 500,000 feet of down timber and somewhat more than a million of standing timber. He immediately began negotiations for the sale of the timber with a Mr. Logston, who in turn introduced him to the defendant Nash as his partner. Plaintiff's price of $30 for the down logs and $8 for the standing timber was agreeable to Nash who stated he could get over two and one-half million feet off the land, and if plaintiff could get an extension on the time for removing the timber, he (Nash) would purchase the same. Plaintiff told Nash that the correct termination date was 1953, and that he would have the contract reformed to express the true date at any time he had a legitimate sale for the timber. Nash was so informed personally by the attorney for the Douglases that the matter could be straightened out. Kalajian gave Nash copies of the agreement he had with the Douglases and copies of all of the documents in the case which the Douglases had filed against him for the balance due on their contract, and Nash kept the same for some two or three weeks. During these conversations, Nash informed plaintiff that he frequently made his deals using the names of members of his family and also that of his bookkeeper; and that he did so in order to effect tax savings. Nash continued to show interest in purchasing the timber and at one time called upon plaintiff with a woman whom he introduced as Mrs. Johnson, his secretary or bookkeeper, for the purpose of drawing up a contract. Plaintiff later learned that she was the defendant Pepper. He had never seen the defendant Johnson until he did so in court at the time of the trial. Plaintiff's negotiations with Nash continued until January 18 or 19, 1953. It was then agreed that plaintiff would meet Nash at Weaverville and go with him to the office of the attorney who had represented the Douglases. However, he received a telegram from Nash informing him that he would be delayed. A few days thereafter plaintiff went to Nash's home in Garberville and there arranged to accompany Nash to the attorney's office on the following morning. When he called for Nash to go to Weaverville, Nash refused to talk to him, and he was informed by Logston that the deal was off and that their attorney had told them to have nothing to do with it.

The following day plaintiff offered the timber to the L. & W. Lumber Company, and it was accepted; but before they could start operations he received a letter dated February 3, 1953, from an attorney representing the defendant Johnson, informing him that she had purchased the timber and he was to keep off the premises. The contract from the Goes to Johnson was dated January 8, 1953, approximately ten days prior to the termination of the negotiations between plaintiff and Nash. Upon learning of the letter, the company refused to proceed. Plaintiff then talked with one Wheelock who likewise agreed to buy the timber, but he also refused upon learning of the Johnson letter.

The Douglases, when called as witnesses for the plaintiff, testified that they informed Goes that plaintiff had until June, 1953, to remove the timber, and that the escrow instructions which were set up for that sale specifically referred to plaintiff's

contract with them. They further testified that prior to the sale to Kalajian they had quoted a price to Goe of $14,500, but that when they again talked to Goe after the sale of the timber to Kalajian they told Goe the price would be $9,500.

Hayes C. Goe testified he had never met defendant Johnson; that he had no copy of the contract between himself and her; that all of the negotiations were carried on by Nash; and that all of the documents were prepared by the defendant Pepper. He further testified that the price of $1,500 was for a mill site; that the timber was an unimportant part of the deal; that all of the parties knew of plaintiff's rights; that because he did not want to appear to be selling something he had no right to sell, he had a specific reference inserted in his contract with Johnson relative to plaintiff's interest.

Neither the defendant Johnson nor her husband had ever owned any timber before. Her testimony, when called under section 2055 of the Code of Civil Procedure, was that her sister, the defendant Pepper, acted for her throughout; that she never saw the timber in question; that she did not meet Goe until the time of the trial; that she received all of her information from Nash, and neither Nash nor her sister ever told her that he had been negotiating for the property; that she didn't consult an attorney concerning the effect of plaintiff's contract; that she didn't give Goe a signed copy of the contract, and she didn't know where her copy was. She further testified she contemplated setting up a portable sawmill and selling the lumber to the company for which she was working; that the money which she used to make the purchase had been kept by her in a safety deposit box in a Eureka bank; that she gave the money in cash to her sister; that when she was in Oregon she kept the money in her home in order that it might be available in the evening if a deal was presented to her; but that when she moved to Eureka she didn't see so many people who were interested in buying timber, and hence she put the money in the bank.

Pepper and Nash were the only witnesses who testified for the defense. Their testimony was essentially a denial of the evidence introduced by plaintiff, and hence merely created a conflict which the trial court in its memorandum opinion noted did not "impress" him and which, by the judgment, was quite obviously resolved against them.

The pertinent findings of the trial court were that Pepper and Johnson were the agents of Nash; that defendants, with full knowledge that plaintiff's rights would not expire until June, 1953, purchased these timber rights from Goe; that, with full knowledge, they caused the letter of February 3 to be written, and the contract to be recorded on February 8; that such acts constituted a publication of matter which was slanderous and untrue; that, as a result, plaintiff was prevented from selling the timber; that all of the defendants conspired together to defraud plaintiff; and that, by reason thereof, plaintiff had been damaged in the sum of $13,680.

Nash now contends: (1) That the evidence was insufficient to sustain the finding that Pepper and Johnson were acting as his agents; (2) that there could be no slander of plaintiff's title, since the recorded contract showed that his rights had expired; and (3) that any publication of the letter of February 3 was attributable to plaintiff. We find no merit in any of these contentions.

[2] There can be no question but that the evidence, as summarized, was amply sufficient to support the trial court's finding that Johnson and Pepper were acting as Nash's agents; that all three had knowledge of the mutual mistake in plaintiff's contract with the Douglases; and that all three conspired to slander plaintiff's title.

[3] It is the well-established rule that " 'One who, without a privilege to do so, publishes matter which is untrue and disparaging to another's property in land, chattels or intangible things under such circumstances as would lead a reasonable man to foresee that the conduct of a third per-

son as purchaser or lessee thereof might be determined thereby is liable for pecuniary loss resulting to the other from the impairment of vendibility thus caused.'" Gudger v. Manton, 21 Cal.2d 537, 541, 134 P.2d 217, 220. In that case the defendants levied and recorded a writ of execution upon all interest of plaintiff's wife in real property standing in his name and which was his separate property. With full knowledge of such facts defendants refused to release the execution. The court concluded such action constituted slander of title and affirmed a judgment for the plaintiff husband. The court therein, further citing and relying upon Restatement of Torts, section 624, held, "If the matter is reasonably understood to cast doubt upon the existence or extent of another's existence in land, it is disparaging to the latter's title where it is so understood by the recipient. (Rest.Torts, sec. 629.) As we have seen, the reasonable imputation of the recording was a claim of an interest adverse to plaintiff's title."

[4, 5] It necessarily follows that under the rule enunciated in the Gudger case the judgment is amply supported by the findings here. That case is likewise authority for the further rule which is a complete answer to appellant's final contention, to wit, that any publication of the letter was attributable to plaintiff and any damages suffered were the result of his own act. In that case a like contention was made and the court held that, "* * * Certainly plaintiff was justified in not concealing the existence of the execution. He might well be committing fraud if he did not divulge the information or represented that the title was clear * * *. That would not constitute a publication which would bar him from recovery. The real publication, as we have seen, was the recording of the execution. Regardless of whether plaintiff had informed the purchasers of the execution, it was a matter of record, and it would in practically all instances be discovered by the prospective purchaser before the transaction was completely consummated * * *. A policy fostering the exercise of good faith and fair dealing would require the owner of property to inform a purchaser of what the record showed, although he would in all probability discover it in any event. * *" 21 Cal.2d 556, 134 P.2d 227.

The judgment is affirmed.

VAN DYKE, P. J., and SCHOTTKY, J., concur.



148 Cal.App.2d 490

OIL BASE, Inc., a corporation, Plaintiff, Appellant and Cross-Respondent,

v.

TRANSPORT INDEMNITY COMPANY, a corporation, Hardware Mutual Insurance Company of Minnesota, a corporation, and Security Mutual Casualty Company, a corporation, Defendants, Respondents and Cross-Appellants.

Civ. 21152.

District Court of Appeal, Second District, Division 1, California.

Feb. 13, 1957.

Hearing Denied April 10, 1957.

Action was brought for declaratory judgment to determine liability of automobile liability insurers. The Superior Court of Los Angeles County, William J. Palmer, J., entered judgment from which an appeal was taken. The District Court of Appeal, Nourse, J. pro tem, 299 P.2d 952, reversed the judgments. Thereafter a motion was made in the District Court of Appeal to recall the remittitur and to correct it. The District Court of Appeal held that insurer's obligation under liability policy to reimburse insured for money paid by insured in settlement of personal injury action attached the moment insured made payment, which insurer was obligated under policy to make,

and that the amount, being certain, interest commenced to run from that date.

Remittitur recalled and corrected.

1. Interest ⇐44

Insurer's obligation under automobile liability policy to reimburse insured for amount paid by insured in settlement of personal injury action attached the moment insured made payment, which insurer was obligated under policy to make, and the amount, being certain, interest commenced to run from that date. West's Ann.Civ. Code, § 3287.

2. Insurance ⇐598

Where insurer became obligated under liability policy to pay $100,000 to insured on date when insured paid such sum in settlement of personal injury action, but insurer failed to do so, and insured brought action against insurer, and obtained judgment against insurer, insurer was not relieved from paying interest to insured on ground that insured had not been damaged, because third party had loaned insured without interest the money to pay the $100,000 in settlement of the action. West's Ann.Civ. Code, §§ 1916–1, 3287, 3302.

3. Appeal and Error ⇐1116

Where there was a prayer for general relief in amended and supplemental complaint in action by insured against insurer on liability policy, and interest was a part of and incident to damages to which insured was entitled under the facts pleaded and under the interpretation placed on the policy by the District Court of Appeal, award of interest was within power of District Court of Appeal to grant, though amended and supplemental complaint did not make an express demand for interest. West's Ann.Civ.Code, § 3287.

4. Appeal and Error ⇐1222

On motion in District Court of Appeal to recall remittitur and to correct it, it was clearly within power of District Court of Appeal to clarify and make certain that which was implicit in its judgment.

William W. Waters, and Martin, Hahn & Camusi, Los Angeles, for Oil Base.

Robert W. Stevenson, John F. O'Hara, Los Angeles, for Transport.

C. F. Jorz and Gary W. Sawtelle, Los Angeles, for Hardware.

PER CURIAM.

Appellant, Oil Base, Inc. (hereinafter called "Oil Base") has moved this court to recall the remittitur issued pursuant to the judgment of this court in the above-entitled matter, as set forth in the opinion filed herein on July 27, 1956, and which is reported in 143 Cal.App.2d 453, 299 P.2d 952.

The judgment of this court and the remittitur, so far as pertinent, read as follows:

"The judgments are reversed with directions to the trial court to in each case amend its conclusions of law and enter a judgment declaring the relative and respective rights and obligations of the parties to that action in accordance with the views expressed in this opinion. It shall also, in action Number 613386, *award judgment to Oil Base as against Hardware in the sum of $100,000, together with interest at 7 per cent, on account of the moneys paid by Oil Base in settlement of the Smith claim;* and in the further sum of $1,086.22, together with interest at 7 per cent, on account of attorney's fees and costs incurred by Oil Base in the defense of the actions brought against it by Smith and Lowe, being respectively actions Number 610750 and Number 620224 in the Superior Court, State of California, in and for the County of Los Angeles; and it shall also award judgment in favor of Oil Base and against Transport in the sum of $108.63 on account of the attorney's fees and costs incurred by Oil Base in the aforesaid action.

"Oil Base, Transport, Mercury, and Scherer shall recover their costs on appeal against Hardware." (Emphasis added.)

The motion is made on the grounds that this court inadvertently neglected to fix the date from which interest should be allowed to Oil Base upon the judgment which the trial court was directed to award it as against respondent Hardware Mutual Insurance Company of Minneapolis, a corporation (hereinafter called "Hardware"). Oil Base also seeks to have the remittitur corrected so as to specify August 21, 1953, as the date from which interest shall be calculated.

The failure to fix the date from which interest should be calculated in our judgment was an inadvertence on our part, probably induced by the fact that Oil Base was entitled as a matter of law to interest from the date it paid the obligation which Hardware was, under its contract, obligated to pay, and therefore we did not anticipate that Hardware or the trial court would understand our judgment as awarding interest from any other date.

The facts, so far as relevant here, are: Hardware, Transport Indemnity Company, and Security Mutual Casualty Company had issued policies of liability insurance by which each of them agreed to indemnify the persons insured therein against loss from the liability imposed by law arising out of the use, maintenance or operation of certain motor vehicles. On November 8, 1952, a motor vehicle operated by Oil Base was involved in an accident in which one Smith and one Lowe received serious personal injuries. Oil Base gave notice of this accident to each of the insurers. Thereafter, Smith and Lowe brought actions against Oil Base for the injuries they sustained in the accident. Oil Base tendered the defense of these actions to the insurers, each of whom declined to accept the defense, and Hardware denied any liability under its policy. Oil Base then commenced an action in declaratory relief against all of the insurers.

After the commencement of this action, the Smith claim was compromised and settled in the sum of $360,000. Of this amount, $260,000 was paid by Transport and Security, and $100,000 by Oil Base. In order to enable Oil Base to pay said $100,000 to Smith, Transport advanced that sum to Oil Base as a loan "without interest, and repayable only to the extent of such net recovery" as Oil Base might "make from Hardware Mutual Insurance Company * * *."

Oil Base then filed an amended and supplemental complaint by which it sought not only a declaration of its rights against the defendant insurers but also sought judgment in the sum of $100,000 against Hardware. By the prayer of this amended and supplemental complaint, it prayed for judgment against Hardware in the sum of $100,000 and for "such other and further relief as to the court may seem just and equitable in the premises." It did not expressly pray for interest. (For further details as to the facts and the contentions of the parties in the trial of the action and upon the appeal by Oil Base from the judgment of the trial court, see 143 Cal.App.2d 453, 299 P.2d 952.)

[1] In opposing the motion to recall and correct the remittitur, Hardware makes no claim that Oil Base has been guilty of laches, nor does it assert that the amount of the loss sustained by Oil Base was not liquidated and ascertainable as of the date the Smith claim was settled (August 21, 1953), but contends that the amount owed by it was not liquidated and was uncertain because a controversy existed between it and Oil Base as to whether its policy attached to the risk, and if it attached, the extent of Hardware's liability thereunder. The fallacy of this contention seems apparent from the very statement of it. Hardware's liability was created by its contract and, under its contract, it was obligated to pay the $100,000 that was paid by Oil Base. The fact that it misconceived and put an erroneous construction upon this contract in no way affected its liability to pay the $100,000 at the time the Smith claim was settled, and its obliga-

tion to reimburse Oil Base attached the moment Oil Base made the payment which Hardware was obligated under its policy to make, and, the amount being certain, interest commenced to run from that date. Civil Code, § 3287.

It would have been error for this court, or for the trial court, to refuse interest or to have fixed any date from which it was to be calculated other than August 21, 1953. As we have heretofore said our failure to state that date was purely inadvertent.

Hardware further contends, however, that because Oil Base was not obligated to pay interest to Transport it has not been damaged and is therefore not entitled to interest. There is no merit in this contention. Oil Base's right to interest depends solely upon whether it was on and after August 21, 1953, entitled to recover $100,000 from Hardware.

As construed by this court, Hardware became obligated under its policy to pay that sum to Oil Base on August 21, 1953, and upon failure to pay under its contract it became further obligated to pay interest at 7 per cent per annum. Civil Code, § 3302; Deering's Gen.Laws, 1944, Act 3757, sec. 1, West's Ann.Civ.Code, § 1916–1.

[2] If Oil Base, in order to pay the $100,000, had been compelled to borrow that sum and pay interest at the rate of 10 per cent per annum or had been compelled to sell property at a sacrifice, it would still have been limited in the damages which it might recover to the amount owed plus interest at 7 per cent per annum irrespective of its actual damage and Hardware is no more entitled to the benefit of Oil Base's contract with Transport than it would have been penalized had that contract provided for the payment of interest to Transport at a rate in excess of 7 per cent.

[3] It is also seemingly Hardware's contention that because the prayer to the amended and supplemental complaint did not make an express demand for interest, this court is without power to award it. As we have pointed out there was a prayer for general relief and, inasmuch as the interest is a part of and incident to the damages to which Oil Base was entitled under the facts pleaded in its complaint and under the interpretation placed upon Hardware's contract by this court, the award of interest was within the power of the court to grant, and it was our intention to grant it from the date heretofore mentioned. See: Lane v. Gluckauf, 28 Cal. 288; Cassacia v. Phoenix Insurance Co., 28 Cal. 628; Chambers v. Security Com. & Sav. Bk., 46 Cal.App. 32, 188 P. 818; Deaux v. Trinidad Bean & Elevator Co., 8 Cal.App.2d 149, 152, 47 P. 2d 535.

[4] By supplying the date from which interest upon $100,000 is to be calculated, we do not change our judgment or add to it; we merely clarify and make certain that which was implicit in it. This is clearly within our power. See: Southwestern Inv. Corp. v. City of Los Angeles, 38 Cal.2d 623, 626, 241 P.2d 985; In re McGee, 37 Cal.2d 6, 229 P.2d 780; 3 Witkin, California Procedure (1954) sec. 176, p. 2370.

This proceeding has directed our attention to the fact that while we awarded Oil Base judgment against Hardware in the sum of $1,086.22, on account of attorney's fees and costs incurred by it in the Smith and Lowe actions, and against Transport in the sum of $108.63 on the same account, and awarded interest at 7 per cent upon the amounts so awarded, we again inadvertently failed to fix the date from which interest should run.

Inasmuch, however, as Oil Base makes no complaint on this score, we will not examine the record to determine whether the date of the payment of these attorney's fees and costs is fixed so that we might order interest calculated from such a date, or examine the question as to whether our judgment was in effect a modification of

the original judgment entered by the trial court, in which event interest would run from the date of the original judgment even though the exact date upon which attorney's fees and costs were paid was not shown.

We will, therefore, not make any correction in the remittitur as originally issued in this regard, and interest upon the amounts awarded as attorney's fees and costs will run from the date of the judgment entered by the trial court in accordance with our direction.

It Is Therefore Ordered that the remittitur heretofore issued out of this court in the above-entitled matter be recalled, and that the same be corrected and reissued to read as follows:

"The judgments are reversed with directions to the trial court to in each case amend its conclusions of law and enter a judgment declaring the relative and respective rights and obligations of the parties to that action in accordance with the views expressed in this opinion. It shall also, in action Number 613386, award judgment to Oil Base as against Hardware in in the sum of $100,000, together with interest at 7 per cent from August 21, 1953, on account of the moneys paid by Oil Base in settlement of the Smith claim; and in the further sum of $1,086.22, together with interest at 7 per cent, on account of attorney's fees and costs incurred by Oil Base in the defense of the actions brought against it by Smith and Lowe, being respectively actions Number 610750 and Number 620224 in the Superior Court, State of California, in and for the County of Los Angeles; and it shall also award judgment in favor of Oil Base and against Transport in the sum of $108.63 on account of the attorney's fees and costs incurred by Oil Base in the aforesaid action.

"Oil Base, Transport, Mercury, and Scherer shall recover their costs on appeal against Hardware."

148 Cal.App.2d 351

Walter H. GUNN and Jean R. Gunn, husband and wife, Adele A. Fink and Otto Fink, husband and wife, Clifford H. Gossett and Jessie P. Gossett, husband and wife, Plaintiffs and Respondents,

v.

Fred J. FONTES and Marie Fontes, Defendants and Appellants.

Fred J. FONTES, Cross-Complainant and Appellant,

v.

Walter H. GUNN and Jean R. Gunn, husband and wife, Adele A. Fink and Otto Fink, husband and wife, Clifford H. Gossett and Jessie P. Gossett, husband and wife, Cross-Defendants and Respondents.

Civ. 17115.

District Court of Appeal, First District, Division 1, California.

Feb. 8, 1957.

Hearing Denied April 2, 1957.

Action to declare certain roadway across defendants' land a public road. The Superior Court, County of Alameda, Marvin Sherwin, J., entered judgment for plaintiff and defendants appealed. The District Court of Appeal, Fred B. Wood, J., held that landowner's recordation of map depicting road constituted an offer to dedicate and that continuous public use without objection by landowner or successors constituted an acceptance of the offer to dedicate road as a public road.

Judgment affirmed.

1. Dedication ⇐16(1)

Dedication of land for public use where considered as a voluntary transfer of an interest in land is the joint effect of an offer by the owner and acceptance by the public.

2. Dedication ⇐16(1), 19(1)

An offer to dedicate land for public use may be manifest by deed, by map, or in other ways.

3. Dedication ⇐35(1), 37

Acceptance of an offer to dedicate land for public use may be effected by action

of appropriate governmental body or by use by the public.

4. Dedication ⇐46

If the location of a right of way is not defined by the offer of dedication, a reasonably convenient and suitable way is presumed to be intended.

5. Dedication ⇐1

A common law dedication is voluntary transfer of an interest in land which partakes both of a nature of a grant and of a gift, and is governed by the fundamental principles which control such transactions.

6. Dedication ⇐46

When the parties may by their conduct fix the course of a right of way which the grant wholly fails to define, it is competent for them by their conduct to fix with precision the course of a right of way which the offer fixes roughly or approximately although not precisely as to detail.

7. Dedication ⇐37

Even if map offering to dedicate roadway was uncertain in its description of the roadway, the public by the course it traveled in acceptance of the offer and the landowner by acquiescence therein placed their own construction upon the offer and consummated a dedication which was definite and certain.

8. Dedication ⇐19(2)

The making and recording of a map which depicted several parcels of land with certain roads constituted an offer of dedication of road to the public.

9. Dedication ⇐37

Where road shown on map recorded by landowner was used continuously from 1912 to 1950 by the general public as well as by owners of land contiguous to the road, their guests, trades people, servants and employees, without objection by landowners or their successors, such use constituted an acceptance of an offer to dedicate the road as a public road.

10. Dedication ⇐37

To evidence acceptance of an offer to dedicate a road as a public road, the public use may be but a short time, because the offer to dedicate and the acceptance by use, both being shown, the rights of the public have immediately vested.

11. Dedication ⇐44

In action to establish roadway across defendants' land as a public road, dedication of which was manifest by an offer in the form of a map made and recorded by landowner, evidence supported finding of acceptance by public use and finding that the character of the road was a public road.

12. Dedication ⇐51

In action to establish roadway shown on map recorded by landowner as a public road, where width of road was determined by sanitary district engineering measurements and the testimony of laymen as to vehicles using road, evidence supported the finding that road was 14 feet wide.

Fred B. Mellman, Russell P. Studebaker, Oakland, for appellants.

Phillips, Avakian & Johnston, Thomas B. Richardson, Oakland, for respondents.

FRED B. WOOD, Justice.

Upon defendants' appeal from a judgment declaring that a certain road across defendant Fred Fontes' land is a public road and is 14 feet wide, defendants claim the evidence is insufficient to show (1) an offer to dedicate to a public use, (2) acceptance by the public of the offer, or (3) that the road is 14 feet wide.

The offer appeared upon a subdivision map entitled "Map of Van Hoosear Tract" which depicted several parcels of land and across some of them certain roads, including the road in suit, indicated by parallel broken lines and the designation "common road" (except one which was designated "private road"). The map was filed with the county recorder on August 28, 1899, by Mary A. Van Hoosear who signed the map and over her signature (acknowledged before a notary) stated that she was the pro-

prietor of the land shown and designated upon the map.[1]

[1-3] Dedication of land for public use (when considered as a voluntary transfer of an interest in land) is the joint effect of an offer by the owner and acceptance by the public. County of Inyo v. Given, 183 Cal. 415, 417, 191 P. 688. The offer may be manifested in any of several different ways (by deed, by map,[2] or in other ways); in the instant case, by map. Acceptance may be effected by action of the appropriate governmental body or by use by the public. Here, acceptance was manifested by the use which the public made of the "common road" which the owner tendered when she signed and recorded the map.

The intent to offer to dedicate a road to public use seems clear. But, say the defendants, the map was too indefinite and uncertain in its description and depiction of the strip designated "common road" to serve as an offer.

They rely upon the testimony of their surveyor who testified that he could from the map accurately locate the courses and distances of the property lines but not of the road lines because the map gave the former but not the latter. As to the width of the road, the map did not state the distance (in feet or other units of measurement) between the parallel broken lines. But by applying the scale (1″ = 200′) indicated by the legend which the map bore the witness estimated they were about 10 feet apart (indicating a road width of 10 feet) but doubted if the map-maker intended to draw those lines to scale. In short, he could not by use of the map alone locate the course, distance and width of the road across defendants' land with any degree of certainty.

He was able, however, to "find the road as it existed on the ground." He prepared a metes and bounds description and a plat of the traveled portion of the road, and defendants put the description and the map in evidence. Lay witnesses familiar with this area, including the road, had no difficulty in identifying the road as it existed on the ground with the road depicted on the 1899 recorded map, including Mrs. Fink who had known this road since 1912 and Mr. Jorgensen who first observed it in 1925, each of whom testified that its location had not changed since the witness first saw it.

We do not know, of course, whether the road actually existed when the map was filed in 1899. Its existence as a traveled road in 1912 tokened prior use for an appreciable period of time; how long a period we do not know. That, however, is not material. The offer was to dedicate a road to the public along the course roughly indicated by the parallel broken lines. It does not matter greatly whether the road

1. Defendants interposed no objection to the map except as to the broken lines (designated "common road") which extend across the subdivision parcel of which the Fred Fontes' land is a part, upon the ground that it is "uncertain * * * although it pretends to depict, delineate a road, there is no course or distance or width indicated on it, and therefore it's indefinite and uncertain and has no relevancy to the issues of this case."

2. The making and recording of a subdivision map depicting a certain area as a road, street or highway is a well established method of making an offer to dedicate that area for public use. San Francisco v. Burr, 108 Cal. 460, 461, 41 P. 482, "a space corresponding to a street," on either side of which certain "lots" were shown; City of Los Angeles v. McCollum, 156 Cal. 148, 151, 103 P. 914, 23 L.R.A.,N.S., 378, a certain strip was deemed marked on the map as a street even though not named or designated as a street; San Francisco Sulphur Co. v. Contra Costa County, 207 Cal. 1, 5-6, 276 P. 570, the recording of a subdivision map that designates certain spaces as thoroughfares or public streets; Elliott v. McIntosh, 41 Cal. App. 763, 766, 183 P. 692, certain portions designated as public streets or highways; City of Burlingame v. Norberg, 210 Cal. 105, 290 P. 587, the marking upon a subdivision map of a strip ("without name or number") which was some 20 feet wide and embraced the bed of a creek, was deemed an offer of that strip for public use as a drainage channel.

had already been marked upon the ground by wagon tracks or surveyor's stakes or remained yet to be located upon the ground. In any case its precise course was determined (by the owner with acceptance by the public or by public user acquiesced in by the owner) at least as early as 1912.

Thus, by practical construction, that which, assertedly, was indefinite and uncertain has been made definite and certain. This is a familiar and well established principle which, in the law of contracts, has been expressed in these words: "The acts of practical construction placed upon a contract by the parties are binding, and may be resorted to to relieve it from doubt and uncertainty." 6 Cal.Jur. 217, Contracts, § 142.

[4] In the law of easements this principle has been applied to the grant of a right of way whose course the instrument of grant fails to define, expressed by our Supreme Court as recently as 1952 in Youngstown Steel Products Co. v. City of Los Angeles, 38 Cal.2d 407, 410–411, 240 P. 2d 977, 979: "It is well settled that if the location of a right of way is not defined by the grant, a reasonably convenient and suitable way is presumed to be intended * *. Where the right of way has been used at a particular location with the acquiescence of the servient owner, the parties have, in effect, placed their own practical construction upon the grant, and the easement will be regarded as fixed at that place. * * Once the location of an easement has been finally established, whether by express terms of the grant or by use and acquiescence, it cannot be substantially changed without the consent of both parties * *."

[5] We think those principles apply here. "A common law dedication has been described as 'a voluntary transfer of an interest in land [which] partakes both of a nature of a grant and of a gift, and is governed by the fundamental principles which control, such transactions.' * * *" Union Transp. Co. v. Sacramento County, 42 Cal.2d 235, 240, 267 P.2d 10, 12.

[6, 7] When the parties may by their conduct fix the course of a right of way which the grant wholly fails to define, it would seem competent for them by their conduct to fix with precision the course of a right of way which the offer fixes roughly or approximately although not precisely as to detail. The public by the course it traveled in acceptance of the Van Hoosear offer and the landowner by acquiescence therein, placed their own construction upon the offer and consummated a dedication which was definite and certain.

People v. Southern Pac. R. Co., 68 Cal. App. 153, 228 P. 726, upon which defendants heavily rely, is readily distinguished. The map in question was a public map, prepared under instructions from a town board of trustees, not the landowner, hence, not in itself evidence of dedication. When recorded eleven years later, the copyist in the county recorder's office erroneously omitted the west line of the street in question (which, in effect, omitted the street entirely from the map, the street's easterly line becoming the western boundary of the tract depicted), and during the eleven year interval between the making of the map and its filing in the recorder's office persons acquired title under conveyances which ignored the existence of any street or supposed street and disposed of the area as private property, "a withdrawal of the offer of dedication, if any such offer had been made." 68 Cal.App. at page 160, 228 P. at page 728.

[8] We conclude that the evidence supports the finding that the making and recording of the Van Hoosear Tract Map constituted an offer of dedication of this road to the public.

[9] Concerning acceptance of this offer, the trial court found, upon evidence which supports the finding, that this road was used continuously from 1912 to August, 1950, by the general public as well as by the owners of land contiguous to the road, their guests, trades people, servants and employees, without objection by defendants

or their predecessors, and that such use constituted an acceptance of the offer to dedicate this road as a public road.

Defendants claim this finding fatally defective because of the absence of a finding that this use was adverse.

Proof that the public user was adverse might well have been necessary if there had been no proof, as an independent fact, of the offer to dedicate; e. g., if no road had been indicated upon the map or if no map had been filed, and proof that an offer had been made depended solely upon long user of the road by the public, in the absence of circumstances negativing the idea that such use was made under a license.

It is different when, as here, the finding of an offer is predicated upon substantial evidence that an offer was made; i. e., the recording of a map by which the owner tendered the road for public use.

[10] It then remains only to find acceptance of the offer; evidenced in this case by the use of the road by the public. To evidence such acceptance the public's use need not be for the five-year prescriptive period. It may indeed be but a short time, "because, the offer to dedicate and the acceptance by use both being shown, the rights of the public have immediately vested." Schwerdtle v. County of Placer, 108 Cal. 589, 593, 41 P. 448, 449; quoted with approval in Union Transp. Co. v. Sacramento County, supra, 42 Cal.2d 235, 241, 267 P.2d 10, 13, and in Morse v. Miller, 128 Cal.App.2d 237, 245, 275 P.2d 545. See also Elliott v. McIntosh, 41 Cal.App. 763, 766–767, 182 P. 692, and Fitzgerald v. Smith, 94 Cal.App. 480, 483–484, 271 P. 507.

In support of its contention that the absence of a finding of adverse user is fatal to the finding that the offer to dedicate was accepted by public user, defendants cite Niles v. City of Los Angeles, 125 Cal. 572, 58 P. 190. But the facts of that case are not comparable to those of this case. There the trial court found a number of probative facts and then from those probative facts drew the conclusion[3] that the land in question was a public street. The only findings which tended to show an offer to dedicate were not supported by the evidence, with the result that the showing of an offer to dedicate (if any had been made) depended entirely upon a finding that the land in question had for some ten years been used and traveled by the public as a public street (not an adverse user). In short, there was in the Niles case neither a finding of an offer to dedicate nor a finding of adverse user. The absence of both was fatal. The existence of either (if supported by the evidence), together with other facts found, would have supported the trial court's conclusion that this was a public street. In tacit if not explicit recognition of this, the court in the Niles case quoted the following significant passage from Harding v. Jasper, 14 Cal. 643, at pages 576–577 of 125 Cal. at page 192 of 58 P.: " 'The vital principle of the dedication is the intention to dedicate; and, whenever this is unequivocally manifested, the dedication, so far as the owner of the soil is concerned, has been made. Time, therefore, though often a material ingredient in the evidence, is not an indispensable ingredient in the act of dedication. If accepted and used by the public in the manner intended, the dedication is complete, precluding the owner, and all claiming in his right, from asserting any ownership inconsistent with such use.' "

[11] Thus it is clear that the evidence supports the finding of acceptance by the

3. When ultimate facts are tied in with and made dependent upon the probative facts found, a reviewing court must look to the probative facts for their support. Garrison v. Edward Brown & Sons, 25 Cal.2d 473, 478, 154 P.2d 377; In re Estate of Kerr, 127 Cal.App.2d 521, 523–524, 274 P.2d 234.

It does not matter, of course, whether a finding of fact appears among the "facts found" or among the "conclusions of law"; it may and should be regarded as one of fact even though mistakenly placed among the conclusions of law. See cases collected in 24 Cal. Jur. 961, Trial, § 199, note 19.

public. That, coupled with adequate proof of the offer, establishes the character of this road as a public road.

[12] Finally, defendants question the sufficiency of the evidence to support the finding that it is 14 feet wide. We are convinced that the supporting evidence is sufficient.

An engineer in the course of preparing plans for sanitary district improvements, made a survey of this road in 1950 and made a plat showing the traveled portion, confining his measurements to the graveled area, which varied from 12 to 14 feet in width. This was supplemented by the testimony of laymen, including two who said that before defendant Fontes recently began to narrow the road there was sufficient room for cars to pass on it and one who said that in 1948 and again in 1953 he took over this road a hay baler that required a width of 12 feet to get through.

The judgment is affirmed. The appeal from the denial of the motion for a new trial (a nonappealable order) is dismissed.

PETERS, P. J., and BRAY, J., concur.



148 Cal.App.2d 238

ASPEN PICTURES, Inc., Plaintiff and Appellant,

v.

The OCEANIC STEAMSHIP COMPANY, and Matson Navigation Company, Defendants and Respondents.

Civ. 21643.

District Court of Appeal, Second District, Division 1, California.

Feb. 4, 1957.

Rehearing Denied March 4, 1957.

Hearing Denied April 2, 1957.

Shipper's action against carrier and another for delay in carriage of goods because of strike. From an adverse judgment rendered by the Superior Court of Los Angeles County, Roy L. Herndon, J., the shipper appealed. The District Court of Appeal, Fourt, J., held that carrier's regulation purporting to immunize it from liability for loss or damage resulting from strikes was of such a character, under provisions of Carriage of Goods by Sea Act, that it was required to be included as part of published tariffs and as it was so published, shipper was accordingly chargeable with notice of its existence and effect.

Judgment affirmed.

1. Shipping ⇐103

Shippers are chargeable with constructive notice of terms and provisions of tariffs and related rules and regulations to the extent and only to the extent that they have been filed pursuant to requirements of applicable federal law. Intercoastal Shipping Act of 1933, §§ 2, 5, 46 U.S.C.A. §§ 844, 845b; Carriage of Goods by Sea Act, § 1 et seq., 46 U.S.C.A. § 1300 et seq.

2. Shipping ⇐140(1)

Public, in dealing with common carriers, is bound to take notice that carriers have filed tariffs of rates and charges, and is chargeable with notice of everything properly included in or related to such system of rates and charges, including degree of carrier's responsibility for safe carriage and delivery of baggage. Intercoastal Shipping Act of 1933, §§ 2, 5, 46 U.S.C.A. §§ 844, 845b. Carriage of Goods by Sea Act, § 1 et seq., 46 U.S.C.A. § 1300 et seq.

3. Shipping ⇐141(1)

Carrier's regulation purporting to immunize it from liability for loss or damage resulting from strikes, was of such a character that, under Carriage of Goods by Sea Act, it was required to be included as part of published tariff and public was accordingly chargeable with notice of its existence and effect. Intercoastal Shipping Act of 1933, §§ 1–8, 46 U.S.C.A. §§ 843–848; Carriage of Goods by Sea Act, §§ 1 et seq., 1(c), 4(2) (j, q), 46 U.S.C.A. §§ 1300 et seq., 1301(c), 1304(2) (j, q); Shipping Act of 1916, § 1, 46 U.S.C.A. § 801.

4. Shipping ⇐147

Freight rates may properly be affected by degree of carrier's responsibility for goods shipped.

5. Shipping ⇐136

Where dock receipts specifically provided that custody and carriage of goods were to be governed by contractual terms of carrier's regular bill of lading which expressly incorporated provisions of Carriage of Goods by Sea Act, liability for failing to deliver goods because of strike could not be predicated under provisions of the Harter Act. Harter Act, § 1, 46 U.S.C.A. § 190; Carriage of Goods by Sea Act, § 1 et seq., 46 U.S.C.A. § 1300 et seq.

6. Shipping ⇐136

In view of fact that the provisions of Harter Act relating to stipulations relieving from liability for negligence do not apply until vessel breaks ground and starts voyage, liability for failing to timely ship because of work stoppage could not be predicated under such act where shipper's goods were discharged and returned to it before voyage was commenced. Harter Act, § 1, 46 U.S.C.A. § 190; Carriage of Goods by Sea Act, § 1 et seq., 46 U.S.C.A. § 1300 et seq.

7. Shipping ⇐132(3)

Under provisions of Carriage of Goods by Sea Act relieving shippers from liability for loss, unless their negligence contributed to damages, where loss results from such cause as, inter alia, labor disputes and shipper brings suit to recover for such a loss, it has burden of proof that carrier's negligence contributed to loss, and carrier may not be held liable for damages unless it appears that his negligence so contributed. Carriage of Goods by Sea Act, § 4, 46 U.S.C.A. § 1304.

8. Shipping ⇐132(6)

In shipper's action against carrier for damages due to delay in carriage of goods because of labor dispute, evidence on issue of whether carrier was negligent in failing to give notice of likelihood of strike was for jury. Carriage of Goods by Sea Act, § 4, 46 U.S.C.A. § 1304.

9. Trial ⇐285

Correctness of instructions in given case can be determined only by reasonable construction such as will enable judge to ascertain their probable effect upon jury in light of issues raised by pleadings.

10. Appeal and Error ⇐928(1)

In considering instruction assigned as prejudicial, reviewing court must adopt such construction thereof as will support judgment rather than one that will defeat it.

11. Shipping ⇐132(6)

In shipper's action against carrier for damages for delay of carriage of goods caused by labor dispute, evidence warranted instruction that forwarding company was shipper's agent for certain limited purposes. Carriage of Goods by Sea Act, § 4, 46 U.S.C.A. § 1304.

12. Principal and Agent ⇐19, 119(1)

Burden of proving agency, as well as scope of agent's authority, rests upon party asserting existence thereof and seeking thereby to charge principal with knowledge, acts or omissions of agent.

13. Appeal and Error ⇐1050(1), 1064(1)

In shipper's action against carrier for damages due to delay in carriage of goods because of strike, court's admission of newspapers containing on front pages accounts of work stoppage and impending strike, published at port from which shipment was to take place and instructing jury on constructive knowledge of that which reasonably prudent persons should make inquiry was not prejudicial error. Carriage of Goods by Sea Act, § 4, 46 U.S.C.A. § 1304.

14. Trial ⇐295(1)

Instructions are to be read and considered as a whole and, so considered, when it appears therefrom that jury was fully and thoroughly instructed on all law applicable, judgment will not be reversed simply because a particular instruction, taken alone, may not have embodied all applicable law.

15. Appeal and Error ⇐1064(1)

Whether errors in instructions were prejudicial depends on closeness of facts in case and nature of erroneous instructions and other instructions given.

16. Appeal and Error ⇐1064(1)

Unless, upon a consideration of entire case, including evidence, it appears that errors complained of in instructions have resulted in miscarriage of justice, judgment will not be reversed by reason of an erroneous instruction.

17. Trial ⇐295(5)

In shipper's action against carrier for damages resulting from delay in carriage of goods due to strike, instructions, when considered as whole, fully and fairly presented issues in case and contained no prejudicial error. Carriage of Goods by Sea Act, § 4, 46 U.S.C.A. § 1304.

18. Shipping ⇐132(5½)

In shipper's action against carrier for delay in carriage of goods due to strike, wherein there was issue as to whether carrier was negligent in failing to notify shipper of pendency of strike, it was proper to permit carrier's question of witness as to whether witness had ever known a vessel upon which sailors in unlicensed deck department had signed foreign articles and undertaken a voyage and subsequently gone on strike and refused to sail ship. Carriage of Goods by Sea Act, § 4, 46 U.S.C.A. § 1304.

19. Evidence ⇐471(2)

In shipper's action against carrier for delay in carriage of goods due to strike, wherein there was issue as to whether carrier was negligent in failing to notify shipper of pendency of strike, question propounded to carrier's witness on cross-examination as to whether there were instances where sailors, after having signed foreign articles were prevented from striking by reason of having signed such articles called for conclusion and trial court properly sustained objection thereto. Carriage of Goods by Sea Act, § 4, 46 U.S.C.A. § 1304.

20. Shipping ⇐132(5½)

In shipper's action against carrier for delay in carriage of goods, it was proper to permit carrier's freight agent to testify that he had never guaranteed either arrival or departure date of a vessel.

21. Trial ⇐305

Alleged misconduct of defendant's employee who was witness, in stating to juror, during recess that "now you see what we have to cope with" was not of such a character that it could reasonably have had effect upon verdict.

Leonard Horwin and Richard I. M. Kelton, Beverly Hills, for appellant.

Brobeck, Phleger & Harrison, San Francisco, and Sheppard, Mullin, Richter & Balthis, Los Angeles, for respondents.

FOURT, Justice.

This is an appeal by the plaintiff from a judgment on a verdict rendered in favor of defendant in an action by the shipper of goods against the carrier for damages resulting from a delay in the carriage of plaintiff's goods.

Plaintiff delivered to defendants, who are common carriers, certain motion picture equipment and supplies for shipment to Samoa on defendants' steamship "Sierra", which was scheduled to depart from the port of Los Angeles on May 24, 1952, and to arrive in Samoa at the end of the first week in June. The material was needed by plaintiff in connection with its production of a motion picture in Samoa, commencing in mid-June. Plaintiff's executive producer, together with a part of the cast and crew, departed by air for Samoa on May 22, 1952. The goods were loaded on board the Sierra on May 24, 25 and 26. A seamen's strike delayed the sailing of the vessel, with the result that plaintiff was delayed approximately six weeks in commencing production of its motion picture.

For some time prior to the time plaintiff's goods were loaded on board the Sier-

ra, the Sailors Union of the Pacific and the Pacific Maritime Association, defendants' bargaining agent, had been negotiating a new collective bargaining contract. On May 23, 1952, the Union adopted a resolution, which was communicated to defendants, that effective immediately the men would refuse to sail any of defendants' vessels except those certified by the U. S. Military Transport Service to be carrying military cargo to Korea, and that a strike vote would be taken on May 26, unless an agreement with defendants' collective bargaining agent were reached by that time. Also on May 23, 1952, the Union's representatives informed defendants' representatives that none of their ships would be permitted to sail for an indefinite period. No agreement was reached between the Union and the defendants' bargaining agent and accordingly, a coast-wide strike vote was taken and carried on May 26, picket lines were established the following day and maintained thereafter, and no cargo could be removed from defendants' vessels without the consent of the Union. No notice was given by defendants to plaintiff regarding the labor dispute, the work stoppage or the threatened strike until May 28, when defendants notified plaintiff that the ship was delayed by reason of the strike.

It is plaintiff's contention that knowing the importance to the shipper of timely delivery of the cargo, defendants were negligent in failing to notify plaintiff of the likelihood of a work stoppage and in failing to take initiative on their own to stop the loading of the cargo onto a ship that was already under work stoppage and threatened with imminent strike.

Defendants contend that the terms and conditions of the contract of carriage are set forth in the bills of lading and that plaintiff is bound by the terms thereof; that the Carriage of Goods by Sea Act (hereinafter referred to as COGSA) is specifically incorporated in the bills of lading and that under the provisions of Section 4(2) (j) of that act[1] defendants are exempt from liability.

The dock receipts for plaintiff's goods were prepared by Barnett International Forwarders, Inc., on behalf of plaintiff, for execution by defendants at the time of receipt of the goods. The receipts contain the following language printed thereon: "The Goods Above Specified Were Received Upon The Understanding, And Shipper By Accepting Duplicate Dock Receipt Agrees, that except as otherwise provided herein the custody and carriage of said goods by the Oceanic Steamship Company shall be Governed By The Contractual Terms And Conditions Of That Company's Regular Form Of Bill Of Lading, before as well as after its issuance * * *. During any time that the goods are in the custody of the Company prior to loading, the Company shall hold them as warehousemen only and in the event of loss or damage during such time shall not be subject to the burden of proof prescribed by Section 4 (2) (Q) of the Carriage of Goods by Sea Act."

After the goods were loaded on board the Sierra, and in exchange for the dock receipts, Oceanic Steamship Company issued its bills of lading which provided, in pertinent part, as follows: "* * * The Shipper By Receiving This Contract Bill Of Lading Agrees that the custody and carriage of the goods are subject to the terms and conditions provided herein and the authorities and liberties granted hereby, As Set Forth On This And On The Reverse Side Hereof, whether written, stamped or printed, which shall govern the

1. Section 4(2) (j) of the Carriage of Goods by Sea Act, 49 Stat. 1210, U.S. C.A., Title 46, § 1304; reads as follows: "(2) Neither the carrier nor the ship shall be [responsible] for loss or damage arising or resulting from * * * * * * * * * * * * * "(j) Strikes or lockouts or stoppage or restraint of labor from whatever cause, whether partial or general; *Provided*, That nothing herein contained shall be construed to relieve a carrier from responsibility for the carrier's own acts;"

relations, whatsoever they may be, between the Shipper, Consignee and Cargo Owner and the Carrier, Master and Vessel in every contingency, wheresoever and whensoever occuring." The reverse side of the bills of lading contain the following provisions, among others:

"2. This bill of lading shall be deemed to incorporate and shall have effect subject to the provisions of the Carriage of Goods by Sea Act of the United States, approved April 16, 1936 [46 U.S.C.A. § 1300 et seq.], and nothing herein contained shall be deemed a surrender by Carrier of any of its rights or immunities or an increase of any of its responsibilities or liabilities thereunder; nor shall Carrier be deemed to have warranted the seaworthiness of the Vessel. The provisions stated in said Act shall (except as may be otherwise provided herein) govern before the Goods are loaded on and after they are discharged from the ship and throughout the entire time that they are in the custody of the Carrier. In respect of goods carried on deck and stated herein to be so carried, all risks of loss or damage by perils incident to such carriage shall be borne by Cargo Owner but in all other respects the custody and carriage of such goods shall be governed by the terms of this bill of lading and the provisions stated in said Carriage of Goods by Sea Act notwithstanding Section 1(c) thereof. Carrier shall also have the benefit of Sections 181 to 189, inclusive, of Title 46 U.S.Code [46 U.S.C.A. §§ 181–189], and of all other statutes of the United States or any other country which may be applicable in the circumstances to grant Carrier exemption from or limitation of liability.

"* * *

"12. Carrier does not undertake that the Goods shall arrive at port of discharge, destination or transshipment at any particular date or time or to meet any particular market or in time for any particular use. Scheduled or advertised sailing and arrival times are only expected times and may be advanced or delayed if Carrier shall find it necessary, prudent or convenient to do so."

Pursuant to the provisions of the Intercoastal Shipping Act, 46 U.S.C.A. §§ 843–848, and the regulations promulgated thereunder, defendant Oceanic Steamship Company, hereinafter referred to as Oceanic, filed with the United States Maritime Commission its tariff, in which a copy of Oceanic's bill of lading is set forth in full.

Plaintiff urges as grounds for reversal that there was prejudicial error in the giving of certain instructions and in the admission of evidence.

Plaintiff contends that the following instruction was erroneous:

"The Oceanic Steamship Company is a common carrier under the laws of the United States. As a common carrier it is required by law to treat all customers alike. For that purpose it was required to file with the Federal Maritime Board a freight tariff setting forth rates and the bill of lading containing terms and conditions under which it will carry goods of any shipper. The filing of such a tariff is regarded in the law as a public notice to all customers or shippers of all of the terms and conditions under which the company may carry the goods of any shipper. It is prohibited by law from varying from the published tariff, for to do so would result in a discrimination between shippers. Therefore the plaintiff is presumed to have notice of the tariff, as filed, and the terms and conditions set forth therein.

"The bill of lading is the form of contract under which goods could be carried by the steamship company. If the form of the bill of lading issued by the Oceanic Steamship Company was published in full in its freight tariff, the plaintiff is presumed to have known all of its terms and conditions. Therefore, the plaintiff is presumed to have known that the defendants could not legally guarantee to carry the plaintiff's goods to its destination at a particular date or time or in time for any particular use.

"These presumptions of knowledge or notice on the part of plaintiff are conclusive and you may not find that plaintiff did not have such knowledge or notice, if you find that the form of bill of lading was filed as part of the defendant's tariff."

Plaintiff argues that (1) the terms and conditions of the bill of lading were not binding upon the shipper merely because they had been filed with the Federal Maritime Board as a part of the carrier's tariff and (2) even if it be determined that plaintiff was bound by the terms of the bill of lading which the law required the carrier to file with the Federal Maritime Board, plaintiff was not bound by the exemption clauses contained in the bill of lading since they are not a part of the tariff, citing Pacific S.S. Co. v. Cackette, 9 Cir., 8 F.2d 259, and Bernard v. United States Aircoach, D.C., 117 F.Supp. 134.

There was no error in the foregoing instruction. The same contention was advanced by plaintiff in its motion for a new trial and the trial court in its memorandum of ruling on that motion correctly stated the law as follows:

[1] "It is undisputed that the defendant Oceanic filed its tariff (Exhibit "D") with the United States Maritime Commission. This it was required to do by the provisions of the Intercoastal Shipping Act (46 U.S. C.A. § 844; see also secs. 845b and 801), and by the Federal regulations promulgated pursuant thereto (Tariff Cir. 3; 13 Fed. Reg. 709; Code of Federal Regulations, Title 46, Part 231). It is clear from the decisions of the Federal courts that shippers are chargeable with constructive notice of the terms and provisions of tariffs and related rules and regulations to the extent, and only to the extent, that the same have been filed pursuant to the requirements of applicable Federal law. As stated in Pacific S.S. Co. v. Cackette [9 Cir.], 8 F.2d 259:

"'It may be condeded that, by virtue of the reference to a lawfully published tariff, every passenger who travels by means of a ticket such as that which is here involved, is chargeable with notice of everything contained in such published tariff schedules which is by law required to be therein inserted, and that such a provision becomes part of the contract of transportation. Missouri, K. & T. R. Co. v. Harriman, 227 U.S. 657, 33 S.Ct. 397, 57 L.Ed. 690; Boston & Maine R. R. v. Hooker, 233 U.S. 97, 113, 34 S.Ct. 526, 529, 58 L. Ed. 868, L.R.A.1915B, 450, Ann.Cas.1915D, 593. In the case last cited, the court said: "It follows therefore, from the previous decisions in this court, that, if it be found that the limitation of liability for baggage is required to be filed in the carrier's tariffs, the plaintiff was bound by such limitation," and the court made express reference to the notice which follows from the filed and published regulations "as required by the statute and the order of the Interstate Commerce Commission."

* * * * * *

[2] "'* * * The public, in dealing with a common carrier, are bound to take notice that it has filed a tariff of rates and charges, and are chargeable with notice of everything that is properly included in or related to such system of rates and charges. Rates for passenger transportation may be, as the court found in the Hooker case, directly affected by the degree of the carrier's responsibility for safe carriage and delivery of baggage * * *.' [8 F.2d at pages 260–261.]

"In the light of the foregoing, we must examine the Federal law to determine to what extent the defendant carrier was required to file and publish the rules and regulations which it set forth in its contracts with its shippers, that is to say in its form bill of lading. The Intercoastal Shipping Act (46 U.S.C.A. § 844, et seq.) applicable in this case by virtue of the provisions of section 845b provides in part as follows:

"'Every common carrier by water in intercoastal commerce shall file with the United States Maritime Commission and keep open to public inspection schedules showing all the rates, fares, and charges. * * * The schedules filed and kept open

to public inspection as aforesaid by any such carrier * * * shall also state separately * * * any rules or regulations which in anywise change, affect, or determine any part or the aggregate of such aforesaid rates, fares, or charges, or the value of the service rendered to the passenger, consignor, or consignee. * * *'

"The same section of the Federal statute provides that the Maritime Commission shall by regulations prescribe the form and manner in which the schedules required shall be published, filed and posted.

"The regulations as promulgated by the Commission (13 Fed.Reg. 709) restate the requirements with respect to the filing of schedules of rates, fares, and charges, and further require that such schedules 'shall state separately each terminal or other charge, privilege, or facility, granted or allowed, and any rules or regulations which in anywise change, affect, or determine any part or the aggregate of such rates, fares, or charges, or the value of the service rendered to the consignor, consignee, or passenger * * *.' The regulation defines tariff as 'a publication containing actual rates, fares, charges, classifications, rules, regulations, and practices of a common carrier for transportation by water.'

"The tariff as filed by Oceanic sets forth the entirety of the bill of lading verbatim. Paragraph 2 thereof not only incorporates by reference the provisions of the Carriage Of Goods By Sea Act, but further states with respect thereto as follows: 'The provisions stated in said Act shall (except as may be otherwise provided herein) govern before the goods are loaded, on and after they are discharged from the ship, and throughout the entire time that they are in the custody of the carrier.'

"Paragraph 12 of the bill of lading filed as a part of the tariff reads as follows:

"'Carrier does not undertake that the goods shall arrive at port of discharge, destination, or transshipment, at any particular date or time, or to meet any particular market, or in time for any particular use. Scheduled or advertised sailing and arrival times are only expected times and may be advanced or delayed if carrier shall find it necessary, prudent or convenient to do so.'

"Among the incorporated provisions of the Carriage of Goods by Sea Act are the following:

"'Neither the carrier nor the ship shall be responsible for loss or damage arising or resulting from—* * * (j) Strikes or lockouts or stoppage or restraint of labor from whatever cause, whether partial or general: *Provided,* That nothing herein contained shall be construed to relieve a carrier from responsibility for the carrier's own acts; * * *.'

[3] "It is the conclusion of the court that the regulation purporting to immunize the carrier from liability for loss or damage resulting from strikes or stoppage or restraint of labor is of such a character that it was required to be included as a part of published tariff and that accordingly the public is chargeable with notice of its existence and effect.

"The regulations dealt with in Pacific S.S. Co. v. Cackette, [9 Cir.,] 8 F.2d 259, and in Bernard v. U[nited] S[tates] Aircoach, [D.C.,] 117 F.Supp. 134, were of a procedural rather than a *substantive* character, purporting only to require the filing of a notice of claim of loss, they had 'no perceptible relation to rates and charges for transportation.' In contrast, the regulation here involved, designed as it is to exonerate the carrier from liability for loss due to specified causes is *substantive.*

[4] "It seems clear that freight rates may be affected by the degree of the carrier's responsibility for the goods shipped. It is equally clear that any limitation upon such responsibility has a bearing upon 'the value of the services rendered' by the carrier."

Plaintiff also asserts that it was prejudicial error for the court to give the following instructions:

(a) "By the terms of the bill of lading involved in this case and by the terms of a federal statute called the Carriage of Goods

by Sea Act, it is provided that neither the carrier nor the ship shall be responsible for loss or damage arising from or resulting from strikes or lockouts or restraints of labor. This means that the common carrier is granted a general immunity from liability for any loss or damage suffered by a shipper which results from strikes or restraints of labor." [2]

(b) "A shipping company does not insure that cargo will be delivered according to schedule and is not automatically liable as an insurer in case of delays in shipment."

(c) "As to the issue of negligence, plaintiff has the burden of proof; that is to say, the burden is upon the plaintiff to prove negligence on the part of the defendants by a preponderance of the evidence." [3]

It is plaintiff's contention that (1) the applicable statute is the Harter Act, 46 U.S.C.A. § 190, and not COGSA, and (2) the foregoing instructions erroneously put the burden upon plaintiff to prove negligence whereas the burden was upon defendants to prove that the strike was the cause of the damage and that they were not negligent in failing to give the shipper notice of the likelihood of delay.

[5, 6] There is no merit in these contentions. With reference to the contention that the Harter Act is the applicable statute, that act is superseded by COGSA in domestic commerce at the option of the carrier when the Bill of Lading contains an express statement that it shall be subject to the Carriage of Goods by Sea Act, 46 U.S.C.A. § 1312. In the instant case, the dock receipts specifically provide that the custody and carriage of the goods shall be governed by the contractual terms and conditions of Oceanic's regular bill of lading, and the bills of lading expressly incorporate the provisions of COGSA. Moreover, the Sierra did not leave the port of Los Angeles, and the Harter Act does not apply in any event until the vessel "breaks ground" to start her voyage. (The Newport, 9 Cir., 7 F.2d 452; Knauth, Ocean Bills of Lading, Fourth Ed. (1953) p. 166.) Plaintiff's goods were discharged and returned to it before the voyage was commenced.

[7] With respect to the instruction as to the burden of proof, plaintiff alleged in its complaint that it caused its goods to be delivered to defendants at their dock on May 19, 20 and 24, 1952; that the seamen

2. Plaintiff has quoted only a portion of this instruction, the balance of which reads as follows:

"This general rule of immunity, however, is subject to the limitation or qualification which I shall now state to you.

"The common carrier owes to the shipper the duty to exercise ordinary care in the handling of the shipper's property so as to avoid causing the shipper loss or damage, and the duty also to inform the shipper of any fact or facts which are known to the carrier but unknown to the shipper and which a person of ordinary prudence in the carrier's position would recognize as being likely to cause a substantial delay or detention of the shipper's goods beyond the usual time in transit. The reason for imposing the latter duty upon the carrier is to afford the shipper in such circumstances the opportunity to exercise his own judgment as to whether to make the shipment or to make other arrangements.

"The standard of care required of the carrier in the performance of these duties is that of ordinary or reasonable care. Neither the terms of the bill of lading nor the terms of any federal law operates to relieve a carrier of liability to a shipper for damage proximately caused by a breach of either of the duties which I have just defined. If you find that the defendant carrier in this case was negligent in respect to the performance of its duty to plaintiff, as I have defined that duty, and if such negligence was the proximate cause of damage to plaintiff, then plaintiff is entitled to recover."

3. The balance of this instruction, which precedes the part quoted by plaintiff, reads as follows:

"Negligence is the doing of some act which a reasonably prudent person would not do, or the failure to do something which a reasonably prudent person would do, actuated by those considerations which ordinarily regulate the conduct of human affairs. It is the failure to use ordinary care in the management of one's property or person."

represented by the Sailors Union of the Pacific went on strike at about 9:00 P.M. on May 26, 1952, against the SS Sierra, and others; that on May 28, 1952, plaintiff was advised by defendants that the Sierra was delayed by a maritime strike and had not sailed; that following said advice and notice, plaintiff made strenuous efforts through the Government of American Samoa, and other authorities, to cause the Sailors Union of the Pacific to permit the "Sierra" to sail, but without avail; that on or about June 26, 1952, having obtained permission from the Sailors Union of the Pacific to remove its goods from the Sierra, plaintiff transferred them to another vessel. These allegations were admitted by defendants.

[8] It was undisputed, therefore, that the delay in the sailing of the Sierra was caused by the strike. Under the express provisions of the Bills of Lading and COGSA, defendants were exempt from liability for damage caused by such delay unless plaintiff proved that defendants' negligence contributed to the damage. (The Mangalia, D.C., 69 F.Supp. 688, 693; American Tobacco Co. v. The Katingo Hadjipatera, 2 Cir., 194 F.2d 449, 450; The Maui, 9 Cir., 113 F.2d 1018, 1020.) As stated in George F. Pettinos, Inc., v. American Export Lines, D.C., 68 F.Supp. 759, 761: "Section 4 of the Carriage of Goods by Sea Act establishes sixteen exceptions from liability. If the loss is caused by one of the enumerated exceptions, the carrier will not be held liable unless it appears that its negligence contributed to the damages, and the burden of proof upon that issue is upon the libellant."

[9] Plaintiff argues strongly that defendants had the duty of notifying the shipper of the likelihood of a strike. In its brief plaintiff asserts that "in the instant case there was a factual conflict about the need for notice." By their verdict the jury impliedly found that defendants were not negligent in failing to give notice or in loading plaintiff's goods aboard ship. Plaintiff has failed to show that there is no substantial evidence to sustain the implied findings of the jury.

Plaintiff maintains the following instructions erroneously relieved the carrier from the unlawful acts of its servants and created a presumption in favor of the carrier that its employees would obey the carrier's orders and sail the ship:

(a) "Seamen who have signed written shipping articles for a voyage work under different conditions from workers on shore and are governed by different rules. The laws of the United States require seamen to sign articles promising, during the voyage, obedience to all lawful commands. When articles are signed by a crew for a voyage, all bargaining, individual or collective, is ended for the duration of the voyage. After such articles are signed there exists no right to strike. A strike by seamen under such circumstances is in violation of law. Sailors who have signed lawful articles and have undertaken a voyage have no right to strike or to refuse to sail the ship."

(b) "For sailors to breach shipping articles by engaging in a strike or work stoppage and refusing to sail a vessel would be an unlawful act. The Criminal Code of the United States [18 U.S.C.A. § 2193] provides that whoever, being a member of the crew on a vessel of the United States on any waters within the admiralty jurisdiction of the United States (and that includes Los Angeles Harbor), resists or prevents a master of a ship in the free and unlawful exercise of his authority in command of the ship is guilty of a revolt and a mutiny. Whoever, being a member of the crew of such a vessel, endeavors to make a revolt or mutiny or combines, conspires or confederates with any other person on board the ship to make such a revolt or mutiny, or solicits, incites or stirs up any other of the crew to disobey or resist the lawful orders of the master or other officer of the ship or refuse or neglect their proper duties on board the ship is guilty of the crime of inciting revolt or mutiny."

(c) "The abandonment of duty by a seaman, after signing articles, by quitting the ship before the termination of his engagement, without justification and with the intention of not returning, is desertion, for which a seaman may be punished under statutes of the United States."

(d) "There is a presumption that the ordinary course of business will be followed and that the law will be obeyed."

We cannot agree with plaintiff's construction of these instructions. Plaintiff has quoted only a part of the foregoing instruction (d), the balance of which reads as follows: "However, it is for the jury to decide, in the light of all the facts and circumstances shown by the evidence, whether the defendants had knowledge of such facts that in the exercise of ordinary care they should have foreseen that a substantial delay in the sailing of the Sierra was probable." The court then gave the following instruction: "If, in spite of the fact that the seamen on the Sierra were under shipping articles, the defendants had knowledge of such other facts that in the exercise of ordinary care they should have foreseen the probability of a strike or work stoppage which would be likely to cause a substantial delay or detention of plaintiff's property, defendants were under a duty to take such actions with reference to plaintiff and plaintiff's property as a person of ordinary prudence would be expected to take under the same circumstances."

As stated in Perbost v. San Marino Hall-School, 88 Cal.App.2d 796, at page 801, 199 P.2d 701, at page 703: "The virtue of one instruction cannot be determined by extracting it from the context of the entire charge to be criticized as if it alone were given. * * * The correctness of all the instructions given in a cause can be determined only by such reasonable construction as will enable a judge to ascertain their probable effect upon the jury in the light of the issues raised by the pleadings. Guay v. American President Lines, 81 Cal.App.2d 495, 513, 184 P. 2d 539.

* * * * * *

[10] "* * * In considering an instruction assigned as prejudicial the reviewing court must adopt such construction thereof as will support the judgment rather than one that will defeat it, if the one adopted is susceptible of such interpretation. Mullanix v. Basich, 67 Cal.App.2d 675, 681, 155 P.2d 130." Considering the instructions in the light of the foregoing rules, it appears obvious that the instructions were directed to the issue of whether defendants were negligent in failing to notify plaintiff of the work stoppage and threatened strike.

[11, 12] Plaintiff also asserts that the court erred in its instructions on agency, and particularly in instructing the jury that Barnett International Forwarders, Inc., was plaintiff's agent for certain limited purposes. We find no error in the instructions complained of. There is evidence that plaintiff hired Barnett to prepare export declarations, obtain export licenses and to handle the documentation of the goods through customs. Mr. Santiestevan, the secretary of Barnett, testified that he prepared the export declarations and dock receipts; that his company paid the Federal Transfer Company for delivering plaintiff's goods to the dock, and was reimbursed by plaintiff; that Barnett also paid an invoice from defendant Matson Navigation Company for freight charges on plaintiff's shipment, and received the bills of lading and copies of the export declarations from the Matson Company. The jury was properly instructed that "The burden of proving an agency, as well as the scope of the agent's authority, rests upon the party who asserts the existence thereof and who seeks thereby to charge the principal with the knowledge, acts or omissions of the agent."

Plaintiff complains of the following instruction: "You are instructed that though a person may not have actual knowledge of certain facts, but if he has knowledge of

sufficient facts to cause a reasonably prudent person of ordinary intelligence to make inquiry, the law will impute knowledge of those facts which may be easily ascertained by reasonable inquiry. When the law imputes knowledge, it has the same legal effect as though there was actual knowledge."

Plaintiff does not claim that the instruction was an incorrect statement of the law but maintains that it was prejudicial error for the court to admit into evidence issues of the Los Angeles Times of May 24 and 25, 1952, containing on the front pages thereof accounts of the work stoppage and impending strike and that this instruction together with such evidence was sufficient to permit the jury to infer erroneously that plaintiff had knowledge of the strike and therefore defendants had no obligation to give actual notice.

[13] In our opinion the admission into evidence of the newspapers, if error, was not prejudicial and the instruction, when considered with other instructions given, would not have misled the jury. The jury was fully instructed as to the duty of a carrier to inform the shipper of any fact or facts which are known to the carrier but unknown to the shipper and which a person of ordinary prudence in the carrier's position would recognize as being likely to cause a substantial delay. See footnote, 2, supra.

[14] Instructions are to be read and considered as a whole and so considered, "if it appears therefrom that the jury were fairly and fully instructed on all the law applicable to the facts in the case, the judgment will not be reversed simply because the particular instruction, taken alone, may not have embodied all the law applicable." Anderson v. Seropian, 147 Cal. 201, 217, 81 P. 521.

As stated in Henderson v. Los Angeles Traction Co., 150 Cal. 689, at page 699, 89 P. 976, at page 980: "Where numerous instructions are given (as in this case), it may well be that some particular instruction fails to contain a complete or accurate statement of the law. If, however, when the entire charge is examined, the omissions or inaccuracies in a particular instruction appear to have been supplied, and the jury fairly and consistently instructed, generally, as to the law, this is sufficient to defeat any claim of error predicated on defects in particular instructions."

[15–17] Whether errors in instructions were prejudicial must depend upon the closeness of the case on its facts, nature of the erroneous instructions and of other instructions given and other factors. Pullen v. Heyman Bros., 71 Cal.App.2d 444, 453, 162 P.2d 961. Also, unless, upon a consideration of the entire case, including the evidence it appears that the error complained of has resulted in a miscarriage of justice, judgment will not be reversed by reason of an erroneous instruction. Perbost v. San Marino Hall-School, supra, 88 Cal.App.2d 796, 801, 199 P.2d 701; Radisich v. Franco-Italian Packing Co., 68 Cal.App.2d 825, 843, 158 P.2d 435. In our opinion, considering the instructions as a whole, the jury was fairly and fully instructed and there was no prejudicial error.

Plaintiff contends that the court erred in (a) admitting evidence of a claimed custom of seamen not to strike when they had signed foreign articles, and refusing to allow cross-examination of the witnesses regarding this testimony, and (b) admitting evidence of a custom of not insuring or guaranteeing the arrival or departure of a vessel.

[18] On direct examination one of defendants' witnesses was asked the following question: "Now, in your experience, 20 years in the shipping business, Mr. Hudson, have you ever known of a vessel upon which the sailors, that is, the unlicensed deck department, had signed foreign articles and undertaken a voyage where they then subsequently went on strike and refused to sail the ship?" Plaintiff's objection, upon the ground that it did not tend to prove or disprove any issue in the case was overruled, and the witness replied that

he did not recall any such incident. A similar question was asked of three other witnesses, with the same reply. One of the issues was whether defendants were negligent in failing to notify plaintiff of the likelihood of a strike and the evidence related to whether defendants could reasonably rely on the probable fulfillment of the obligation of the sailors under their articles. The trial court's ruling was correct.

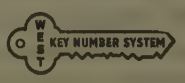
[19] Plaintiff was not denied its right of cross-examination of these witnesses. The trial court properly sustained defendants' objection to plaintiff's question as to any instances where sailors after having signed foreign articles were prevented from striking by reason of having signed such articles. The question clearly called for the witnesses' conclusion.

[20] Plaintiff's contention that the trial court, over its objection, erroneously admitted evidence, of a custom of not insuring or guaranteeing the arrival or departure of a vessel is also without merit. Plaintiff's witness, Mr. Warth, testified that Mr. Carter, defendants' freight agent, assured him the Sierra would sail on the 24th. The trial court sustained plaintiff's objection to the following question asked of Mr. Carter: "Is there any custom or practice in the shipping industry with respect to assuring or guaranteeing departure or arrivals of vessels?" The witness was then asked: "Mr. Carter, do you recall of any instance in your experience in the shipping business when *you* assured or guaranteed either an arrival or departure date of a vessel?" (Emphasis added.) The witness replied: "I recall no instance in my experience in the shipping game where I have ever guaranteed a sailing or guaranteed arrival. That is basic in this business. It's the thing that you cut your eye teeth on in the shipping game, and I did not give such an assurance, such a guarantee." The witness further testified that he did not assure or guarantee to Mr. Theron Warth or any other representative of plaintiff in any conversation that the SS Sierra would sail on a certain date or would arrive in Samoa on a certain date. There was no error in the court's ruling.

[21] Finally, plaintiff contends the trial court's denial of a new trial for defendants' wrongful interference with the jury was erroneous. Plaintiff, on its motion for new trial, submitted an affidavit of one of the jurors that during a recess, while standing with another juror at the drinking fountain, Mr. Paul N. Carter, district freight agent for defendant Matson Navigation Company, caught their attention, smiled, shrugged his shoulders, and said: "Now you see what we have to cope with." We agree with the ruling of the trial judge that the alleged misconduct on the part of the witness Carter was not of such a character that it could reasonably be deemed to have had any effect upon the verdict of the jury.

The judgment is affirmed.

WHITE, P. J., and DORAN, J., concur.



148 Cal.App.2d 325

Edward OPPENHEIM, Plaintiff and Respondent,

v.

I. H. GOODLEY, Defendant and Appellant.

Civ. 22027.

District Court of Appeal, Second District, Division 2, California.

Feb. 6, 1957.

Action by judgment creditor to set aside conveyance of property by judgment debtor. The Superior Court, Los Angeles County, Victor R. Hansen, J., rendered judgment determining homestead declaration void as to creditor, and owner appealed. The District Court of Appeal, Fox, J., held that where owner filed homestead declaration and conveyed house to daughter-in-law, during interval between time

when action was filed against him by creditor and time judgment was entered, conveyance did not work an abandonment of homestead.

Reversed.

Ashburn, J., dissented.

1. Fraudulent Conveyances ⇐52(1)

If homestead declaration is valid, no attempted disposition or conveyance of homestead property, however fraudulent, injures creditor, for such act, whether effective or not, leaves creditor in same position in which he would have been before it was done. West's Ann.Civ.Code, § 1243.

2. Homestead ⇐167

Although owner of house, who had filed declaration that house was homestead, conveyed house to daughter-in-law, during interval between time action was filed against him by creditor and time judgment was entered, conveyance did not constitute abandonment of homestead and creditor was not entitled to execute on house to satisfy his judgment. West's Ann.Civ.Code, § 1243.

3. Fraudulent Conveyances ⇐52(3)

When property fraudulently conveyed is impressed with a homestead, the judgment creditor may reach any excess over the homestead exemption in the hands of the transferee. West's Ann.Civ.Code, §§ 1245–1259.

4. Homestead ⇐165

Where owner filed homestead declaration that house was homestead and then conveyed title to daughter-in-law, transformation of house into duplex did not destroy the homestead as to part of house not occupied by owner. West's Ann.Civ.Code, § 1243.

I. H. Goodley in pro. per.

Gomer & Himmelfarb, Beverly Hills, for respondent.

FOX, Justice.

Defendant appeals from a judgment decreeing that his homestead on certain property is set aside and declared void as to plaintiff, and that plaintiff is entitled to execute upon such property to satisfy a judgment against defendant.

The case was submitted to the trial court upon stipulation that defendant admitted all the allegations of plaintiff's first cause of action in his first amended complaint. No other evidence was introduced by either party.

It thus appears that in July, 1948, plaintiff filed an action against defendant in the Los Angeles Municipal Court on which plaintiff recovered a judgment against defendant for $1,800 in March, 1950. In January, 1949, defendant filed a homestead on the property here involved. With full knowledge of his insolvency, he conveyed this property, in June, 1949, to his daughter-in-law, Eleanor Katz, receiving in payment therefor an unsecured promissory note. In the latter part of March, 1950, an execution was issued upon the $1,800 judgment. The execution was returned wholly unsatisfied and no part of the judgment has been paid.

In March, 1951, plaintiff brought an action in the superior court to set aside the conveyance of the property to Eleanor Katz on the ground that it was in fraud of defendant's creditors. In due course a judgment was rendered in that action decreeing said conveyance to be void as against plaintiff and that plaintiff was entitled to proceed in the required manner to satisfy his outstanding judgment.

In September, 1953, plaintiff had another execution issued on the municipal court judgment and caused the sheriff to levy it upon the property in question. Defendant immediately notified the sheriff that there was a homestead on the property, dated January 27, 1949. The sheriff thereupon refused to sell the property until a judicial determination of the validity of the asserted homestead.

Subsequent to the declaration of the homestead, defendant altered the residence, "so that it is now a duplex type building, having two separate entrances, one to each of the two residences, and two different

families reside in the said separate portions of the building."

Finally, it is alleged that defendant's homestead is void as against plaintiff, in that it was "abandoned and destroyed" by defendant's conveyance of the property to Eleanor Katz.

As noted at the outset, the court held the homestead is void as to plaintiff and that plaintiff is entitled to execute on the property to satisfy his judgment. It is from this judgment that defendant appeals.

The basic question is whether the conveyance to Mrs. Katz worked an abandonment of the homestead.[1]

Defendant's thesis is that homesteads are not subject to the law of fraudulent conveyances—that is, the doctrine which invalidates fraudulent conveyances against creditors has no application where the property is homesteaded and thus exempt from execution by the creditors. The authorities in this state support his position. Montgomery v. Bullock, 11 Cal.2d 58, 62, 77 P.2d 846; Wood v. Emig, 58 Cal.App.2d 851, 859–861, 137 P.2d 875; Nicholdson v. Nesbitt, 4 Cal.App. 585, 588, 88 P. 725; Wetherly v. Straus, 93 Cal. 283, 286, 28 P. 1045; Payne v. Cummings, 146 Cal. 426, 431–432, 80 P. 620; 24 Am.Jur., Fraudulent Conveyances, sec. 109, pp. 259–260; 25 Cal.Jur.2d, Homesteads, sec. 100, p. 416; 37 C.J.S., Fraudulent Conveyances, § 31, p. 878.

In Palen v. Palen, 28 Cal.App.2d 602, 606, 83 P.2d 36, 38, the court stated: "Neither is a homestead abandoned by a conveyance made for the purpose of avoiding creditors." In reaching this conclusion, the court adopted as its own the reasons given in 13 R.C.L., p. 660: "A homestead is not liable to seizure under execution, and therefore a conveyance of it is a question in which the creditor has no interest. It is not liable before conveyance to the claim he asserts; and the conveyance, though fraudulent, puts the creditor in no better condition than he was in before. If the conveyance is set aside as fraudulent this leaves the homestead as if no attempt had been made to convey it, so far as any claim can be asserted by the creditor. It is void as to him to all intents and purposes. He cannot be heard to say in one and the same breath that the conveyance is void in its attempt to divest title out of the debtor, but is valid in destroying the homestead right. He cannot claim both under and against the conveyance; under it as a valid parting with the homestead right; against it as an abortive effort to pass title out of the debtor. It must stand, as to him, as if no conveyance had been attempted."

In Montgomery v. Bullock, supra, property subject to a homestead was conveyed by defendant Bullock to a Mrs. James in contemplation of insolvency and with intent to defeat plaintiff's claim. The court held that although the transfer was void as against plaintiff as a fraudulent transfer, plaintiff could not complain because it was an asset plaintiff could not have reached had no conveyance been made. The court stated, 11 Cal.2d at page 62, 77 P.2d at page 848: "As the doctrine bearing upon conveyances made to hinder, delay, and defraud creditors has no application to the creation of a homestead, the homestead here was not invalidated by reason of the pendency of plaintiff's tort action, and it was exempt from execution or forced sale in satisfaction of the judgment for damages later obtained by plaintiff in said action. [Citations.] Furthermore, it has long been the rule that a gift, sale, or pledge of any part of a homestead cannot, under any circumstances, be with intent to defraud a creditor not having a lien[2] upon the premises, for a creditor is not entitled to complain of the transfer by the debtor of

1. Civil Code, section 1243, provides, in part: "A homestead can be abandoned only by a declaration of abandonment, or a grant thereof * * *."

2. In the case at bar plaintiff had no judgment lien on the property either on the date the declaration of homestead was filed (January 27, 1949) or on the date defendant conveyed to Mrs. Katz (June 2, 1949) since his judgment was not rendered until March, 1950.

an asset which he could not have reached, had the debtor retained it. [Citations.] Thus the validity of Mrs. Bullock's conveyance of the homestead to Mrs. James was not subject to attack by plaintiff on the ground that it was made in fraud of creditors or otherwise. If the conveyance was invalid, then the property remained impressed with the homestead and was not subject to plaintiff's claim. If the conveyance was valid, then the property in passing to the grantee, retained the exemption which it acquired by reason of the homestead. In either event the matter was no concern of plaintiff, for she could not reach the homestead or the fruits of sale thereof."

In Wood v. Emig, 58 Cal.App.2d 851, 861, 137 P.2d 875 (hearing denied), Mr. and Mrs. Wood filed a declaration of homestead on certain property on which they lived. Thereafter a judgment was recovered against them and a writ of execution levied on the property. Mr. and Mrs. Wood conveyed the property to their son and daughter, the deed being recorded some two months after the recordation of the judgment (which had been recorded elsewhere) in the county where the property was situated. Plaintiffs asserted the property was exempt because of their declaration of homestead. Defendants argued, as here, that the deed to the son and daughter effected an abondonment of the homestead under the terms of section 1243, Civil Code. See footnote 1. In sustaining plaintiffs' position the court stated, 58 Cal.App.2d at page 859, 137 P.2d at page 879: "By transferring the property to their children, plaintiffs put defendants in no different position than before the transfer took place. While the property was homesteaded in plaintiffs' favor, the defendants could not reach it for the satisfaction of their judgment—so it is immaterial to the creditors whether or not the debtors retained or transferred the property."

[1] The rationale of these decisions is that since the creditor cannot subject the homestead to the satisfaction of his judgment, a conveyance of it cannot injure him for he is not harmed by being deprived of the right to subject to the satisfaction of his judgment property not subject to levy. Otherwise stated, if the homestead is valid, no attempted disposition or conveyance of the property, however fraudulent, injures the creditor. For such act, whether effective or not, leaves the creditor in the same position in which he would have been before it was done. Montgomery v. Bullock, supra; Wood v. Emig, supra; Payne v. Cummings, supra, 146 Cal. at page 432, 80 P. 620; Nicholdson v. Nesbitt, supra. While defendant's attempt to defeat his creditors is not commendable, such conduct neither enlarges plaintiff's rights nor gives him benefits as punishment of defendant. In such circumstances the defendant's motives are immaterial. Nicholdson v. Nesbitt, supra. As stated in Hing v. Lee, 37 Cal.App. 313, at page 316, 174 P. 356, at page 358: "Debts should be paid, but public policy recognizes the exemption of certain property belonging to debtors as even more important than the payment of his debts. Otherwise it would not be protected by the law from execution."

[2, 3] The application of these principles to the case at hand leads to the conclusion that the trial court erred in decreeing that the homestead of defendant on the property in question be set aside and declared void as to plaintiff, thus enabling plaintiff to levy upon such property in satisfaction of his judgment.[3]

3. It should be pointed out that plaintiff is not foreclosed by what is said here of any of the rights available to him by law as a judgment creditor seeking to levy execution on homesteaded property. When property fraudulently conveyed is impressed with a homestead the judgment creditor may, if he complies with the procedure provided for in sections 1245–1259 of the Civil Code, reach *any excess* over the homestead exemption in the hands of the transferee. See Marelli v.

Plaintiff argues that a fraudulent conveyance of the property works an abandonment of the homestead except in cases where there is either a failure to convey the entire estate or the grantee took title to hold in trust for the grantor. However, in both the Montgomery and Wood cases, supra, there was an outright conveyance of the entire interest yet the court, nevertheless, held the property impressed with a homestead as against a creditor of the grantor.

Plaintiff incidentally adverts to defendant's admission of paragraph ten of the first cause of action to the effect that the homestead was abandoned and destroyed by the conveyance to Mrs. Katz. This is obviously a conclusion of law assertedly flowing from the facts alleged. But, as developed above, it is an erroneous conclusion. Clearly defendant's admissions were directed to the facts properly pleaded and not to invalid conclusions that would have the effect of striking down the heart of his case. The entire conduct of defendant's case is predicated on his contention that his conveyance to Mrs. Katz did not work an abandonment of his homestead as against a judgment creditor.

[4] Plaintiff argues that the transformation of the building into a duplex destroys the homestead as to the part of the house not occupied by defendant. Since, however, the homestead relates to but one building, which is being used as a residence by defendant, this argument is without merit. Hohn v. Pauly, 11 Cal.App. 724, 728–730, 106 P. 266; Vincenzini v. Fiorentini, 2 Cal.App.2d 739, 741–742, 38 P.2d 876; Phelps v. Loop, 64 Cal.App.2d 332, 333–334, 148 P.2d 674.

The judgment is reversed.

ASHBURN, J., dissents.

MOORE, Presiding Justice.

I concur.

It should be added, however, that the right to be protected in the preservation of one's homestead is of serious concern to the State. The scheme of maintaining a barrier about a man's home is perpetuated so that by reason of flood, fire or mismanagement, his family will not be lodged beneath the elements or the stars. Provision for him who may shudder and be afraid when the wolf comes scratching at his door was not made for the purpose of enabling him to cheat his neighbor but so that the serenity of society may be promoted and encouraged. Neither the welfare of a family, its comforts, its health and happiness, nor the arts which flourish only among a contented people, can be maintained with a crescendo of zeal and patriotic fervor if every constituent of the State be subject to removal from his castle for debt.

The vulgar notion of persons to cheat their creditors by concealing their movables or clouding their titles is not to be commended. But despite such acts, the owner of a homestead may not be penalized for his indiscretion by erasing his homestead from the official records. Indeed, it is not necessary for a man to impair the title to his homestead because the State has generously constructed a bulwark around his "exempt" possessions which, if he chooses, may protect him against invasions of the righteous. If by reason of dishonest motive or of excessive zeal he may attempt to frustrate the minions of the law in the execution of judicial process, he cannot thereby be deprived of a right vouchsafed to him by the Constitution and the law. Inasmuch as appellant is unable to steal from himself his act in beclouding the title of his homestead by a transfer thereof nei-

Keating, 208 Cal. 528, 531, 282 P. 793, and Martin v. Hildebrand, 190 Cal. 369, 373, 212 P. 618. The record does not indicate that plaintiff followed the procedure outlined in these code sections.

ther impaired the rights of respondent nor caused detriment to anyone.

Therefore, because the judgment herein would, if undisturbed, deprive appellant of a valuable legal right, it should be reversed, as demonstrated by Mr. Justice FOX.



148 Cal.App.2d 358

CITY OF SAN PABLO, a municipal corporation, and Clyde W. Redmon and Alice A. Redmon, Petitioners and Appellants,

v.

CITY OF RICHMOND, a municipal corporation, Clarence D. Erickson, Robert H. Miller, Daniel M. Bradley, William A. Cannon, John J. Sheridan, Gay G. Vargas, Ed J. J. McKeegan, Carl F. Lyford, and James P. Kenny, Respondents and Respondents.

CITY OF SAN PABLO, a municipal corporation, and Clyde W. Redmon and Alice A. Redmon, Petitioners and Appellants,

v.

CITY OF RICHMOND, a municipal corporation, Clarence D. Erickson, Robert H. Miller, Daniel M. Bradley, William A. Cannon, John J. Sheridan, Gay G. Vargas, Ed J. J. McKeegan, Carl F. Lyford, and James P. Kenny, Respondents and Respondents.

COLLEGE HIGHLANDS, Inc., a corporation and City of Richmond, a municipal corporation, Petitioners and Respondents,

v.

CITY OF SAN PABLO, a municipal corporation, Gertrude Yurko, R. W. Pelletreau, George W. Moltoza, William Zachary, Roy Cleek, and John M. Snider, Respondents and Appellants.

Civ. 17181–17183.

District Court of Appeal, First District, Division 1, California.

Feb. 8, 1957.

Hearing Denied April 2, 1957.

Proceedings by two municipalities to annex substantially same territory. The Superior Court, County of Contra Costa, Lilburn Gibson, J., upheld validity of first municipality's annexation and second municipality appealed. The District Court of Appeal, Peters, P. J., held that where first municipality had instituted annexation proceedings with respect to questioned territory but second municipality challenged its validity and judgment was announced adverse to first municipality's annexation, no legal impediment existed to first municipality commencing annexation proceedings for a territory almost entirely within territory involved in first proceedings even though judgment had not been entered in first proceedings holding first annexation void and valid.

Judgments affirmed.

1. Municipal Corporations ⇐29(4)

A city cannot annex territory already within its corporate limits.

2. Statutes ⇐63

Generally, an act that is "null and void" is so from the very beginning, and legal rights cannot be predicated upon it.

3. Administrative Law and Procedure ⇐489
Courts ⇐40
Officers ⇐103
States ⇐31

If a judicial, legislative, executive, or administrative body proceeds without jurisdiction, its acts are generally ineffectual for all purposes.

4. Municipal Corporations ⇐33(1)

The absence of a prior annexation is an indispensable condition precedent to the filing of a subsequent proceeding for annexation but rule is applicable only where the prior proceedings are valid, and is not applicable where the prior proceedings are null and void.

5. Municipal Corporations ⇐33(1)

A prior void annexation proceeding has no priority over a subsequent valid annexation proceeding by another municipality where the territories overlap. West's Ann.Gov.Code, §§ 35300–35326.

6. Municipal Corporations ⇐33(1)

Where first municipality had instituted annexation proceedings with respect to questioned territory but second municipality challenged its validity and judgment was announced adverse to first municipality's annexation, no legal impediment existed to first municipality commencing annexation proceedings for a territory almost entirely within territory involved in first proceedings even though judgment had not been entered in first proceedings holding first annexation void and invalid. West's Ann. Gov.Code, §§ 35300–35326.

James P. O'Drain, City Atty., City of San Pablo, Richmond, Robert T. Anderson, Berkeley, for appellants.

Thomas M. Carlson, City Atty., City of Richmond, Dana Murdock (special counsel), Richmond, Robert Eshleman, Martinez (of counsel), for respondents.

PETERS, Presiding Justice.

Lying near to the cities of Richmond and San Pablo is certain uninhabited territory that both cities covet, and each has attempted to annex. Several facets of the controversy have already been before the appellate courts. People ex rel. Pennington v. City of Richmond, 141 Cal.App.2d 107, 296 P.2d 351—the so-called Pennington case; Johnson v. City of San Pablo, 132 Cal.App.2d 447, 283 P.2d 57.

The two cities, proceeding under the Annexation of Uninhabited Territory Act of 1939, Gov.Code, §§ 35300–35326, purported to annex substantially the same territory. Cases numbered 1 Civ. 17,181 and 1 Civ. 17,182 are review and mandate proceedings, respectively, challenging the validity of the Richmond annexation, while case numbered 1 Civ. 17,183 challenges the validity of the San Pablo proceedings. The three cases were consolidated for trial, together with certain other cases not involved on these appeals. The trial court upheld the validity of the Richmond annexation, and held that the San Pablo annexation was invalid, and entered its judgments accordingly. San Pablo appeals.

The legal issue involved can be simply stated: If a city starts an annexation proceeding which is attacked and subsequently held to be invalid, may it validly start a second and proper proceeding to annex the whole or part of the same territory before the judgment is entered declaring the first proceeding to be invalid? In our opinion, it may do so.

The facts may be summarized as follows:

February 16, 1954: Richmond Ordinance 1423 was filed with the Secretary of State, purporting to annex a certain 10 square mile area adjoining that city. On May 10, 1954, the complaint in the Pennington case, supra, was filed, challenging the validity of this annexation.

September 21, 1954: Richmond Ordinance 1448 was filed with the Secretary of State, purporting to annex the DeAnza Vista portion of the above 10 square miles, plus some additional acreage outside the 10 square miles. This proceeding is not directly, but is indirectly, challenged on these appeals.

January 13, 1955: Judgment was announced adverse to Richmond in the Pennington case, and a restraining order issued on January 31, 1955. The trial court ruled that Richmond's purported annexation of the 10 square miles was void and invalid.

February 1, 1955: Richmond adopted Resolution 5923, initiating the Richmond-Fairmede annexation proceedings which included territory almost entirely within the 10 square miles involved in the earlier annexation. This proceeding was attacked by the city of San Pablo and in I Civ. 17,181 and 1 Civ. 17,182 held to be valid.

February 2, 1955: Judgment was entered against Richmond in the Pennington case.

February 15, 1955: San Pablo adopted Resolution 832, which initiated its San Pablo-Fairmede annexation. The area involved also included territory within the above mentioned 10 square miles. These proceedings were attacked by Richmond,

and judgment was entered for Richmond. San Pablo appeals. (Number 1 Civ. 17,-183.)

March 25, 1955: On Richmond's motion for new trial, the court modified certain of its findings and conclusions of law in the Pennington case. The new judgment was entered March 29, 1955. This was affirmed by this court in People ex rel. Pennington v. City of Richmond, 141 Cal.App.2d 107, 296 P.2d 351, 360.

[1] The basic argument of San Pablo is that Richmond had no legal authority to initiate the Richmond-Fairmede annexation on February 1, 1955, because on that date the area involved was already legally annexed to Richmond. Based on this premise, it is argued that the Richmond-Fairmede annexation was fraudulent as a matter of law, and that the San Pablo-Fairmede annexation was valid because commenced subsequent to the entry of judgment in the Pennington case (although before the entry of the modification in that case). It is also argued, for the same reasons, that the Richmond-DeAnza Vista annexation was invalid and that this invalidity results in the invalidity of the Richmond-Fairmede annexation because without the DeAnza annexation the Fairmede area is not contiguous to Richmond as required by statute. The argument of San Pablo is that the validity of the Richmond-Fairmede annexation must be tested by the facts existing on the date of its commencement, that is, February 1, 1955; that a judgment is not effective until entered, and, therefore, the annexation declared invalid in the Pennington case which "voided and annulled" that annexation was effective until February 2, 1955; that until February 2nd the annexation involved in the Pennington case was effective so that the area included in the Richmond-Fairmede annexation was already legally annexed to Richmond. A city cannot, of course, annex territory already within its corporate limits.

The trial court declared in the Pennington case that the annexation there involved was "null and void." This was affirmed by this court. We held that because of certain facts existing when the annexation proceeding was instituted, Richmond was without "jurisdiction" to proceed. In the course of our opinion we amended two paragraphs of the judgment to read as follows, 141 Cal. App.2d 107, at page 120, 296 P.2d at page 359:

"It is further ordered, adjudged and decreed that the proceedings hereby voided and annulled did not cause said territory to be legally annexed nor to become a part of the City of Richmond.

"It is further ordered, adjudged and decreed that the City of Richmond shall not, based upon the annexation proceedings hereby voided and annulled exercise (1) the franchise of municipal government in or over said territory or (2) any jurisdiction or dominion therein or thereover."

Thus, although the annexation proceedings involved in the Pennington case were declared null and void because Richmond from the inception of the proceedings lacked "jurisdiction" to proceed, San Pablo insists such annexation was legally effective until declared to be invalid on February 2, 1955, by the entry of judgment.

[2, 3] Generally speaking, an act that is "null and void" is so from the very beginning, and legal rights cannot be predicated upon it. If a judicial, legislative, executive, or administrative body proceeds without "jurisdiction," its acts are generally ineffectual for all purposes.

In support of its somewhat startling argument that the Pennington annexation was effectual to bar all other attempts to annex until the date it was declared void, appellant places its main reliance on two cases—People ex rel. Forde v. Town of Corte Madera, 115 Cal.App.2d 32, 251 P.2d 988, and Bray v. Payne, 210 Cal. 465, 292 P. 478. Neither supports the contention made.

[4, 5] In the Corte Madera case this court held that under sections 35308 and 35309 of the Government Code "the absence of a prior annexation is, by the law, made an indispensable condition precedent to the

filing of a subsequent proceeding. The existence of a prior proceeding renders the subsequent one void, under the well settled principle that an act is void if specifically prohibited by statute." 115 Cal.App.2d at page 38, 251 P.2d at page 991. Of course, the quoted rule is applicable only where the prior proceedings are valid, and not applicable where, as in the instant case, the prior proceedings are "null and void." This is made crystal clear by the fact that in the Corte Madera case reference is made four times to the prior "valid" proceedings. 115 Cal.App.2d at pages 39 and 40, 251 P.2d at pages 991, 992. In the Corte Madera case the prior proceeding was upheld. If other argument were needed to demonstrate that the quoted rule of the Corte Madera case only applies to a prior valid annexation, it is to be found in Johnson v. City of San Pablo, 132 Cal.App.2d 447, 283 P.2d 57, where this court expressly held that a prior void San Pablo annexation proceeding had no priority over a subsequent valid Richmond annexation where the territories overlapped. This case disposes of appellant's contentions. Its attempts to distinguish it are unsound.

The second case relied upon is Bray v. Payne, 210 Cal. 465, 292 P. 478, which was a proceeding to determine whether Barnes City was an unincorporated or incorporated area. The city was first declared by the Board of Supervisors to be incorporated and later voted to consolidate with Los Angeles. The consolidation was valid only if Barnes City was already incorporated. In prior litigation it was determined that the original incorporation was void. Nevertheless, the consolidation was upheld. Appellant urges that necessarily the opinion must stand for the proposition that the declaration that the original incorporation was void became effective only from the date of its declaration. But the case stands for no such proposition. There it was held that Barnes City, although not legally incorporated, was at least a *de facto* municipal corporation, and that, 210 Cal. at page 471, 292 P. at page 481: "There is nothing in the Consolidation Act to prevent a *de facto* municipal corporation from effectually participating in an act of consolidation, and we are referred to no precedent to the effect that it may not."

The case of People v. City of Westmoreland, 135 Cal.App. 517, 27 P.2d 394, contains some significant language. There the question was whether a judgment which declared Westmoreland was not validly incorporated changed the status quo. If it was validly incorporated until the judgment of invalidity was entered, obviously the judgment changed the status quo. But the court held the incorporation invalid from the beginning, declaring, 135 Cal.App. at page 521, 27 P.2d at page 395: "The judgment necessarily relates back to the date of incorporation, and petitioner's status which is affected by the judgment is its status on the date on which it claimed that it came into existence as a municipality. If, at the time of its alleged incorporation, it was not legally incorporated, its legal status subsequent to that time has not been changed by the judgment."

[6] Thus, it is clear that, under the law as it existed when these proceedings were instituted,* there was no legal impediment to Richmond starting an annexation proceeding after having started a prior one, subsequently declared void, involving some or all of the same area. In such a situation priority between it and San Pablo is governed by the usual rule that first in time is first in right. The Richmond-Fairmede annexation being first in time, it therefore prevails over the San Pablo annexation of the same area.

The contention that the Richmond-Fairmede annexation territory is not contiguous to the corporate limits of Richmond is based upon the claim that contiguity depends upon the Richmond-DeAnza annexation. It is claimed that the DeAnza annexation is void for the same reason that it is claimed that the Richmond-Fairmede

* Section 35308 of the Government Code was amended, and section 35309 was repealed in 1955. Stats. of 1955, Chap. 915, p. 1541.

annexation is void—because it was commenced before the judgment declaring the original annexation of the 10 square miles was void was entered. This collateral attack on the Richmond-DeAnza annexation must fail for the same reasons that have already been given in unholding the Richmond-Fairmede annexation.

All other points raised depend upon the point already discussed, and fall with it.

The judgments are affirmed.

BRAY and FRED B. WOOD, JJ., concur.

Hearing denied; SHENK and CARTER, JJ., dissenting.



148 Cal.App.2d 465

The PEOPLE of the State of California, Plaintiff and Appellant,

v.

John H. TOOMES and Philander Smith, Defendants and Respondents.

Cr. 5780.

District Court of Appeal, Second District, Division 3, California.

Feb. 11, 1957.

Rehearing Denied March 13, 1957.

Hearing Denied April 10, 1957.

Prosecution for burglary. The Superior Court of Los Angeles County, Herbert V. Walker, J., granted defendants' motion to set aside the information, and the People appealed. The District Court of Appeal, Shinn, P. J., held that under statute making it burglary to enter motor vehicle when doors thereof are locked for purpose of larceny or felony, trunk cover was a "door" and hence opening locked trunk for purpose of theft when door thereof and all other doors were locked, would be burglary.

Reversed.

VALLÉE, J., dissented.

Burglary ⇐2

Under statute making it burglary to enter motor vehicle when doors thereof are locked, with intent to commit larceny or felony, "door" included trunk cover and hence opening locked trunk of automobile for theft, when door of trunk and all other doors were locked, would be burglary. West's Ann.Pen.Code, §§ 459, 995; West's Ann.Vehicle Code, § 31.

See publication Words and Phrases, for other judicial constructions and definitions of "Door".

Edmund G. Brown, Atty. Gen., William E. James, Deputy Atty. Gen., William B. McKesson, Dist. Atty., Jere J. Sullivan, Lewis Watnick, Fred N. Whichello, Deputy Dist. Attys., Los Angeles, for appellant.

Ellery E. Cuff, Public Defender of Los Angeles County, Richard W. Erskine, Deputy Public Defender, Los Angeles, for respondent Philander Smith.

SHINN, Presiding Justice.

John H. Toomes and Philander Smith were accused of burglary and upon the preliminary hearing were committed for trial. They made a motion to set aside the information under section 995 of the Penal Code upon the ground that they had been committed without reasonable or probable cause. The motion was granted and the People appeal.

The evidence at the preliminary hearing established the following facts: Harry Bergerson parked his automobile on the street. He closed the windows and locked the doors. The trunk was locked. Defendants drove up in a car, parked alongside, opened the trunk with a tire iron rim and screw driver and took therefrom a spare tire mounted on a rim. They were later apprehended with the rim and tire in question, and two others, in the trunk of their car and were placed under arrest.

The question on appeal is whether the defendants were guilty of burglary or only of theft. Section 459 of the Penal Code

provides in part: "Every person who enters any * * * vehicle as defined by said code when the doors of such vehicle are locked * * * with intent to commit grand or petit larceny or any felony is guilty of burglary." An automobile is such a vehicle. § 31, Vehicle Code. It is the contention of defendants, which prevailed in the trial court, that the words, "the doors of such vehicle are locked" refer only to the side doors of an automobile and cannot reasonably be understood as including the cover of the trunk. Therefore, they argue that in order to constitute burglary there must be an unlawful entry into the section of the car that is entered through the side doors. They concede that if the lid or cover of a trunk is one of the doors of the vehicle within the meaning of section 459, and is locked, an entry into the trunk compartment for the purpose of committing a theft would constitute burglary. "Door" is defined in Webster's New International Dictionary, Second Edition, Unabridged: "1. The movable frame or barrier of boards, or other material, usually turning on hinges or pivots or sliding, by which an entranceway into a house or apartment is closed and opened; also, a similar part of a piece of furniture, as in a cabinet or bookcase. 2. An opening in the wall of a house or of an apartment, by which to go in and out; an entranceway; a doorway. 3. Passage; means of approach or access."

In deciding whether it was the intent of the legislature in using the word "doors" that it should include only the side doors of a vehicle or also the lid or cover of the trunk, a most satisfactory guide to the legislative intention would be the apparent evils sought to be prevented, namely, the breaking into the interior sections of locked cars. Manifestly, making the offense a felony would tend to minimize the frequency of such unlawful acts. It is apparent that that purpose could not be adequately accomplished by denouncing as a felony entry by the breaking or opening of locks of the side doors without also making it an equally serious offense to enter a locked trunk compartment for the purpose of committing theft. The trunks or luggage compartments of automobiles are fitted with locks for the very reason that they furnish a convenient place for the carrying of things of value. We think the word "door" better describes the top of a luggage compartment than would any of the words "top", "cover", or "lid". We do not associate hinges and locks with such coverings, but we do associate them with doors. And we have always understood that the entrance to a cellar is through a cellar door, even though it may lift upward instead of outward. There are, of course, many types of doors to small compartments, such as cupboard doors, which are entered only by reaching into them. There is room for difference of opinion whether the cover of a luggage compartment would generally be included in the term "doors" but we believe any doubts as to the meaning to be given it in construing the statute is removed when effect is given to the purpose of the statute, namely, to make it a more serious offense to break into the interior of a car than to merely steal something from it. We are therefore of the opinion that the act of entering the trunk of an automobile for the purpose of theft, when the door of the trunk and all other doors are locked is burglary. That is the only question for decision.

The order is reversed.

PARKER WOOD, J., concurs.

VALLÉE, Justice (dissenting).

I dissent. I cannot join in the majority's strained construction of the statute. I do not believe that the lid or cover of the trunk of an automobile is a door within the meaning of the statute. When the Legislature used the word "doors" I think it had in mind the side doors of the vehicle. Automobiles are commonly referred to as two-door cars and four-door cars—and the

reference is to the side doors. Anyone reading the statute would naturally understand that it referred only to the side doors of a car. Words and phrases used in a statute must be construed according to the context and the approved usage of the language. Pen.Code, § 7, subd. 16. The cover of an ordinary trunk, which is lifted up as is the cover of the trunk of an automobile, is not commonly called a door. I would be interested to know whether the majority would construe the statute as including the hood of an automobile, which covers the motor and may be locked on some cars, as within the meaning of the word "door." If the Legislature had intended to include the lid or cover of a trunk compartment as one of the means of entrance which must be locked in order that an entrance would constitute burglary, it would have added words to the definition of burglary which would include entry into a locked trunk. Furthermore, the statute requires that all doors be locked. If any one of them is left unlocked, entry for the purpose of theft would not constitute burglary. If the cover of a trunk is a "door" of the vehicle, and if the side doors are locked and the trunk is not, then breaking into the vehicle through the side doors would not constitute burglary and the statute would fall far short of its objective. Although the intentions of one bent on theft are the same whether he enters a locked trunk or through a side door of a car, and entering a trunk is equally reprehensible, these considerations do not warrant the courts in legislating and enlarging the definition of burglary beyond the reasonable and commonly understood meaning of the word which the Legislature has employed in defining the offense. If something has been left out of the statute which should have been included, it is a matter for the Legislature. As the statute now reads the evidence disclosed no more than the commission by the defendants of theft and the court did not err in dismissing the information. I would affirm the order.

Rehearing denied; VALLÉE, J., dissenting.

148 Cal.App.2d 211

Albert E. KELLY, a/k/a A. E. Kelly, and Helen Kelly, a/k/a Helen H. Kelly, Plaintiffs and Respondents,

v.

Robert B. STEINBERG, Sam Gordon, Albert Joseph Filipelli, a/k/a A. J. Filipeli, Mary Katherine Filipelli, Michael A. Filipelli, Helen Lois Filipelli, James Ralph Villella, a/k/a James R. Villella, Jean Lucy Villella, John I, John II, and John III, Defendants,

Sam Gordon, Appellant.

Civ. 21879.

District Court of Appeal, Second District, Division 3, California.

Feb. 1, 1957.

Rehearing Denied March 1, 1957.

Hearing Denied March 27, 1957.

Action by purchaser for money alleged to have been converted by escrow holder. From adverse judgment of Superior Court, Los Angeles County, Hale McCowen, J., escrow holder appealed. The District Court of Appeal, Vallée, J., held that evidence was sufficient to sustain finding that purchaser and vendor had entered into escrow with respect to sale and purchase of property, that defendant was escrow holder and at time the money was appropriated, title to money was in the purchaser.

Judgment affirmed.

1. Escrows ⇐15

In action for money alleged to have been converted by escrow holder, evidence was sufficient to sustain finding that purchaser and vendor had entered into escrow and that defendant was the escrow holder.

2. Escrows ⇐1

An escrow agreement does not have to be in writing.

3. Escrows ⇐9

Where escrow money is disposed of without compliance with escrow instructions, owner of money is entitled to recover from the escrow holder such damages as he may have suffered.

4. Escrows ⇐8(1)

Where purchaser deposits money in escrow to be paid to vendor on close of the escrow, the escrow holder is the purchaser's agent as to such money pending close of the escrow and the purchaser retains title to the money until the condition has been performed.

5. Escrows ⇐9

Escrow money is returnable to the purchaser if the vendor does not comply with conditions of escrow agreement, and it is duty of escrow holder to protect purchaser by withholding from vendor until consummation of the determining event money placed in escrow by purchaser and by returning money to purchaser on failure of prescribed event.

6. Escrows ⇐8(2)

Where purchaser and vendor mutually canceled the agreement to purchase property, title to money placed in escrow remained in the purchaser.

7. Appeal and Error ⇐931(1), 1071(1)

Findings of trial court will be liberally construed in order to make the findings complete and internally consistent, thus avoiding a reversal on purely technical grounds.

8. Escrows ⇐15

In action by purchaser for money alleged to have been converted by escrow holder, evidence was sufficient to sustain finding that escrow holder converted $3,780.76 to his own use.

9. Evidence ⇐213(1)

Mere offer of compromise is not admissible in evidence.

10. Evidence ⇐213(1)

Statement of party against whom a claim is made that he is willing to settle the claim, when not connected with an offer of compromise, may be proved as an admission against interest.

11. Evidence ⇐213(2)

In action for money alleged to have been converted by escrow holder, evidence that escrow holder deposited the exact sum alleged to have been appropriated with plaintiff's attorney prior to trial was not inadmissible as offer of compromise, in absence of evidence that attorney and escrow holder conducted settlement negotiations or discussed compromise. West's Ann.Code Civ.Proc., § 2078.

12. Compromise and Settlement ⇐2

A "compromise" is a settlement of differences by mutual concessions; an adjustment of conflicting claims.

See publication Words and Phrases, for other judicial constructions and definitions of "Compromise".

Daniel G. Marshall, Los Angeles, for appellant.

Jack B. Tenney and Cecil W. Collins, Los Angeles, for respondents.

VALLÉE, Justice.

Appeal by defendant Gordon from a judgment for plaintiffs in an action for money alleged to have been converted by Gordon.

The court found: 1. On October 5, 1953 plaintiffs entered into negotiations with the Filipellis and Villellas for purchase from them of a parcel of realty and delivered to them $100 as a deposit. 2. On October 8, 1953 plaintiff Helen Kelly and the Filipellis and Villellas met at the office of defendant Steinberg who commenced preparations of a document titled "Agreement to Purchase Real Property." Steinberg told Helen Kelly the document would be completed later that day and requested her to return with plaintiff Albert Kelly to execute it. Helen Kelly at that time deposited with Steinberg a check for $2,500 to apply on the purchase price. 3. Later that day plaintiffs went to Steinberg's office and at his request signed the agreement to purchase. Steinberg told them the Filipellis and Villellas would sign the document later, but they never did. 4. On the same day Steinberg delivered the check for $2,500 to Gordon. 5. On October 8, 1953 an escrow was opened for the purchase and

sale of the realty with Gordon as escrow holder. The check for $2,500 was delivered to Gordon as escrow holder to be applied by him to the purchase price of the realty in the course of the escrow. 6. On October 9, 1953 Gordon endorsed and cashed the check for $2,500. 7. On October 10 Gordon called on plaintiffs and told them the instrument they had signed was erroneous and that he had prepared a new agreement which he presented to them. They signed the new agreement and delivered it to him. 8. On October 29, 1953 plaintiffs delivered to Gordon a check for $1,280.76 to be applied to the purchase price of the realty in the course of the escrow and a letter from plaintiffs' attorney, MacManigal. Gordon acknowledged receipt of the check and a copy of the letter. 9. Gordon permitted Steinberg to take possession of the check for $1,280.76, to endorse Gordon's name thereon, and to cash it. 10. Gordon failed and neglected to place the funds or any of them in escrow. 11. The escrow was never completed. The Filipellis and Villellas were unable to deliver title to the property as provided in the agreement. They and plaintiffs mutually rescinded the agreement. 12. On October 8, 1953 Gordon unlawfully took, converted, and disposed of the $2,500 to his own use. On October 29, 1953 he unlawfully took, converted, and disposed of the $1,280.76 to his own use. 13. Thereafter plaintiffs demanded payment of $3,780.76 from Gordon, which was refused. 14. Before the filing of this action Steinberg gave Gordon more than $2,000 as restitution to plaintiffs; Gordon added enough to make $3,877, which sum in the form of two money orders Gordon deposited with plaintiffs' attorney pending the outcome of litigation. 15. Gordon and Steinberg are each indebted to plaintiffs in the sum of $3,780.76.

Steinberg defaulted. Judgment was for plaintiffs against Gordon and Steinberg for $3,780.76. Gordon appeals.

The first assignment of error is that the evidence is insufficient to support the findings. The argument is that Gordon was neither bailee nor trustee of the funds. It is also argued that title, at the times the funds were appropriated, was not in plaintiffs.

On October 5, 1953 plaintiffs delivered $100 to the Filipellis and Villellas as a deposit for the purchase of the realty and agreed to enter into a 30-day escrow. On October 8 James Villella took plaintiff Helen Kelly to La Cienega Escrow Company in Los Angeles. Helen Kelly was introduced to defendant Steinberg, who told her and Villella he would take a memorandum of the facts of the agreement and turn it over to Gordon who, as attorney, would handle the escrow. Mrs. Kelly gave Steinberg a check for $2,500 payable to cash. Steinberg asked Gordon if he was interested in holding the Kelly escrow. Gordon said he was and Steinberg gave him the preliminary notes he had made and the $2,500 check.

On October 10 Gordon appeared at plaintiffs' home and presented to them an agreement to purchase the realty which had already been signed by the Filipellis and Villellas. Gordon told plaintiffs he was in charge of the escrow and that Steinberg had turned the $2,500 check over to him with a memorandum of the escrow.

A week or ten days later plaintiffs demanded of Gordon that he return the $2,500. Gordon told them they had signed papers to put all the money in escrow and it was up to them to keep their agreement; that they had agreed to put the further sum of $1,280.76 in the escrow, and they had better have it in or they would forfeit the $2,500.

On October 29 Plaintiff Albert Kelly, accompanied by his attorney, MacManigal, went to Gordon's office. Kelly handed Gordon a check for $1,280.76 payable to Gordon. Simultaneously MacManigal handed Gordon a letter addressed to him reading in part:

> "In accordance with the provisions of the above identified agreement, we hand you, as escrow holder, a cashier's check of the Security First National Bank of Los Angeles, 47th & Broad-

way Branch, Los Angeles, dated October 29, 1953, in the amount of $1280.76."

The letter further stated that Gordon held $3,780.76 "as escrow holder." Gordon wrote the following on the letter:

"Received copy of this letter 10–29–53 with check for $1280[76]

"Sam Gordon"

MacManigal testified: "We discussed whether—the title to the property with respect to the mineral rights, and Mr. Gordon told me that although he didn't have the title report to this property at the time, that according to a prior title report, a prior seller had reserved a half interest in the oil and mineral rights with respect to the property. He did not want to take the check for $1,280.76. He said, 'There is no use of giving me this money. I am going to try to get the consent of my clients, the Filipellis and the Villellas to return the money to the Kellys and call the deal off because their title to the property is such that they cannot convey a good and merchantable title,' and I told him that I insisted that he take the money as escrow holder because the agreement that had been entered into between the parties provided that we were to pay into escrow the sum of $1,280.76 by that date, which was on the 29th of October, 1953. I told him that as I understood it, as escrow holder he had no choice but to accept the check. Mr. Steinberg at that time stated the same thing, that as escrow holder that Mr. Gordon had no right to give law or give—to advise either party, but he was to be neutral. He was not to pay—not advise either the Kellys or the Villellas and the Filipellis but to act strictly as an escrow holder in connection with the transaction. Q. And did this occur before or after Mr. Gordon had signed that letter which you presented to him? A. It occurred just immediately prior to the time that Mr. Gordon signed the letter. Q. Then I take it he signed the letter and took the $1,280, is that correct? A. That is right. Q. Now, then, have you had any conversation with Mr. Gordon after the 29th of October? A. Yes. I had many conversations with Mr. Gordon after that time. Q. Did you ever make demand upon him for the return of the some $3,800? A. Yes. I made many oral demands and I made a written demand on Mr. Gordon. * * * One occasion I asked Mr. Gordon where the money was and he told me that it was in a trust account with the Citizens National Bank in Westwood, California. I asked him when he was going to return the money and terminate the escrow. He told me—I said he had agreed that his clients couldn't give a good title to the property and therefore he should return it and he said that he would do that just as soon as he got the consent of the Villellas and the Filipellis." Prior to October 29 MacManigal had several conversations with Gordon with respect to the escrow. In the first one MacManigal asked him if he was acting as escrow holder with respect to the purchase of the realty. Gordon said he was.

Plaintiffs, the Filipellis, and the Villellas mutually cancelled the agreement to purchase. Plaintiff Helen Kelly so informed Gordon. Gordon did not return any part of the $3,780.76 to plaintiffs.

Steinberg was a public accountant. Gordon, 31 years of age, is a member of the Bar, admitted in 1952. He was an employee of Steinberg. With the $2,500 check Gordon obtained two cashier's checks payable to himself, endorsed them and delivered them to Steinberg. When he received the $1,280.76 check Gordon put it in an envelope, sealed it with scotch tape, and put the envelope in his desk. Gordon testified he did not "exactly remember whether that [the $1,280.76 check] was taken out of my desk or whether it was left by me with Mr. Steinberg for safe keeping." The $1,280.76 check was deposited in Steinberg's bank account. The endorsement on the check was not that of Gordon. Gordon knew Steinberg did not have a license to operate an escrow agency and that if he so operated he would violate the law. About January

1954 Gordon advised plaintiffs he did not have the money in his possession and could not return it.

[1, 2] It seems obvious the evidence is sufficient to support the finding that the Filipellis and Villellas as sellers and plaintiffs as buyers entered into an escrow with respect to the sale and purchase of the property and that Gordon was the escrow holder. "'Escrow' means any transaction wherein one person, for the purpose of effecting the sale * * * of real or personal property to another person, delivers any written instrument, money, evidence of title to real or personal property, or other thing of value to a third person to be held by such third person until the happening of a specified event or the performance of a prescribed condition, when it is then to be delivered by such third person to a * * * grantor * * *." Fin. Code, § 17003. There is no requirement that an escrow agreement, as such, be in writing. Cannon v. Handley, 72 Cal. 133, 144, 13 P. 315; 18 Cal.Jur.2d 315, § 9.

[3] Where a party's money is deposited in escrow and is disposed of without compliance with the escrow instructions, he is entitled to recover from the escrow holder such damages as he may have suffered. Jones v. Title Guaranty & Trust Co., 178 Cal. 375, 380, 173 P. 586; Trask v. Garza, 51 Cal.App. 739, 743, 197 P. 807; French v. Orange County Inv. Corp., 125 Cal.App. 587, 592, 13 P.2d 1046; Gallagher v. California Pac. T. & T. Co., 13 Cal.App.2d 482, 488–489, 57 P.2d 195; Anderson v. Southern Title & Trust Co., 81 Cal.App.2d 700, 702, 184 P.2d 949; Montgomery v. Bank of America, 85 Cal.App.2d 559, 564, 193 P.2d 475; Lenchner v. Chase, 98 Cal.App.2d 794, 804, 220 P.2d 921; Karras v. Title Ins. & Guar. Co., 118 Cal.App.2d 659, 665–666, 258 P.2d 866. Rianda v. San Benito Title Guar. Co., 35 Cal.2d 170, at page 173, 217 P.2d 25, at page 27, says:

"Defendant's duty to plaintiffs is to be determined by the application of ordinary principles of agency, whether defendant be considered as escrow holder with duties to both Rianda and Daskarolis or as agent of plaintiffs alone. It is the duty of an agent to obey the instructions of his principal and exercise in his employment reasonable skill and ordinary diligence, and, if defendant violated instructions or acted negligently in retaining the check in its files, it would ordinarily be liable for any loss occasioned by its breach of duty. See Jones v. Title Guaranty & Trust Co., 178 Cal. 375, 380, 173 P. 586; Rest., Agency, §§ 385, 379; 1 Mechem on Agency (1914), §§ 1245, 1274–1287, 1309; 19 Am.Jur. § 465; 30 C.J.S., Escrows, § 8, pp. 1205–1206."

[4–6] The contention that title to the money was not in plaintiffs, the buyers, at the time it was appropriated is untenable. Where a buyer deposits money in escrow to be paid to the seller on close of the escrow, the escrow holder is the buyer's agent as to such money pending close of the escrow; and the buyer retains title to the money until the condition has been performed. Kellogg v. Curry, 101 Cal.App.2d 856, 859, 226 P.2d 381. Where money is deposited with an escrow holder by a buyer, to be delivered to a seller when the seller has performed specified conditions, it is returnable to the buyer if the seller does not comply with the conditions. Widess v. Title Ins. & Trust Co., 112 Cal.App. 343, 347–348, 296 P. 899. It is the duty of an escrow holder to protect the buyer by withholding from the seller until consummation of the determining event money placed in the escrow by the buyer and by returning it to him on failure of the prescribed event. See In re Estate of Cornelius, 151 Cal. 550, 91 P. 329; Greenzweight v. Title Guarantee & Trust Co., 1 Cal.2d 577, 581, 36 P.2d 186. He must keep the buyer's money in his possession until there is either a consummation or a failure of the prescribed event. (18 Cal.Jur.2d 321, § 12.) In our case the conditions to be performed by the sellers were not performed. The deal was mutually rescinded. Title to the money did not pass to the sellers but remained in plaintiffs. It was plaintiffs' mon-

ey that was appropriated. Hildebrand v. Beck, 196 Cal. 141, 146, 236 P. 301, 39 A.L.R. 1076.

[7, 8] It is asserted the findings are contradictory and, if reconcilable, the evidence supports only findings exculpating Gordon. Findings will be liberally construed in order to make them complete and internally consistent, thus avoiding a reversal on purely technical grounds. Daniels v. Daniels, 143 Cal.App.2d 430, 300 P.2d 335; Arsenian v. Meketarian, 138 Cal.App.2d 627, 632–633, 292 P.2d 293. No purpose would be served by detailed analysis of the findings. Suffice it to say they are supported by the evidence and they, in turn, support the judgment.

[9, 10] Over Gordon's objection the court received evidence that sometime in February 1954 Steinberg gave Gordon about $2,090 and told him it was by way of restitution for the account of plaintiffs; that Gordon added $1,690.76 thereto, obtained two money orders totaling $3,780.76, and deposited them with plaintiffs' then attorney "to settle this case." Gordon asserts error. He says the evidence showed an offer to compromise which is not admissible. It is the general rule that a mere offer of compromise is not admissible in evidence. Harris v. Miller, 196 Cal. 8, 18, 235 P. 981. "An offer of compromise is not an admission that anything is due." Code Civ.Proc. § 2078. The statement of a party against whom a claim is made that he is willing to settle the claim, when not connected with an offer of compromise, may be proved as an admission against interest. The rule which excludes offers of compromise does not apply to statements which are in nowise connected with any attempt to compromise. Smith v. Whittier, 95 Cal. 279, 297, 30 P. 529. Story v. Nidiffer, 146 Cal. 549, 80 P. 692, held that on offer of the defendant to pay a certain sum for a trespass was admissible for the purpose of showing an admission that his cattle had done the damage.

[11, 12] The amount deposited by Gordon was the exact sum received by him from plaintiffs. Tender of the exact sum appropriated was not an offer of compromise. A compromise is a settlement of differences by mutual concessions; an adjustment of conflicting claims. (Webster's Inter.Dict., 2d ed.) There were no negotiatons for a settlement. There was no discussion of a compromise. The evidence did not relate to an offer of any terms of compromise or to any dealing with plaintiffs' attorney on the subject of compromise. The court did not err in admitting the evidence.

We find no error in the record.

Affirmed.

SHINN, P. J., and FRED B. WOOD, J., concur.



148 Cal.App.2d 335

LeRoy SCHWERDTFEGER, Plaintiff and Appellant,

v.

STATE of California, Defendant and Respondent.

Civ. 16967.

District Court of Appeal, First District, Division 1, California.

Feb. 7, 1957.

Rehearing Denied March 8, 1957.

Hearing Denied April 2, 1957.

Action against state for injuries sustained by plaintiff when defective cable rigging installed by marine terminal, to which state had leased entire pier space, collapsed and fell on him. The Superior Court, City & County of San Francisco, Robert McWilliams, J., entered judgment upon verdict for defendant, and plaintiff appealed. The District Court of Appeal, Peters, P. J., held that where state had leased entire space on pier to marine terminal which had installed cable rigging that collapsed because defective and injured employee of terminal operator, and state had no authority to control manner of installation of cable rigging, though it had

unexercised right of inspection of premises, state was not liable for injuries to employee.

Judgment affirmed.

1. States ⇐112

If activities of state in ownership of pier were proprietary in nature, legislature could not transform them into governmental functions by legislative mandate, within rule imposing liability on state in tort if state's activities are proprietary.

2. States ⇐112

It is the inherent nature of the activity that determines whether it is proprietary or governmental, within rule imposing liability on state in tort if state's activities are proprietary.

3. States ⇐112

Where state, owned pier, entire space on which it had assigned to marine terminal that engaged in terminal and stevedore operations, was engaged in activities in competition with private piers in area, state operations were proprietary, not governmental in nature and in proper case, state would be liable in tort for its own negligence. West's Ann.Harbors & Nav.Code, §§ 1700, 1732.5, 1732.7, 1735, 1738, 1740, 1741, 1770, 1900, 1902 1906, 1907, 1980 et seq., 3000, 3050–3064, 3061, 3063, 3080, 3081, 3086, 3087, 3100, 3101, 3105, 3106, 3107; West's Ann.Gov.Code, § 16041.

4. Negligence ⇐32(1)

Rule applicable to invitor is that duty is imposed on person in possession of land as price he must pay for economic benefit he derives or expects to derive from presence of visitor; and benefit to possessor does not have to be a monetary one.

5. Wharves ⇐21

Before state can be held liable to employee of marine terminal to which state had assigned entire pier space, it would have to appear that state possessed such control over place and particular instrumentality causing injury that duty to inspect in favor of invitees of tenant existed.

6. Negligence ⇐32(1)

Generally, duty to exercise due care towards invitees is imposed only on possessor of property because he, rather than title holder, is in position to learn of hazards and to correct them.

7. Landlord and Tenant ⇐167(8)

If landlord retains control over any portion of leased premises, he is deemed to be an invitor of invitees of tenant as to portion of premises over which he retains control.

8. Landlord and Tenant ⇐167(1, 8)

A person legally can be the invitee of both the tenant and the landlord, if both control the premises.

9. Landlord and Tenant ⇐167(2)

Ownership of instrumentality causing injury does not alone show control of premises by landlord, within rule imposing liability on landlord to invitee injured on leased premises if landlord has retained control over that portion of premises.

10. Wharves ⇐21

Pier which state assigned to marine terminal was not public place, within rule imposing special duty on landlord where landlord knows that rented premises are put to public use, where marine terminal locked and did not permit public on premises, and falling cable rigging, which injured marine terminal's employee who sued state for injuries, was brought on premises by marine terminal and was not defect in leased premises.

11. Landlord and Tenant ⇐167(2)

Duty of landlord to person injured on leased premises open to public extends only to defects in leased premises, that is, in property leased, and not in respect to an appliance which is brought on premises and is owned by the tenant.

12. Wharves ⇐21

Rule of harbor board that coal screens, donkey engines, stevedores' tools and appliances, merchandise, vehicles or structures, must be removed from wharves and other state property when directed by wharfinger did not impose duty on state to

inspect and maintain, and accordingly did not render state negligent in respect to defective cable rigging installed by marine terminal, to which state had assigned entire pier space, and accordingly did not render state liable to employee of marine terminal who was injured when rigging fell on him.

13. Wharves ⇐21

Where state had leased entire space on pier to marine terminal, which installed cable rigging that collapsed because defective and injured employee of terminal operator, and state had no authority to control manner of installation of cable rigging, though it had unexercised right of inspection of premises, state was not liable for injury to employee.

Jarvis, Miller & Decker, Martin J. Jarvis, Hugh B. Miller, Charles W. Decker, San Francisco, for appellant.

Bledsoe, Smith, Cathcart, Johnson & Phelps, San Francisco, Wilbur J. Russ, San Francisco, of counsel, for respondent.

PETERS, Presiding Justice.

Plaintiff, an employee of Marine Terminals Corporation, a company that has an agreement to occupy space on pier 39 in San Francisco, was seriously injured while working in the course and scope of his employment on the pier. The pier is owned by the State. Plaintiff brought this action against the State, claiming that it owed him a duty of due care which had been violated. The jury brought in a defense verdict. Plaintiff appeals. His two major contentions are that the state law imposes such control over the situs and instrumentality of the injury that the State owed him a duty to use reasonable care to inspect the instrumentality causing the injury, and the place where it occurred, or, independently of statute, under general principles, he was an invitee of the State to whom the State owed the duty of reasonable care to see to it that the premises were reasonably safe. The trial court refused to so instruct.

The case has been tried twice. The first trial resulted in a verdict for plaintiff, which was set aside on motion for a new trial. The second trial resulted in a defense verdict.

The State owns the land and pier in question. The "possession and control" of the pier are vested in the Board of State Harbor Commissioners for San Francisco Harbor. Harb. & Nav.Code, §§ 1700, 1732.5, 1732.7, 1735, 1741, 1770, 1900, 1906, 1907, 3000, 3105, 3106. The State engages in certain activities on the piers under its control. The Harbor Board is authorized to "fix and regulate the rates of dockage, wharfage, cranage, tolls, rents and other charges." § 3080, Harb. & Nav.Code. It charges rent to the private businesses, such as Marine Terminals, that operate on its piers, §§ 3050–3064, Harb. & Nav. Code, and dockage, § 3081, Harb. & Nav. Code, and wharfage, §§ 3086–3087, Harb. & Nav.Code. The Board supervises the operation of these facilities and properties, § 1732.5, Harb. & Nav.Code, the construction, maintenance and repair of piers, and the erection of improvements necessary for the safe landing, loading and unloading of cargo and passengers passing into and out of San Francisco by water. § 3000, Harb. & Nav.Code. It also operates the State Belt Railroad, which has tracks on pier 39, and sells electricity to ships berthing at any of the many piers under its jurisdiction. The port of San Francisco is a competitor with other ports through which cargo and passengers pass. One of the declared statutory purposes of these provisions is to aid in harbor development and trade promotion in this area. (See, generally, §§ 1906, 1980, et seq., Harb. § Nav.Code.)

Under these and related provisions the Board has the power to license private businesses, such as Marine Terminals, to engage in certain activities on the piers under its jurisdiction. To this end the Board is authorized to make rules and regulations "concerning the control and management" of the piers. § 1900, Harb.

§ Nav.Code. It may insure against loss or damage regarding its property or operations. § 1902, Harb. & Nav.Code. It fixes and collects all fees for the services and facilities provided by the State. It may impress a lien upon all goods stored upon its piers to secure the collection of its fees. § 3100, Harb. & Nav.Code. It may require the removal of any goods or structures which constitute obstructions on the wharves and piers. §§ 3101, 3106, 3107, Harb. & Nav.Code. Through its chief wharfinger and through wharfingers assigned to each pier, the Board regulates the movement of ships in the docks and harbor, guards against obstructions on the piers and preserves order and reports accidents. §§ 1735, 1738, Harb & Nav.Code. Through its chief engineer, the Board gives constant attention to the condition of the seawall, and to the thoroughfares, structures and wharves under its jurisdiction. §§ 1740, 1741, Harb. & Nav.Code. The Board cannot "lease any premises under its control for any purpose," but the Board "may permit any property under its control to be used by any person." § 3061, Harb. & Nav.Code. This section was derived from former Political Code section 2524 which referred to this power as one to "set apart and assign" the property. Any such use permitted by the Board may be terminated upon 30 days' notice. § 3063, Harb. & Nav.Code. By one of its duly adopted rules the Board has the power to remove stevedores' tools and appliances from the wharves. Rule 154a. It is a conceded fact that a wharfinger employed by the State was present on pier 39 daily not less than twice, and, on the average, four or five times. His duties were principally to assess charges and to preserve the state property under the jurisdiction of the Board. He also investigated accidents, kept the piers free from obstructions, and generally supervised the piers.

Pier 39 has been rented to Marine Terminals by the State since 1945. Prior to that, Marine Terminals had operated the pier for the United States Army. Marine Terminals is both a terminal operator and a contracting stevedore. There are several provisions of the rental agreement to which reference should be made. Among other things, it provides:

"1. This assignment of space is a revocable license to use the same. The said license is revocable at the pleasure of the Board of State Harbor Commissioners for San Francisco Harbor. Payment of the above mentioned charges for space in advance is a condition precedent to the continuance of this license and the same may be revoked forthwith at any time when the payment of said charges is in default or when said premises are used in an unlawful manner, or for unlawful purposes. When the payment of said charges is not in default, said license may be revoked by either Assignor or Assignee at any time, said revocation, however, to be effective thirty (30) days after notice in writing thereof * * *.

"10. Assignee shall permit Assignor and his agents to enter into and upon said premises at all reasonable times, and, in the event of an emergency, at any other time for the purpose of inspecting the same or for the purpose of maintaining, altering or repairing said premises, or if the premises be part of a building, then to maintain, alter or repair said building including the erection and maintenance of such scaffolding, canopies, fences and props as may be required, or for the purpose of posting notices of non-liability for alterations, additions, or repairs, or for the purpose of placing upon the property in which the said premises are located any usual or ordinary signs, or for fire or police purposes or to protect the premises from any cause whatever, without any rebate of assignment charges and without any liability on the part of Assignor for any loss of occupation or quiet enjoyment of the premises thereby occasioned.

"11. Assignee shall, at his sole cost, keep said premises and appurtenances and every part thereof, including glazing, sidewalks adjacent to said premises, any store front and the interior of the premises, in

good and sanitary order and condition, * * *

"12. Assignee hereby accepts liability for any and all damage to said premises and appurtenances and every part thereof caused by assignee or his employees, by licensees or invitees of assignee, which occurs during the period of this assignment and Assignee agrees to notify Assignor of said damage within thirty (30) days thereof, and Assignee specifically agrees to either repair said damage or to compensate Assignor for the reasonable value of said damage or to compensate Assignor for the cost of repair thereof, at the election of Assignor.

"13. Assignee, as a material part of the consideration to be rendered to Assignor, hereby waives all claims against Assignor for damages to goods, wares and merchandise, in, upon or about said premises and for injuries to persons in or about said premises, from any cause arising at any time, and Assignee will hold Assignor exempt and harmless from any damage or injury to any person, or to the goods, wares and merchandise of any person, arising from the use of the premises by Assignee, or from the failure of Assignee to keep the premises in good condition and repair, as herein provided."

This assignment of space gave Marine Terminals physical possession of all of pier 39. The State did not reserve any portion of the premises, nor did it impose specific instructions on the use of the pier. Marine Terminals was permitted to solicit its own business and to operate its premises in accordance with its needs. The State does not engage in stevedore or rigging operations, nor does it solicit business for any particular pier or tenant.

Since 1945 Marine Terminals has been the only assignee operating on pier 39. It makes its own arrangements for the docking of ships and for the loading or unloading of cargo. It directed cargo placement and handling, and it routed over the pier any passengers from ships docking there. It maintained a 24-hour guard on the pier, and locked the gate leading to it at night. Neither the pier wharfinger nor any other state employee had a key to this gate. The general public was excluded from the pier. The Board licenses strappers, weighers and stencilers, who, however, perform no services for the State. They seek employment from the pier operators such as Marine Terminals. The Board operates the State Belt Railroad which is used by Marine Terminals in its operations. Tracks of this railroad are on pier 39. Cars are delivered to Marine Terminals at its request. There is a door across the tracks at the end of the pier which is normally kept locked and only opened by an employee of Marine Terminals when cars are delivered to that company.

In addition to rent, the State receives a direct benefit from the operations of Marine Terminals, in that it collects demurrage on cargo after it has been on the pier for a stated period of time. These charges are based on books kept by Marine Terminals.

Appellant was the clerk supervisor of Marine Terminals on pier 39, and, as such, directed the movement and placement of cargo on the pier. He occasionally supervised the rearranging of cargo which would result in the State collecting added demurrage.

The injury occurred on June 10, 1952, when an overhanging wire cable fell to the pier, carrying with it six suspended canvas tarpaulins. These tarpaulins weighed about 1,200 pounds each. When they fell, portions hit and seriously injured appellant who was then working in the course and scope of his employment with Marine Terminals. The heavy canvases were used when it rained by the stevedores employed by Marine Terminals as covers for the hatches of ships. When not in use they were stored on the wire cable. They were the property of Marine Terminals.

The cable was installed by Marine Terminals when it first occupied the pier. It was rigged by running each end through an eye in a metal dog and clamping it back on itself by means of "U" clamps. The dogs

were looped over two "I" beams which were integral parts of the pier. Marine Terminals' employees originally rigged the cable, and only Marine Terminals maintained and used the installation. After the accident, Marine Terminals removed the cable and its attachments and stored it in its gear shed.

There was expert testimony that the original installation of the cable was improperly made. Ordinary prudence would require inspection of the installation at least twice a year, and probably once a month. The defects in the installation were obvious and discoverable by a mere visual examination. Admittedly, neither the State's employees, nor Marine Terminals' employees, ever inspected the installation. The State's employees knew of the location and use of the cable. It was so located that it was exposed to vibration, caused by docking ships and operation of the Belt Line Railroad.

The assignment of space contract contained the following provision: "Assignee shall not make, or suffer to be made, any alterations or improvements of the said premises, or any part thereof, without the written consent of Assignor first had and obtained, and any additions to, or alterations of, the said premises, except movable furniture and trade fixtures, shall become at once a part of the realty and belong to Assignor."

At the inception of the case we are met with the contention by respondent that the State is insulated from any tort liability by the doctrine of sovereign immunity. If the operations by the State here involved are governmental in nature, the doctrine would apply, but if the operations are proprietary in nature the State is, of course, liable for its torts. § 16041, Gov.Code. In Guidi v. State of California, 41 Cal.2d 623, 262 P.2d 3, the court held that the State was acting in a proprietary capacity when it entered into activities at the State Fair to amuse and entertain the public. The court held that these "activities of defendants do not differ from those of private enterprise in the entertainment industry." 41 Cal.2d at page 627, 262 P.2d at page 6. It also stated, 41 Cal.2d at page 625, 262 P.2d at page 5: "Governmental immunity, however, turns on the nature of the particular activity that leads to the plaintiff's injury, not on the identity of the governmental subdivision or agency carrying on the activity, or on the fact that the facility in question may also be used for governmental purposes." See also Muses v. Housing Authority, 83 Cal. App.2d 489, 189 P.2d 305.

A case that is directly in point is People v. Superior Court, 29 Cal.2d 754, 178 P.2d 1, 40 A.L.R.2d 919, which held that the Board of Harbor Commissioner's operation of the State Belt Railroad was a proprietary function, and that the State was liable for torts growing out of the negligent operation of that railroad. The court rejected the argument that, due to the absence of the profit motive, the State was immune. The court stated, 29 Cal.2d at page 763, 178 P.2d at page 6: "The additional fact that the expense of operation, including damages for negligent operation, is primarily a burden on industry and commerce, and the fact that the business of transportation for hire is usually undertaken by private individuals or corporations and not by government, support the conclusion that the operation of the railroad is not in the exercise of a governmental function, but constitutes a commercial or business enterprise in the negligent operation of which the state may be held liable."

In the instant case, the State's activities are admittedly in competition with private piers in Oakland. The operation of the railroad and the piers are similar in character and purpose.

[1–3] Respondent places its main reliance on section 1906 of the Harbors and Navigation Code which forbids the Board "to exercise other than a governmental function in carrying out the purpose of this part." Of course, that same code specifies, in some detail, the functions, duties and operations of the Board. If those activities are proprietary in nature, the Legislature could not transform them to govern-

mental functions by legislative mandate. It is, as already pointed out, the inherent nature of the activity that determines whether it is proprietary or governmental. Necessarily implicit in People v. Superior Court, supra, is the holding that section 1906 of the Harbor and Navigation Code is not controlling in passing on the question under discussion. We think that the operations of the State are proprietary in nature, and that the State, in a proper case, is liable in tort for its own negligence.

The basic question involved on this appeal is whether the State owed appellant any duty of care, and, if so, what the extent and nature of that duty may have been. More specifically, did the State owe to appellant the duty to inspect the instrumentality that caused the injury? If so, the uncontradicted evidence shows that the State failed to inspect. It should be mentioned that it is conceded that whatever duty, if any, that was owed appellant by the State, is nondelegable.

The status of Marine Terminals on the pier is somewhat equivocal. It could not be a lessee because the statute prohibited the State from leasing the piers. But the State was permitted to assign space. It assigned pier 39 to Marine Terminals. Marine Terminals paid the State a fixed rent. Marine Terminals had the legal right to and did exclude the public from the pier. It had possession of the pier, and within the limits of control by the State, determined the activities on the pier and how they should be performed. But the State had certain activities on the pier, and its wharfinger visited the pier several times a day to see that those activities were carried out. Thus, the State was not exactly in the position of a landlord out of possession.

Appellant, the employee of Marine Terminals, argues that he was a business invitee of the State. He relies on the well-settled rule that "An invitation will be implied when one visits the premises of another for a purpose which is of mutual benefit to both parties and not as the mere caprice or for the sole pleasure of the visitor." Strong v. Chronicle Pub. Co., 34 Cal.App.2d 335, 339, 93 P.2d 649, 652. He asserts that his activities as an employee of Marine Terminals were not only of benefit to the State in the conduct of its wharfinger business on the pier, but were indispensable to such business.

[4] In California, the rule applicable to an invitor is that a duty is imposed on the person in possession of land as the price he must pay for the economic benefit he derives or expects to derive from the presence of the visitor. Austin v. Riverside Portland Cement Co., 44 Cal.2d 225, 282 P.2d 69; Saba v. Jacobs, 130 Cal.App.2d 717, 279 P.2d 826; Fraters v. Keeling, 20 Cal.App.2d 490, 67 P.2d 118; Aguilar v. Riverdale C. C. Ass'n, 104 Cal.App. 263, 285 P. 889. The benefit to the possessor does not have to be a monetary one. Edwards v. Hollywood Canteen, 27 Cal.2d 802, 167 P.2d 729; Oles v. Kahn Bros., 81 Cal.App. 76, 253 P. 158.

It would appear that the State was benefited by the activities of Marine Terminals. The activities of Marine Terminals were an integral part of the functions of the Harbor Board. Clearly, the activities of Marine Terminals helped the State to carry out the statutory purpose of developing the San Francisco Harbor, and to promote the port and terminal facilities in that area. Moreover, as already pointed out, the State collected demurrage on cargoes handled by Marine Terminals that remained on the pier over a certain length of time. Thus, the State was benefited by the presence of appellant on the pier.

[5] But benefit to the State is not the only problem involved. Before the State can be held liable it must also appear that the State possessed such control over the place and particular instrumentality causing the injury that a duty to inspect in favor of invitees of the tenant existed. It is here that appellant has failed in his proof.

[6–9] The State was not in possession of the pier, it having assigned that area to Marine Terminals. In that sense, the State was in the position of an out-of-possession

landlord. Generally speaking, the duty to exercise due care towards invitees is imposed only on the possessor of the property because he, rather than the title holder, is in a position to learn of hazards and to correct them. It would be unjust to put the invitor obligation on someone who could not, practically, correct the defective condition. But if the landlord retains control over any portion of the leased premises he is deemed to be an invitor of invitees of the tenant as to the portion of the premises over which he retains control. Johnston v. De La Guerra Properties, Inc., 28 Cal. 2d 394, 170 P.2d 5. Thus, a person legally can be the invitee of both the tenant and the landlord if both control the premises. Oles v. Kahn Bros., 81 Cal.App. 76, 253 P. 158. Ownership of the instrumentality causing the injury does not alone show control. Pfingst v. Mayer, 93 Cal.App.2d 265, 208 P.2d 1002. The crucial question is whether there was any substantial evidence that the State possessed control over the instrumentality that caused the injury. We find no such evidence.

Appellant argues that in three different respects the State can be found to have exercised the requisite control to impose upon it the duties of an invitor. He urges that the State had exclusive possession, management and control of the pier, and conducted a business thereon; that the situs of the injury was a "common passageway," and that, by statute, the State had control of the instrumentality involved.

The facts and the governing statutes have been set forth at some length and need not be reviewed. It is not necessary to define legally the relationship between Marine Terminals and the State. Certainly as to the pier itself and the structures on it which were assigned to Marine Terminals the State had the statutory nondelegable duty to maintain them, and can be considered an invitor of invitees of the tenant. But here the defectively installed wire cable was not installed by the State. It was installed by Marine Terminals, the licensee of the premises. It was used by Marine Terminals to store its tarpaulins, and was under the direct control of that company. Its employees determined when and how the tarpaulins were to be stored. The State, as owner under the statutes and its rule had the legal right to inspect, but it was not obligated to do so. It had no legal duty to tell Marine Terminals how to conduct its business. Thus, over the instrumentality of the injury, the State did not possess such control that invitees of Marine Terminals became invitees of the State. This is so even though the State be deemed to be a tenant in common with Marine Terminals of the pier.

There are several cases which are directly in point. In McDonald v. Standard Gas Engine Co., 8 Cal.App.2d 464, 47 P.2d 777, a jury verdict against a lessor was reversed where the lessor was a tenant in common of the premises where the injury occurred. A pulley on an engine exploded, injuring an invitee of the tenant. The court held that the "record shows affirmatively that from the time * * [the record manager of both lessor and lessee] took the pulley out of the storeroom it was in the exclusive use of the * * * [lessee]. Because the * * * [lessor] was a tenant in common did not *ipso facto* render it liable for the acts of the * * * [lessee]." 8 Cal.App.2d at page 471, 47 P.2d at page 780. The court held that since the instrumentality causing the injury was under the exclusive control of the lessee, the lessor was not liable.

A case even closer in point is McDonald v. Shell Oil Co., 44 Cal.2d 785, 285 P.2d 902. There a nonsuit in favor of the owner was affirmed in a case where Shell hired an independent contractor by the name of Owens to work on a certain oil well. Plaintiff was an employee of Owens. Plaintiff was injured while working on certain equipment owned by Owens. This equipment was defectively rigged by Owens. Shell had the right to have, and did have, a foreman on the job at all times. Plaintiff contended that Shell exercised control over Owens and knew or should have known of the absence of a certain safety clamp. The court, in ab-

solving Shell from liability, stated, 44 Cal. 2d at page 788, 285 P.2d at page 904: "An owner is not liable for injuries resulting from defective appliances unless he has supplied them or has the privilege of selecting them or the materials out of which they are made [citation] or unless he exercises active control over the men employed or the operations of the equipment used by the independent contractor." The court emphasized that Owens furnished and installed the defective rig; that the work performed when plaintiff was injured was the work Owens was hired to perform; that there were no Shell employees present at the time of the accident; that no Shell employee had knowledge of the defective condition; and that Shell at no time affirmatively assumed control of the work performed by Owens. Plaintiff also urged that Shell retained control over the work because the Shell foreman was in general charge and had the equipment under observation; that Shell also maintained a working production foreman on the job who dealt with Owens' foreman; that Shell had the authority to stop Owens if the work was unsatisfactory; that the contract between Shell and Owens gave Shell the right of inspection. The court stated, 44 Cal.2d at page 790, 285 P.2d at page 904:

"However, the owner may retain a broad general power of supervision and control as to the results of the work so as to insure satisfactory performance of the independent contract—including the right to inspect [citation], the right to stop the work [citation], the right to make suggestions or recommendations as to details of the work [citation], the right to prescribe alterations or deviations in the work [citation]—without changing the relationship from that of owner and independent contractor or the duties arising from that relationship." After discussing Shell's activities and holding that they were not sufficient to make Shell an invitor of plaintiff the court stated that there were several situations in which the owner or landlord would be liable, as follows, 44 Cal.2d at page 790, 285 P.2d at page 905:

"(1) This is not a case where the employee of the independent contractor was injured by some condition of the owner's premises over which the owner remained in control, and where the owner's duties to the employee were those owing to a business invitee [citing cases]; (2) Nor is this a case where the owner furnished the equipment or was obligated by contract to do so, and the equipment proved to be defective, causing injury to the employee of the independent contractor [citing cases]; (3) Finally, this is not a case where the owner actively interfered with or arbitrarily assumed to direct the employees of the independent contractor as to the manner and method of performing the work. [Citations.] * * *

"We conclude that the record before us shows no basis for establishing liability on the part of defendants Shell Oil Company * * *; and that the trial court properly granted the motion for nonsuit."

In the instant case the evidence does not show that, either under the statutes, under the contract for the assignment of space, or under the practices adopted by the State and Marine Terminals, the State exercised the extent of control that Shell exercised in the case above discussed. The appliance causing the injury originally belonged to Marine Terminals, was installed by it, and was operated by its employees. The State had the power of general inspection, but no duty to inspect. It did not inspect. Under these circumstances there is no evidence sufficient to go to the jury on the issue.

The contention that the wire cable belonged to the State because it became a fixture requires but scant consideration. Assuming that the point can now be raised, the cable was not a fixture as a matter of law. It was not permanently attached to the realty. After it fell, it was removed by Marine Terminals and kept by it. Moreover, whether the cable was or was not a fixture, its control was in Marine Terminals.

Equally without merit is the contention that the place where appellant was injured was a "common passageway." It is contended that the place where the injury occurred is comparable to the lobby of a hotel. It is also contended that the State's wharfinger business results in bringing large numbers of the "public" to the premises. If these facts were correct, the liability of the State as landlord would be clear. See Blumberg v. M. & T. Incorporated, 34 Cal.2d 226, 209 P.2d 1; Harris v. Joffe, 28 Cal.2d 418, 170 P.2d 454; Pfingst v. Mayer, 93 Cal.App.2d 265, 208 P.2d 1002; Foster v. A. P. Jacobs & Associates, 85 Cal.App.2d 746, 193 P.2d 971; Dineen v. City and County of San Francisco, 38 Cal. App.2d 486, 101 P.2d 736; see Annotations 97 A.L.R. 220; 75 A.L.R. 154; 58 A.L.R. 1411; 25 A.L.R. 1273. But the facts are not as interpreted by appellant. Marine Terminals was the assignee of the space, and of all of the space on pier 39. It was the sole occupant of the pier, including the area where the accident occurred. It paid rent for that area. The assignment of space makes no special reference to the area where the accident occurred, and neither the State nor Marine Terminals had any special rules applicable to it. Marine Terminals stored equipment and vehicles in the area as well as cargo. At times, the area was completely blocked with cargo. The area is simply one means of ingress and egress to and from the north stringer of the pier. The tracks of the State Belt Railroad run through it. Located in the general area is a toilet, water cooler, and flight of stairs leading to a stevedore lunchroom. Various employees of Marine Terminals and of the State pass over it in the course of their work. Passengers, crews and suppliers from ships docked at the pier occasionally use it, but this is an inconvenient route. The cases above cited hold that where the landlord retains control over a portion of the leased premises he may be liable to invitees of the tenant. But the rule has no application where the area in question was not a common passageway, and was not reserved by the landlord. Except for the rights of the State in reference to the whole area assigned, Marine Terminals was the sole occupant. There is nothing to distinguish the area where the accident happened from other areas of the pier. Thus, the rule relied upon just is not applicable to the facts.

[10, 11] Appellant also contends that the jury should have been instructed on the so-called "public purpose" exception to the general rule of non-liability. There is no doubt that the law imposes a special duty on the landlord where the landlord knows that the rented premises are to be put to a public use. Thus, the duty applies when premises are rented for a polling place (Boothby v. Town of Yreka City, 117 Cal. App. 643, 4 P.2d 589); a women's club meeting place (King v. New Masonic Temple Ass'n, 51 Cal.App.2d 512, 125 P.2d 559); an auto parking lot (Burroughs v. Ben's Auto Park, Inc., 27 Cal.2d 449, 164 P.2d 897); a service Station (Hayes v. Richfield Oil Corp., 38 Cal.2d 375, 240 P.2d 580); and a motel (Goodman v. Harris, 40 Cal.2d 254, 253 P.2d 447). Certainly, pier 39 was not a public place. Marine Terminals maintained a 24-hour guard on duty for the very purpose of excluding the public. But if, because passengers from freighters docking at the pier used it for ingress and egress, the pier be considered semi-public, the exception under discussion would still not be applicable. The duty on the landlord in such cases only extends to defects in the premises leased, that is, in the property leased, and not in an appliance which was brought on the premises and is owned by the tenant. That was the precise point involved in Goodman v. Harris, 40 Cal.2d 254, 253 P.2d 447, where it was held that, although a motel was a public place within the meaning of the rule, the landlord, as a matter of law was not liable for the death or injury of guests caused by defective gas stoves installed by the tenant and attached to the premises by pipe connections. The case is similar to the in-

stant one. Here the cable that fell was installed and used exclusively by Marine Terminals. The defect was not in the cable but in the manner it was rigged. This rigging was done by Marine Terminals.

The exception imposing liabilty in the public purposes cases is based on the fact that, where there is a defect in the premises leased, it is fair and just to require the landlord to inspect, repair and maintain the premises for the protection of the public. But in the instant case, the instrumentality causing the injury was an appliance brought on the pier and installed by Marine Terminals. As to such an appliance, the State did not have the same duty as it did towards the railroad tracks, the structures on the pier and the pier itself. As to such appliance it must be held, as a matter of law, that the State had no responsibility so far as appellant is concerned.

[12] Appellant contends that under Rule 154a adopted by the Board the cable here involved became subject to the jurisdiction and control of the Board, and therefore a duty to inspect was imposed. That rule provides that: "Coal screens, donkey engines, stevedores' tools and appliances, merchandise, vehicles, or structures, must be removed from the wharves and other State property when directed by the wharfinger." This rule, obviously aimed at preventing obstructions on wharves and piers, imposes no duty to inspect. Certainly, the cable was not an obstruction. Undoubtedly if the wharfinger believed or knew the cable was dangerous, he could have ordered it removed. But this power did not create a duty to inspect and maintain.

[13] From the foregoing, it is apparent that, under the facts as a matter of law, there was no duty to inspect and maintain the cable. Thus, it was not error to have failed to instruct on any of appellant's theories of the case.

The judgment appealed from is affirmed.

BRAY and FRED B. WOOD, JJ., concur.

Hearing denied; CARTER, J., dissenting.

148 Cal.App.2d 469

ANGLO CALIFORNIA NATIONAL BANK OF SAN FRANCISCO, as Special Administrator of the Estate of Harry C. Stauffer, Deceased, Plaintiff and Respondent,

v.

R. N. PHILPOT, J. Robert Philpot, Elizabeth Heilig and Hilda F. Kirtlan, Defendants and Appellants.

Civ. 8812.

District Court of Appeal, Third District, California.

Feb. 11, 1957.

Rehearing Denied March 8, 1957.

Hearing Denied April 10, 1957.

Action by special administrator against realty broker and his secretary, son, and daughter to quiet title to land conveyed by decedent to broker's son and daughter and to recover rents from land conveyed, less value of defendants' services and lien held by broker on the land. The Superior Court, Sacramento County, Sherrill Halbert, J., sitting without a jury, entered judgment setting aside the deed of gift, quieting title in special administrator, and awarding damages, and defendants appealed. The District Court of Appeal, Warne, J. pro tem., held that evidence was sufficient to sustain trial court's findings that relationship of trust and confidence existed between decedent and his secretary and that the deed had been obtained without consideration by abuse of such relationship with aid of son and with misrepresentation by broker.

Judgment affirmed.

1. Deeds ⇐210, 211(3, 4)

In action by special administrator against realty broker and his secretary, son, and daughter to quiet title to land conveyed by decedent to broker's son and daughter and to recover rents received from land conveyed, evidence was sufficient to sustain trial court's findings that relationship of trust and confidence existed between decedent and his secretary and that deed had been obtained without consideration by abuse of such relationship with aid of son and with misrepresentation by broker.

2. Deeds ⇐195, 196(3)

In action by special administrator against realty broker and his secretary, son, and daughter to quiet title to land conveyed by decedent to broker's son and daughter, presumptions of insufficiency of consideration and undue influence existed in view of showing that, in obtaining deed, broker and secretary had obtained an undue advantage of decedent. West's Ann. Civ.Code, § 2235.

3. Deeds ⇐195, 196(3)

Even if realty broker's secretary-bookkeeper did not have managerial authority over land, with whose owner broker stood in relationship of trust and confidence, gain which secretary-bookkeeper took from owner would be subjected to same presumptions of insufficient consideration and undue influence as were applicable to broker. West's Ann.Civ.Code, § 2228.

4. Deeds ⇐211(3)

In action by special administrator against realty broker and his secretary, son, and daughter to quiet title to land conveyed by decedent to broker's son and daughter and to recover rents received from land conveyed, evidence was sufficient to sustain trial court's finding that defendants had misrepresented and concealed from decedent state of his business affairs and value of his property. West's Ann.Civ.Code, § 2228.

5. Money Received ⇐18(3)

In action by special administrator against realty broker and his secretary, son, and daughter to recover rents received from land conveyed by decedent to broker's son and daughter, less value of defendants' services and lien held on broker under the land, evidence, which revealed that broker and secretary had legitimate offsets for services rendered and that son had received certain rents to exclusion of other defendants, sustained judgment which burdened son more than broker and secretary.

Lewis, Lewis & Lewis, Pierce & Brown, Sacramento, for appellants.

Anthony J. Kennedy and Carl Kuchman, and Devlin, Diepenbrock & Wulff, Sacramento, for respondent.

WARNE, Justice pro tem.

This is an appeal from a judgment setting aside a deed of gift to the real property at 1400 I Street in Sacramento from Harry C. Stauffer, deceased, to the four appellants; quieting title in plaintiff as special administrator of the estate of Harry C. Stauffer against their claims to the property covered by the deed; and awarding damages against three of them for the rents they received less the value of their services in caring for the property, and also less a lien which the defendant R. N. Philpot had under a second deed of trust upon the property.

The trial court, sitting without a jury, made findings that a relationship of trust and confidence existed between Harry Stauffer and defendants R. N. Philpot and Hilda Kirtlan, and that the deed was obtained without consideration by abuse of their relationship with the aid of J. Robert Philpot. The court also found misrepresentation by R. N. Philpot to Harry Stauffer in obtaining the deed. There is a finding of no delivery. There is a finding that at the time Harry C. Stauffer was 75 years old, suffering from bodily decrepitude and chronic alcoholism and had been without business experience or gainful employment in the preceding 20 years. There is also a finding that Harry C. Stauffer had no independent legal advice or any advice at all save and except that of defendant in executing said deed.

The money damages resulted from an accounting which was done through a referee after an order of reference. The accuracy of his work was stipulated to at the time his report was before the court for confirmation and no exceptions were taken. Thereafter, the court took evidence of the value of defendants' services in caring for the property and determined the amount of R. N. Philpot's lien against the property. These were offset against the conclusions of the referee.

[1] The appellants contend that the findings and the judgment are not supported by the evidence. With this contention we do not agree. Many of the facts in this case are substantially the same as those set forth in the case of In re Estate of Stauffer, 142 Cal.App.2d 35, 297 P.2d 1029, in which the will of Harry C. Stauffer, offered by R. N. Philpot and Hilda Kirtlan, was denied probate.

For many years prior to December 21, 1949, and thereafter until the death of Harry Stauffer in 1952, R. N. Philpot was a real estate broker who managed this property. He was also custodian of Harry Stauffer's money and kept it in his own bank accounts. Hilda Kirtlan was R. N. Philpot's secretary and bookkeeper. J. Robert Philpot and Elizabeth Heilig are an adult son and adult daughter, respectively, of R. N. Philpot. Their names were included as grantees in the deed for the purpose of saving taxes. It was understood by them that title was equally in the names of R. N. Philpot and Hilda Kirtlan, only. However, R. N. Philpot granted half of his ownership to J. Robert Philpot, and the rents from the building on the property were so intermingled between R. N. Philpot, Hilda Kirtlan and J. Robert Philpot that they could not be traced. The judgment against these defendants for these rents was joint and several. Also, J. Robert Philpot alone kept the rents from the portion of the property that was used as a parking area, and he was held separately liable for them after credits for his expenses. In addition R. N. Philpot was held liable for moneys he took directly from Harry Stauffer's funds.

R. N. Philpot became a real estate broker in 1919 and continued as such until 1947 when he turned his business over to J. Robert Philpot. Hilda Kirtlan was employed in this real estate office for thirty years, managed the office and kept the books, and after the business was taken over by J. Robert Philpot her salary was paid in part by R. N. Philpot and in part by J. Robert Philpot.

R. N. Philpot also lived at his place of business which is across the street from 1400 I Street, the old Stauffer family home. He began handling business affairs for Harry Stauffer's mother, Susanna, a widow of the age of 90 years, in and about the year 1932, and also became the confidant of Harry's sisters, Lillie and Ida, neither of whom had any business experience. He persuaded the Stauffer women to tear down the family house and put up a commercial building. In the year 1942 he managed 1400 I Street under a general power of attorney from Ida Stauffer, Harry Stauffer's elderly spinster sister.

On July 13, 1942, R. N. Philpot, as attorney in fact for Ida Stauffer, executed a lease to the State of California of the premises at 1400 I Street, for a term expiring July 14, 1945. The rents were paid into Philpot's office, and he would pay over money to Ida from time to time when she called for it.

The property in question was conveyed from one member of the Stauffer family to another upon deeds drafted by Hilda Kirtlan and executed in R. N. Philpot's office. One of these conveyances is a deed dated in 1935 transferring said property from Ida Stauffer to Harry Stauffer. Mr. Philpot had this instrument in his possession and recorded it in 1943, shortly after Ida Stauffer died. He later made an affidavit whereby he swore that this deed was delivered many years prior to her death. However, notwithstanding the date of the deed and the facts stated in the affidavit, it was not until after Ida's death that R. N. Philpot treated Harry Stauffer as owner of the property and entitled to be credited with the rents deposited in the Philpot accounts. No change was made upon Ida's death so far as the tenancy was concerned, and checks for the rent continued to come to R. N. Philpot as agent and to be deposited by Hilda Kirtlan in one or more of his office accounts.

R. N. Philpot testified at the trial that he instructed the State of California to make the rent checks payable to him be-

cause the state had directed him to do so. He repudiated this testimony shortly afterwards. Documentary proof showed that he instructed the state repeatedly over the years to make the rent checks payable to himself as agent, without designating for whom he was acting as agent. Commencing in May of 1949 and continuing until May 1, 1951, R. N. Philpot instructed the state to make the rent checks payable to him as "attorney in fact", again without designating for whom he was acting.

These rent payments received by R. N. Philpot and the disbursements made from the fund which they form, were recorded by Hilda Kirtlan in a loose-leaf book appellants called the "Stauffer Account". This began as an account for Ida Stauffer, but upon her death in November of 1943 it was continued for Harry, with a beginning balance of $2,336.30 and went on in this fashion until December 2, 1949, when the balance was $10,219. The rent checks, themselves, for July 8, 1943, until that of April 19, 1946, were made payable to R. N. Philpot, agent, as payee. From April 19, 1946 to December 16, 1948, the warrants, with one exception, were issued to R. N. Philpot, personally, as payee. From May 13, 1949, with one exception, through the warrant of April 26, 1950, the payee was R. N. Philpot, attorney in fact for Harry C. Stauffer. Thereafter, warrants were payable either to R. N. Philpot or R. N. Philpot & Son. There is a summary in the record of all rents paid for 1400 I Street by the State of California from July 7, 1943, until January 22, 1953, which shows that the warrants were endorsed by appellants and deposited in one or another of appellants' own bank accounts or presented for payment at various banks. The referee was unable to trace the money to one or another of the appellants.

The "Stauffer Account" shows that there were other sources of revenue besides rent paid by the State of California, such as parking lot rent, the proceeds from the sale of a house, etc. These are summarized.

The "Stauffer Account" also, along with various vouchers introduced as defendants' exhibits, shows the manner in which money was disbursed for the benefit of Harry Stauffer by R. N. Philpot and Hilda Kirtlan. Payments were made on a loan secured by 1400 I Street, taxes were paid, insurance was purchased, repairs were paid for, small sums of money were given in cash to Harry Stauffer on Wednesdays and Saturdays as he called at Philpot's office for his allowance, after signing a receipt, and clothing bills for Mr. Stauffer were paid. Harry Stauffer was always broke; his allowance from Mr. Philpot never amounted to enough to pay his bills. Hilda Kirtlan fixed the amount of his allowance.

The evidence also shows that at the time said deed was executed Harry C. Stauffer was 75 years old and suffering from bodily decrepitude; that he was without any business experience or gainful employment during the preceding 20 years; and that for many years prior thereto and thereafter he had been a chronic alcoholic; that he had no independent legal advice nor any advice at all save and except that of defendant in executing said deed; that the property described in said deed had a value of approximately $120,000 at the time the deed was executed and constituted all the real estate and substantially all the assets of Harry C. Stauffer.

On July 13, 1942, Ida Stauffer, through R. N. Philpot as attorney in fact, leased the property at 1400 I Street, less the parking area, to the State of California for a term expiring July 14, 1945, but with an option to the state to renew for an additional term of three years. The option was exercised, carrying the tenancy to July, 1948. On July 17, 1948, R. N. Philpot took the power of attorney to himself from Harry Stauffer. Using this, he negotiated a six-months extension of the lease with the state at $2,000 per month until December, 1948. Keeping his activities in leasing a secret thereafter from Harry Stauffer, effective February 21, 1949, R. N. Philpot executed a three-year term lease of the property with the state, less the parking area, at $1,845 per month.

R. N. Philpot, after having thus secretly but securely leased the premises, less the

parking area, to a responsible tenant until February 20, 1952, then began to chat with Harry on Harry's twice-weekly visits to the office to get his allowance. He informed Harry in the spring of 1949, with J. Robert Philpot present, that he didn't know what would happen in the way of releasing, requiring remodeling, and he wanted to refinance the building, to which Harry said "go ahead". Then in the summer of 1949, he again spoke to Harry with J. Robert Philpot present and told him it was imperative to refinance the building because the Oestes, whose loan was secured by it, were "in financial trouble" and demanded their money, to which Harry said, "go ahead". In the fall of 1949 R. N. Philpot again told Harry of a need for a loan to remodel the building and got Harry's "go ahead".

J. Robert Philpot then undertook employment as agent of Harry Stauffer and R. N. Philpot to secure a loan. He represented to the loan agent of California Western States Life Insurance Company that there were plans to remodel the building and he wanted the largest loan obtainable. An appraisal was made and 1400 I Street was valued at $120,000. On November 30, 1949, escrow instructions were filed with the Sacramento Abstract and Title Company, whereby the insurance company agreed to a loan of $45,000 to Harry Stauffer upon Harry's note secured by a first deed of trust on the property at 1400 I Street, Sacramento, and also to pay a $450 commission to J. Robert Philpot for securing the loan. On December 20, 1949, R. N. Philpot filed with the Sacramento Abstract and Title Company, in the same escrow, an instruction signed by himself in which he agreed for Harry Stauffer to accept the loan and its terms, and directed that after the balance of the existing loan was paid the cash remaining was to be paid to R. N. Philpot.

While this transaction was pending, R. N. Philpot and Hilda Kirtlan claim to have had a conversation with Harry Stauffer in which Harry suggested giving them the property. At this time Harry Stauffer believed that there was so much against the property the value of it "don't amount to anything", and Mr. Philpot, notwithstanding the $120,000 appraisal, and the $1,845 a month lease, plus $125 a month from the parking lot, did nothing to correct this misimpression when Harry stated it. All Harry wanted was $500 a month for life, whether the property was rented or not. Mr. Philpot then employed an attorney who, without consultation with Harry, drew up the deed in question on December 21, 1949. Harry Stauffer never had any independent advice. The deed reserved to Harry $500 a month out of the rent, only.

The deed in question contains four grantees. Two of them, J. Robert Philpot and Elizabeth Heilig, R. N. Philpot's children, were dummy names put on to evade gift taxes, and, by private arrangement among the parties, only Hilda Kirtlan and R. N. Philpot acquired any title. Elizabeth Heilig, in Germany, executed a deed dated April 15, 1950, transferring her one-quarter to Hilda Kirtlan, which deed was sent to her by Hilda with the approval of R. N. Philpot. R. N. Philpot, in Sacramento, acknowledged the deed executed in Germany before it was executed. R. N. Philpot conveyed a one-fourth interest in the property and its income to J. Robert Philpot.

On December 20, 1949, R. N. Philpot and J. Robert Philpot had Harry Stauffer execute the $45,000 note and deed of trust for the loan, and at the same time they claim they had him sign the deed. The deed is dated, as stated hereinbefore, December 21st, a day later. At the trial R. N. Philpot testified the deed was given to him after it was executed, and he kept it in his office until it was recorded in February of 1950. Previously, he had testified by deposition that he did not know what became of the deed after it was signed, including knowing whether or not it was in the possession of Harry Stauffer. The deed was kept secret. A week later the Philpots signed instruments to complete the secured loan of $45,000 to Harry Stauffer.

Neither the title company handling the escrow nor the lending agency had any knowledge of the deed. On December 28,

1950, the title company issued its policy insuring title in Harry C. Stauffer, recorded the loan papers and disbursed the money. Agents of the life insurance company testified that they would not have made the loan had they known of the deed. R. N. Philpot testified on his knowledge as a real estate man that had the deed been recorded the loan could not have been made. J. Robert Philpot testified that had the deed been disclosed he would not have gotten a finder's commission.

In January, 1950, R. N. Philpot & Son, as insurance agents, sent to the California Western States Life Insurance Company a fire insurance policy on 1400 I Street for the period of January 10, 1950 to January 10, 1953, in the beneficial amount of $60,000 showing Harry C. Stauffer as owner, together with a letter dated January 24, 1950, signed by J. Robert Philpot, describing this policy as being on Harry C. Stauffer's property.

On January 7, 1953, R. N. Philpot & Son advised the California Western States Life Insurance Company that "Mr. Harry C. Stauffer, the former owner, is now deceased". Then, after repeated demands that the present owner be disclosed, J. Robert Philpot, by letter dated February 24, 1953, revealed the deed of December 21, 1949, conveying the property to appellants. The State of California, tenant of 1400 I Street, received no notice of the deed transaction until January, 1952, when a new lease was made with the four grantees as lessors, although Elizabeth Heilig owned no interest. Hilda Kirtlan regards her title as coming under the will of Harry Stauffer, denied probate, rather than under the deed of December 21, 1949.

In June of 1949 R. N. Philpot and Hilda Kirtlan opened a trustee account at the Anglo California Bank for the deposit of Harry Stauffer's money. The balance belonging to Harry on the books of R. N. Philpot & Son was not deposited to this account. For example, on November 29, 1949, the balance in the trustee account was $4,996.57, but R. N. Philpot & Son was holding $8,374.52 of Harry's money. Into this account in December, 1949, went $24,729.96 of the $45,000 loan from California Western States Life Insurance Company. After 1950 all the expenses of maintaining 1400 I Street continued to be paid out of moneys in this trustee account.

From this trustee account the $24,729.96 was disbursed to R. N. Philpot. He tried to cover up this misappropriation by representing that he used the money to pay a $23,000 note he had taken from Ida Stauffer in payment of his services, which note was secured by a lien on 1400 I Street. However, he never satisfied the note even in part.

It appears from the testimony of the witness DeWitt Rice that Harry Stauffer was unaware of having deeded the property and believed the $45,000, after satisfying the existing Oeste loan, was used to put a new roof on the building. He understood that Philpot was talking about forming a corporation to operate his property in December of 1949, but he opposed control by the Philpot family. Other than that, all he knew was that his allowance had been increased to $100 a week about Christmastime of 1949.

In addition to taking the $24,729.96, R. N. Philpot also took $3,920.47 of Harry Stauffer's money, and no accounting was given Harry of these takings.

So far as Harry was concerned, matters continued the same with appellants after December, 1949, as before. Hilda Kirtlan continued to give him his allowance in cash on his twice-weekly visits to the office of R. N. Philpot & Son. His personal life remained unaltered from what was described. He died in January, 1952, at the age of 77. His last days, however, were not without duplicity by appellants. J. Robert Philpot signed a hospital admission card stating that the nearest relative was R. N. Philpot. Upon his death, R. N. Philpot concealed his will and denied that he left an estate, even though there was still about $5,000 in the trustee account.

While there is evidence that J. Robert Philpot was enjoying Harry Stauffer's in-

come before the deed of gift dated December 21, 1949, after the events of that month the income from the building, $1,845 per month, was divided and expended among Hilda Kirtlan, R. N. Philpot and J. Robert Philpot. The receipts and withdrawals are set forth in the exhibits attached to the referee's report. In addition, a composite statement of these matters is set forth in addendum number 1 to this report. It appears that, commencing in 1950, J. Robert Philpot appropriated personally the receipts from the parking lot, without keeping any record of them. What he received was accepted on his own statement and is reported in the addendum to the referee's report. As already noted, no exceptions have been taken to the accuracy of the referee's work. It is entirely based upon records kept by the appellants, reconciled to pertinent records kept by others, and in the total absence of any records kept by appellants the word of appellants has been accepted at face value.

[2] The trial court found that the appellants R. N. Philpot and Hilda F. Kirtlan, on December 21, 1949, and for many years prior thereto and thereafter until the death of Harry C. Stauffer had a relationship of trust and confidence with Harry, and that Harry placed complete trust and confidence in them, including the handling and management of his real property, and that when they obtained the deed of gift they obtained an undue advantage of Harry. Since the evidence established the existence of an advantage, it follows that the presumptions specified in Section 2235 of the Civil Code, that is, the presumptions of insufficiency of consideration and undue influence, are present in the case.

[3, 4] As secretary to R. N. Philpot and also substantially as co-trustee, Hilda Kirtlan shared the same fiduciary obligations. But even if it were determined that she was not a mere secretary and bookkeeper and did not have the managerial authority over the trust property, which the evidence discloses, the law still subjects the gain she took from the beneficiary to the same presumptions of insufficient consideration and undue influence as applied to R. N. Philpot. Mosser v. Darrow, 341 U.S. 267, 71 S.Ct. 680, 95 L.Ed. 927. The above finding alone would be sufficient to sustain the decision in this case. Bradner v. Vasquez, 43 Cal.2d 147, 272 P.2d 11; and the many cases cited therein. There is also a finding of misrepresentation and concealment by appellants with reference to the state of Harry's business affairs and the concealment from him of the value of his property, which is supported by the evidence in the case. Section 2228 of the Civil Code provides that:

> "In all matters connected with his trust, a trustee is bound to act in the highest good faith toward his beneficiary, and may not obtain any advantage therein over the latter by the slightest misrepresentation, concealment, threat, or adverse pressure of any kind."

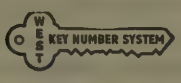
[5] Appellants complain that J. Robert Philpot is burdened with a judgment in a larger sum than appellants R. N. Philpot and Hilda Kirtlan. The evidence in the report of the referee, together with addendum number 1 to the referee's report, makes this clear. J. Robert Philpot participated with R. N. Philpot and Hilda Kirtlan in receiving and appropriating the rents from the property, commencing with the month of January, 1950. In addition, J. Robert Philpot exclusively took the parking lot receipts. On the other hand, the trial court awarded an offset to Hilda Kirtlan and R. N. Philpot for the years of property management of 1400 I Street, and the other property of Harry Stauffer. J. Robert Philpot did not participate in this property management other than as to said deposits of Harry Stauffer's money in his accounts occurring prior to December of 1949. He did not have a direct connection with the affairs of Harry Stauffer until his participation in obtaining the deed of December 21, 1949 and the $45,000 loan that was made at the same time. Consequently, he did not enjoy the offset for services that his co-appellants did. Ac-

cordingly, the trial court recognized and satisfied the $23,000 note and lien Ida Stauffer had given to R. N. Philpot in 1942. This gave R. N. Philpot an offset against his personal liability on the accounting of some $35,000 as of December 29, 1949, when he misappropriated the $24,729.96 in cash. The several liabilities of the other defendants are set forth in the report of the referee, addendum number 2. The accuracy of the account was stipulated to by the parties.

We conclude that the findings and the judgment are fully supported by the evidence in this case.

The judgment is affirmed.

SCHOTTKY and PEEK, JJ., concur.



Ruth M. HILTON, Plaintiff and Respondent,

v.

Rollin L. McNITT, as Executor of the Estate of Hal H. Hilton, Deceased,

Defendant and Appellant.

Ruth M. HILTON, Plaintiff and Appellant,

v.

Rollin L. McNITT, as Executor of the Estate of Hal H. Hilton, Deceased, Defendant and Respondent.*

Civ. 21938.

District Court of Appeal, Second District, Division 1, California.

Feb. 6, 1957.

Hearing Granted April 5, 1957.

Proceedings by ex-wife for allowance of her claim against ex-husband's estate based on a property settlement agreement by the terms of which ex-husband agreed to pay ex-wife for her support and maintenance the sum of $300 per month for a certain length of time. The Superior Court, Los Angeles County, Philbrick McCoy, J., entered judgment allowing ex-wife's claim and she appealed from that part of judgment which failed to provide for interest on the sums awarded her and executor appealed from the judgment in its entirety. The District Court of Appeal, White, P. J., held that although the periodic payments were labeled "for support and maintenance" both in agreement and in interlocutory decree, the provision for them was integral part of the property settlement agreement and an inseverable part of the settlement and, therefore, obligation to pay was not terminated by ex-husband's death prior to expiration of the period for which he had agreed to make the payments.

Judgment affirmed.

1. Divorce ⇐247

Amendment to statute providing that except as otherwise agreed by parties in writing, obligation of any party in any decree, judgment or order for support and maintenance of other party shall terminate upon death of obligor or upon remarriage of other party, is not applicable to contracts fairly and equitably made between parties. West's Ann.Civ.Code, §§ 139, 158.

2. Husband and Wife ⇐279(1, 4)

Where husband agrees to make periodic payments to a divorced wife, such obligation is not terminated by his death or by remarriage of wife where such obligation is an integral and inseverable part of property settlement agreement or where the parties have agreed otherwise in writing.

3. Husband and Wife ⇐279(4)

Where husband and wife had entered into a property settlement agreement providing for the payment of $300 per month to wife for a certain designated period of time, although periodic payments were labeled "for support and maintenance" both in agreement and in interlocutory decree, provision for them was an integral part

* Opinion vacated 315 P.2d 1.

of a property settlement agreement and therefore did not terminate upon husband's death prior to the expiration of the period for which the payments were to be made.

4. Husband and Wife ⇐279(1)

The labels adopted by parties in a separation agreement are not conclusive, since agreement must be considered as a whole.

5. Husband and Wife ⇐279(1)

Fact that husband and wife had designated periodic payments of money to wife in a property settlement agreement as "support and maintenance" did not mean that payments had to be deemed as alimony.

6. Divorce ⇐247

Where husband and wife had entered into a property settlement providing that husband was to pay wife $300 per month for a certain specified time, fact that interlocutory judgment made no reference to the property settlement and provided for the same amount of payments did not mean that payments of husband must be considered as solely alimony which would terminate upon his death.

7. Executors and Administrators ⇐221(9)

In proceedings by ex-wife against ex-husband's estate on a claim based on property agreement which provided ex-husband was to pay wife $300 per month for a specified period of time, findings that obligation of husband to make periodic payments for wife's support and maintenance was an integral and inseverable part of the property settlement was justified by the evidence. West's Ann.Civ. Code, § 139.

8. Executors and Administrators ⇐267

A claim against a decedent's estate, whether allowed by the personal representative or established by judgment of court after rejection, bears interest at the legal rate only from date of order for payment. West's Ann.Prob.Code, § 713.

9. Executors and Administrators ⇐267

Where determination had been made that ex-husband's estate was liable for ex-wife's claim based on a property settlement agreement, but claim was not based upon a contract for the payment of interest, claim would bear interest at the statutory rate only after judgment rendered directing executor to pay claim. West's Ann.Prob.Code, § 713.

10. Executors and Administrators ⇐267

Until an order of the court is made directing executor or administrator to pay a claim, claim is simply an acknowledged debt of the estate, bearing interest at the contract rate.

11. Executors and Administrators ⇐257

Where trial court had allowed ex-wife's claim against deceased ex-husband's estate based on property settlement and ex-wife appealed from that part of judgment denying statutory rate of interest on sums awarded and executor appealed from entire judgment, each party would be required to bear his respective appeal costs, in interests of justice. West's Ann.Rules on Appeal, rule 26(a).

Glenn R. Watson and Robert G. Beverly, Los Angeles, for plaintiff and respondent-appellant.

Edythe Jacobs, Los Angeles, for defendant and appellant-respondent, Rollin L. McNitt.

WHITE, Presiding Justice.

Ruth M. Hilton, the above-named plaintiff has appealed from a judgment of the trial court allowing and establishing her claim against the estate of Hal H. Hilton, deceased, but only insofar as such judgment failed to provide for interest on the sums awarded her.

Defendant executor has also appealed from the judgment in its entirety. In the interest of clarity, the parties will be referred to herein as plaintiff and defendant.

As to the factual background surrounding this litigation, the record reflects that on or about July 25, 1953 decedent and plaintiff, then being husband and wife, entered into a property settlement agreement, by

the terms of which decedent agreed, among other things, to pay to plaintiff "for her support and maintenance" the sum of $300 per month, on the first day of each month, commencing August 1, 1953, and continuing to and including July 1, 1956.

On August 21, 1953 plaintiff was granted an interlocutory judgment of divorce under the terms of which decedent was ordered to pay to plaintiff "$300.00 per month commencing October 1st, 1953, and on the 1st day of each month thereafter until the 1st day of July, 1956," and in addition to pay attorney's fees and costs and to pay off an insurance policy loan. The property settlement agreement was neither approved nor referred to in the interlocutory judgment of divorce.

On or about July 25, 1954, Hal H. Hilton died and defendant Rollin L. McNitt was appointed as executor of his estate on August 19, 1954.

On or about September 18, 1954, plaintiff, Ruth M. Hilton, married James R. Tracy.

On July 25, 1953, the date of the property settlement agreement, decedent and plaintiff entered into a stipulation re alimony, attorneys' fees, court costs, title and possession of property in the divorce action, stipulating that decedent shall pay plaintiff, among other sums, "the sum of $300.00 per month, commencing August 1, 1953, and continuing thereafter on each and every month, on the first day of such month, until the first day of July, 1956".

With reference to the aforesaid property settlement agreement, the trial court in the action now before us found, "* * * that said agreement compromised and settled the community property rights of the parties, which rights and the extent of the community property were in dispute; that the parties to said contract intended said provision for $300 per month to be and the same was an indivisible part of said property settlement agreement; that said contract was and is an inseverable and integrated property settlement agreement." The court also found that "decedent was ordered to pay to plaintiff the sum of $300.00 for a period of three years, pursuant to written stipulation, in an interlocutory order upon an order to show cause in a divorce action pending between plaintiff and said decedent, being action No. D 454,737 and that the installments remaining unpaid at the time of the interlocutory judgment in said action were ordered to be paid pursuant to the terms of said interlocutory judgment."

Plaintiff presented to defendant executor a creditor's claim against decedent's estate for $7,500 plus interest, claiming payments of $300 per month, commencing July 1, 1954, and twenty-four consecutive months thereafter, to and including July 1, 1956, under both the terms of the property settlement agreement and the interlocutory judgment of divorce, attached as Exhibits "A" and "B", respectively, to the creditor's claim. Defendant executor gave written notice of approval of the claim to the extent of $300 for support and maintenance of plaintiff due July 1, 1954 (prior to decedent's death) and rejected the balance of the claim accruing subsequent to decedent's death, as a claim based upon support and maintenance of the former wife of decedent which terminated with his death.

Plaintiff filed suit against defendant executor to establish the whole claim against the estate of decedent in the sum of $7,500 plus interest and seeking declaratory relief.

In his answer defendant executor asserted that the property settlement agreement expressly provides that the payments are "for support and maintenance," that the obligation to make such payments was made the basis of an interlocutory order on an order to show cause in the divorce action and in the interlocutory judgment of divorce, and that such obligation for support and maintenance terminated on the death of the husband, Hal H. Hilton and also on the remarriage of the plaintiff wife.

In addition to the express provision for monthly payments of $300 "for support and maintenance" of the wife, the property

settlement agreement contains other provisions with reference to separate and community properties of the parties. It contains no provision for termination of the monthly support payments on death of the husband or remarriage of the wife.

Neither the interlocutory order for payment of similar monthly payments, pursuant to contemporaneous stipulation in the divorce action, dated the same day as the property settlement agreement nor the interlocutory judgment of divorce approves or makes reference to the property settlement agreement.

The trial court concluded that the property settlement agreement "is an inseverable and integrated property settlement agreement" and that the obligation for the monthly payments thereunder and under the interlocutory judgment of divorce "was not terminated by the death of the decedent or by the remarriage of the plaintiff."

The complaint tendered two causes of action, the first of which was based on the provisions of the property settlement agreement and the aforesaid interlocutory decree of divorce. The second cause of action was for declaratory relief. The trial court concluded that declaratory relief was not necessary or appropriate since "all issues between the parties can be determined under the first cause of action".

By its judgment the court allowed and established the claim of plaintiff against the estate of decedent in the sum of $7,500, the total of monthly payments unpaid, but did not allow any interest on such claim against decedent's estate.

Turning our attention first to the appeal of defendant executor from the whole of the aforesaid judgment, it is urged by him that unless property settlement agreements executed subsequent to the 1951 amendment to Section 139 of the Civil Code provide to the contrary, payments for support terminate on death of the obligor or remarriage of the other party whether such payments are severable or included in an inseverable integrated agreement, as the provisions of the 1951 amendment are by implication included in the agreement for such payments.

Prior to the 1951 amendment to Section 139 of the Civil Code, there was contained therein a provision that the obligation of a husband to support his wife terminates upon the remarriage of the latter. In 1951, Section 139 was amended to provide, in part, that "Except as otherwise agreed by the parties in writing, the obligation of any party in any decree, judgment or order for the support and maintenance of the other party shall terminate upon the death of the obligor or upon the remarriage of the other party."

[1] At the outset, it should be noted that the 1951 amendment to Civil Code, Section 139, by its very language restricts the application of such section to any "decree, judgment or order" and provides that the obligation of support contained in such a judicial adjudication terminates on the death of the husband or the wife's remarriage, unless otherwise agreed by the parties in writing. We are loath to believe that by its language terminating the obligation of support contained in a court order, the legislature intended that such termination of support obligations should apply to contracts fairly and equitably made between the parties, without taint of fraud or oppression. Such a forced construction would not only amount to judicial legislation under the guise of construction, but would completely ignore the provisions of Civil Code, Section 158, which expressly provide that a husband and wife may contract with respect to their property.

Appellant's contention that we must regard the provisions of Section 139 of the Civil Code as it read at the time of the execution of the agreement here in question, as written into the contract, and that strong public policy demands that support be terminated upon death of the husband or remarriage of the wife was rejected by the court in the case of Taliaferro v. Taliaferro, 125 Cal.App.2d 419, 424, 270 P.2d 1036, 1040, wherein it was said: "Sec. 139 places no limitations upon the rights of husband and

wife to contract with each other as they please, and if the husband for adequate consideration contracts to give support beyond that for which he is strictly obligated, he has the right to thus freely contract with his wife. This is not being imposed upon him by the power of the court, but is something which he undertakes voluntarily, and in the present case, with advice of counsel."

[2] It is now the established law of this state that where the husband agrees to make periodic payments to a divorced wife, such obligation is not terminated by his death or by the remarriage of the wife where such obligation is an integral and inseverable part of a property settlement agreement or where the parties have agreed otherwise in writing. Taliaferro v. Taliaferro, supra, 125 Cal.App.2d at page 424, 270 P.2d 1036; Rosson v. Crellin, 90 Cal. App.2d 753, 756, 203 P.2d 841; Lane v. Bradley, 124 Cal.App.2d 661, 665, 268 P.2d 1092; Harnden v. Harnden, 102 Cal.App.2d 209, 210, 227 P.2d 51; Landres v. Rosasco, 62 Cal.App.2d 99, 106, 144 P.2d 20. In other words, where the support provision is integrated with provisions for division of property, it would be unfair to hold that such payments were terminated on the death of the husband or remarriage of the wife merely because it was not expressly stated to the contrary.

[3] In the action now engaging our attention the court specifically found that the property settlement agreement of July 25, 1953 "compromised and settled the community property rights of the parties, which rights and the extent of the community property were in dispute," that the provision for payment of $300 per month was intended "to be and the same was an indivisible part of said property settlement agreement" and that "said contract was and is an inseverable and integrated property settlement agreement." Conversely, the court also found that such payments were not made as "support and maintenance payments, rather than as installments in settlement of the parties marital property rights."

In the opening paragraph of the property settlement agreement now before us the parties agreed that they "desire to effect a final and complete settlement of their property rights." Paragraphs X and XI provide for a waiver and release by each of all claimes against the other arising out of the marriage, including any claim for support and maintenance, "except as herein provided."

Reference to the property settlement agreement clearly indicates to us that the parties thereto were attempting to effect a complete adjustment of their property and the benefits thereof were to be accepted in full satisfaction of support, maintenance or alimony. From an examination of the agreement herein we are satisfied that, although the periodic payments were labeled "for support and maintenance" both in the agreement and concededly in the interlocutory decree, the provision for them was an integral part of a property settlement agreement and it would be contrary to the clearly expressed intention of the parties to hold that the provision for monthly payment for a specified time constituted a separable agreement for the payment of alimony, maintenance or support. What we have herein enunciated finds support in the cases of Dexter v. Dexter, 42 Cal.2d 36, 41, 42, 265 P.2d 873; Fox v. Fox, 42 Cal.2d 49, 52, 53, 265 P.2d 881; Taliaferro v. Taliaferro, supra; Lane v. Bradley, supra; Harnden v. Harnden, supra; Rosson v. Crellin, supra; Landres v. Rosasco, supra.

[4, 5] Defendant's contention that the payments here under consideration must be deemed to be alimony because designated as being for "support and maintenance" in the property settlement agreement and in a document filed by the parties in the divorce proceeding entitled "Stipulation in Re Alimony, etc." is unavailing for the reason stated in Fox v. Fox, supra, 42 Cal. 2d at page 53, 265 P.2d at page 883, "The labels adopted by the parties are not con-

clusive, since the agreement must be considered as a whole."

[6, 7] Equally unavailing is defendant executor's contention that because the interlocutory judgment made no reference to the property settlement agreement that the payments of the husband must be considered as solely alimony and that such obligation terminated with his death. It is manifest from the record that the provisions for payments by the husband in the interlocutory judgment of divorce were adopted from and based upon the agreement of the parties. The provision for payment to the wife of $300 per month on the first day of each month until July 1, 1956, is the same in the decree and in the agreement except for the date upon which payments were to commence. In the agreement, executed July 25, 1953, such payments were to begin on August 1, 1953. In the judgment such payments are ordered to commence on October 1, 1953, a time subsequent to the date the decree was granted on August 21, 1953. Obviously, it was only proper for the decree to order payments to start in the future. We therefore conclude that the trial court was justified by substantial evidence in finding that the obligation of the husband to make periodic payments to his divorced wife for her support and maintenance was an integral and inseparable part of the property settlement agreement here in question, does not come within the purview of the limitations imposed by Civil Code, Section 139, and was not therefore terminated by the death of the husband or plaintiff's remarriage.

We now come to a consideration of the appeal of plaintiff Ruth M. Hilton from that portion of the judgment which failed to provide for interest on the sums due her thereunder.

It is plaintiff's contention that where a rejected creditor's claim has been subsequently adjudged to be valid, interest is properly allowable from the date of the presentation of the claim.

[8] Defendant executor on the contrary asserts that a claim against a decedent's estate, whether allowed by the personal representative or established by judgment of the court after rejection, bears interest at the legal rate only from date of order for payment.

We are in accord with the contention of defendant executor. While it is true that some of the earlier cases relied upon by plaintiff hold that she would be entitled to interest from the time of presentation of her demand to defendant executor, Pico v. Stevens, 18 Cal. 376, 378; In re Kennedy's Estate, 94 Cal. 22, 23, 29 P. 412; White v. Deering, 38 Cal.App. 516, 518, 179 P. 401, we are convinced that the cited cases do not furnish authority for her contention in view of statutory changes in the Probate Code with reference to the prior prevailing rule allowing interest on claims against decedents' estate.

[9, 10] In the case of Estate of Girard, 110 Cal.App.2d 203, 204–206, 242 P.2d 669, 670, the court reviews some of the earlier cases in which it was held that an "allowed claim" bears interest "from the date of the allowance", and calls attention to the fact that since the amendment of Section 713 of the Probate Code, such allowed claim is subject to contest by any person in interest and therefore, concludes that an allowed claim does not bear interest from the date of allowance. That until an order of court is made directing the executor or administrator to pay a claim, it is simply an acknowledged debt of the estate, bearing interest at the contract rate. In the instant case, where the claim is not based upon a contract for the payment of interest, we are satisfied that it is only after the judgment was rendered herein directing defendant executor to pay plaintiff's claim, that such claim would bear interest at the statutory rate.

[11] The judgment is affirmed. In the interests of justice it is ordered that each party bear his respective costs on appeal. Rule 26(a), Rules on Appeal.

DORAN and FOURT, JJ., concur.

148 Cal.App.2d 205

The YOUNGSTOWN STEEL PRODUCTS COMPANY OF CALIFORNIA, a California corporation, Plaintiff and Respondent,

v.

The STATE BOARD OF EQUALIZATION of the State of California et al., Defendants and Appellants.

Civ. 21847.

District Court of Appeal, Second District, Division 3, California.

Feb. 1, 1957.

Action by corporation against State Board of Equalization to recover sales taxes paid under protest. From a judgment of Superior Court, Los Angeles County, Lloyd S. Nix, J., awarding refund, Board appealed. The District Court of Appeal, Shinn, P. J., held that return of pipe within 90 days from date of sale and agreements to give credit to purchaser accomplished rescission of the purchase agreement within provisions of the statute exempting from sales tax amounts charged for property returned by customers upon recission of sale, even though the corporation formally cancelled the orders and entered the credits to the purchaser after the expiration of the 90-day period.

Judgment affirmed.

1. Sales ⇐92

An agreement between seller and buyer to credit the purchase price upon return of property purchased is a "refund" and accomplishes rescission even though credit is not entered on seller's records until at a later time.

See publication Words and Phrases, for other judicial constructions and definitions of "Refund".

2. Licenses ⇐19(3)

Where seller and buyer understood that credit would be given for pipe returned, return of the pipe and the agreement to give credit accomplished "rescission" of the purchase agreement within statute exempting from sales tax amounts charged for property returned by customers upon rescission of contract of sale when sale price was refunded in cash or credit and when property was returned within 90 days from date of purchase, even though cancellation of orders and credits were not formally entered on seller's records within the 90-day period. West's Ann.Rev. & Tax.Code, §§ 6011, par. 3(b), 6012, par. 3(b).

See publication Words and Phrases, for other judicial constructions and definitions of "Rescission".

3. Statutes ⇐230

Where statutory amendment only provided a better means of accomplishing purpose of earlier statute, it was proper for court to consider later statutory amendment as illustrative of the scope of the prior statute.

4. Licenses ⇐19(3)

Where court had found that seller had accepted return of pipe from buyer, later cancelled the orders and gave buyer credit for purchase price, rescission of the purchase agreements was sufficiently accomplished within statute exempting from sales tax amounts charged for property returned by customers upon rescission of contract of sale and another finding that there was a rescission would have been redundant, in seller's action to recover sales taxes paid under protest. West's Ann.Rev. & Tax.Code, §§ 6011, par. 3(b), 6012, par. 3(b).

Edmund G. Brown, Atty. Gen., James E. Sabine, Asst. Atty. Gen., Dan Kaufmann, James C. Maupin, Deputy Attys. Gen., for appellants.

Chandler, Wright, Tyler & Ward, Los Angeles, for respondent.

SHINN, Presiding Justice.

Defendant appeals from a judgment awarding plaintiff a refund of $2,698.16 in an action to recover sales taxes paid under protest. Trial was to the court. The sole question presented on this appeal is whether, under the provisions of sections 6011, paragraph 3(b) and 6012, paragraph 3(b) of the Revenue and Taxation Code, as they read prior to their amendment in 1953, plaintiff

was obligated to pay a sales tax upon certain sales of steel pipe where the pipe was returned to plaintiff within 90 days after the respective sales but the sales were noted as cancelled and refunds were made at later dates.

Plaintiff, a California corporation, is a wholly owned subsidiary of the Youngstown Sheet and Tube Company which produces steel pipe at its mills in Ohio and Illinois. Plaintiff maintains a yard for the storage of pipe at Wilmington, California. Upon receipt of pipe from the mills, it is unloaded and stored according to size in a series of numbered racks on the yard and a record of where the pipe is stored is kept at the yard office. When pipe is invoiced to a customer, plaintiff's records are adjusted to show ownership of the pipe in the customer's name. This is accomplished by transferring the inventory information from a stock card and putting it on the customer's card.

The facts of the case are not in dispute. The transactions in question were twenty-nine separate sales of pipe between April 1, 1948 and March 31, 1951. The gross receipts from these sales totaled $86,173.74. Approximately one-half of this amount was represented by nine separate sales in which pipe was invoiced by the parent company at Youngstown, Ohio, and shipped to California either directly to the purchaser or to plaintiff's storage yard to await the purchaser's instructions. The remainder of the $86,173 in gross receipts was represented by twenty separate transactions in which pipe stored at the Wilmington yard was sold for future delivery to the purchasers. The full purchase price, including the sales tax, was paid by each purchaser within ten days of the invoice date and the sales tax was reported and paid by plaintiff with its next quarterly return.

All the pipe in question was returned to plaintiff within 90 days after the respective sales dates. The court so found and the finding is not questioned by appellant. However, the respective sales were not formally cancelled and credits to the accounts of the purchasers were not entered until some months later. Plaintiff stored all pipe not delivered and all pipe physically returned at the yard without segregating it from other pipe stored there. Plaintiff subsequently sold the pipe to other purchasers and reported and paid a sales tax on each of the resales. However, plaintiff took credit for the undelivered pipe on previous sales in its returns for the quarterly periods in which credits were entered for the cancelled orders. In 1951 defendant ordered a field audit of plaintiff's records and filed a notice of determination in which it claimed that a sales tax was due on the twenty-nine rescinded transactions. Plaintiff's petition for redetermination was denied as to those sales and plaintiff paid the sales tax under protest. Plaintiff's claim for refund was likewise denied by the Board.

Prior to the amendment of section 6011 (b) of the Revenue and Taxation Code in 1953, there was excluded from the sales price: "The amount charged for property returned by customers upon rescission of the contract of sale when the entire amount charged therefor is refunded either in cash or credit, and when the property is returned within 90 days from the date of purchase." Prior to the amendment of section 6012(b) in 1953,[1] there was excluded

1. In 1953, the Legislature amended those sections to read as follows:
"§ 6011. * * *
"'Sales price' does not include any of the following:
* * * * * * *
"(b) The amount charged for property returned by customers when that entire amount is refunded either in cash or credit, but this exclusion shall not apply in any instance when the customer, in order to obtain the refund, is required to purchase other property at a price greater than the amount charged for the property that is returned."
"§ 6012. * * *
"'Gross receipts' do not include any of the following:
* * * * * * *
"(b) Sale price of property returned by customers when the full sale price is refunded either in cash or credit, but this exclusion shall not apply in any in-

from the "gross receipts": "Sale price of property returned by customers upon rescission of the contract of sale when the full sale price is refunded either in cash or credit, and when the property is returned within 90 days from the date of sale." The words "and when the property is returned within 90 days from the date of purchase [sale]" had been added to those sections in 1945.

The court concluded that under the language of sections 6011(b) and 6012(b), as they read prior to 1953, as applied to the facts that the pipe had been returned to plaintiff within the several 90-day periods and the purchase prices had been refunded, plaintiff was entitled to a refund of the tax it had paid on the rescinded transactions.

The Board contends that the court's construction of sections 6011(b) and 6012(b) is erroneous. In this connection, defendant argues that the return of the property must be pursuant to a rescission, the rescission must be contemporaneous with the return of the property, and both must occur within 90 days of the original sale. Defendant's reasoning is predicated upon the clause "property returned by customers upon rescission of the contract of sale." The word "upon" is defined as "with little or no interval after." Hence, defendant argues, the sections must be taken to exclude only the sales price or the amount charged for "property returned by customers with little or no interval after rescission of the contract of sale," etc.

[1, 2] Under the literal construction of sections 6011 and 6012 insisted upon by appellant, it would seem that in order to become entitled to a credit the buyer would not only have to return the property within 90 days but would have to be given a refund within that time. But an agreement to credit the purchase price is a refund, and, as we shall point out, accomplishes a rescission even though credit is entered later. Appellant's tax counsel twice ruled that under the 1945 amendment a deduction was allowable if the property was returned within 90 days, even though credit was given at some later date. See C.C.H. State Tax Reporter, California, Volume 2, paragraphs 60–356.052 and 60–356.054.

Under the law in effect at the times of the transactions in question three things were necessary to avoid liability for a tax on sales where the buyer returned the property, (1) rescission of the sale, (2) refund of the purchase price in cash or by credit, and (3) return of the property within 90 days. In ascertaining the significance of the addition in 1945 of the phrase "and when the property is returned within 90 days from the date of sale," we turn to appropriate sources of information as to the purpose the legislation was intended to accomplish. In September 1943 sales tax ruling No. 50 read in part: "If there has been a substantial use of the property and the credit is pursuant to an agreement that the full selling price would be allowed on the purchase of property of substantially greater value, * * * it will be presumed that the contract of sale was not rescinded and the property was traded in; * * *." Appellant proposed to substitute for the above the following: "The tax does not apply when: (1) The customer returns the property and the sale is rescinded under the terms of the agreement as in the case of a sale 'on trial,' 'on satisfaction,' 'on sale or return' or similar terms or pursuant to the election of the customer as in the case of a breach of warranty, and (2) The full sale price, including that portion designated to be on account of 'sales tax,' is refunded or credited to the customer." The Attorney General approved the change, stating in part "The contract of sale is rescinded when the customer exercises his option to return the property (citations). The full sale price is refunded in credit. Thus we have a situation in which there is refunded in credit the full sale price of property returned by customers upon rescission of the

stance when the customer, in order to obtain the refund, is required to purchase other property at a price greater than the amount charged for the property that is returned."

contract of sale and this satisfies the requirement of the statute." But there still remained the problem arising from the practice of requiring the buyer upon the return of used property for credit to purchase other property of substantially greater value. Under rule 50, before revision, it was presumed that in such cases the contract of sale had not been rescinded but that the property was merely traded in. The rule as amended did not bar exemption from taxation in case of trade-ins nor did it provide a method for distinguishing between trade-ins and rescissions.

It was clearly the purpose in the enactment of the 1945 amendment to provide a test by which the bona fides of the parties in the return of property would be measured. Accordingly, 90 days was fixed as the time within which a buyer might return the property and obtain full credit even though it had been substantially used. The result was that if the property was returned within that time it could be deemed a rescission but if it was returned later it would be deemed merely a trade-in. However, the 1945 amendment was not effectual to eliminate the practice under which a buyer, in order to obtain full credit, would have to buy property of greater value. Even though the property was returned within 90 days it might still have been a trade-in and not a bona fide rescission. The clear purpose of the 1953 amendment which eliminated the 90-day provision and added "but this exclusion shall not apply in any instance when the customer, in order to obtain the refund, is required to purchase other property at a price greater than the amount charged for the property that is returned," was to provide a better test for determining whether a given transaction was a bona fide rescission or merely a trade-in.

[3] The amendment only provided a better means for accomplishing the purpose of the 90-day provision, and since both had a single purpose, it is proper to consider the later legislative act as illustrative of the scope of the earlier one. Martin v. California Mut. B. & L. Ass'n, 18 Cal.2d 478, 484, 116 P.2d 71; Standard Oil Co. of California v. Johnson, 24 Cal.2d 40, 48, 147 P.2d 577.

Return of the pipe within 90 days and allowance of full credit, without further condition, was as effectual under the law in force at the time of the transactions as it would have been had they occurred after the law was amended.

[4] The arguments of appellant are untenable for another reason. In view of the court's findings of particular facts the word "rescission" loses its significance. It means that each party returns or agrees to return what he received in the transaction. The word as used in the statute serves a purpose. It excludes all transactions in which the original sale is treated as binding upon the parties. The 1953 amendment made it certain that "trade-ins" on larger purchases could not be claimed to be rescissions.

The findings that the purchasers of the pipe in question returned it and that plaintiff accepted it and later cancelled the sales and gave credit for the purchase prices imply there were at the times the pipe was returned mutual releases from the sales agreements. Appellant does not question that the findings should be so construed. If the parties understood that credit would be given for the pipe that was returned, rescission of the purchases was thereby sufficiently accomplished and another finding that there was a rescission would have been redundant.

The court found that plaintiff cancelled the orders and entered the credits after the expiration of the respective 90-day periods. But the purchasers became entitled to credit when they returned the pipe; and if any of them had changed their minds, and found they had use for the pipe, it would have been necessary for them to make new purchase agreements, which, of course, would have been taxable. The fact that none of them who had returned pipe within 90 days discovered any need for it was convincing evidence that the purchase agreements had been rescinded by return of the pipe and the agreements to give credit.

The findings, when interpreted fairly and in a manner consistent with the conclusions and judgment, clearly establish plaintiff's claim to the refund, the amount of which is not in question.

The judgment is affirmed.

PARKER WOOD and VALLÉE, JJ., concur.



148 Cal.App.2d 372

Vera A. NEW, Plaintiff and Appellant,
v.
Robert NEW, Defendant and Respondent.
Civ. 20679.

District Court of Appeal, Second District, Division 2, California.
Feb. 8, 1957.
Rehearing Denied March 4, 1957.
Hearing Denied April 9, 1957.

Divorced wife brought action against divorced husband, who under property settlement agreement embodied in divorce decree was required to pay her 25% of sums received by him from two corporations which he and business associate controlled, to recover under the corporate opportunity doctrine, on ground that divorced husband wrongfully appropriated to himself a corporate opportunity belonging to corporations when he and business associate organized certain companies to drill oil wells. The Superior Court of Los Angeles County, John J. Ford, J., entered judgment adverse to the divorced wife, and she appealed. The District Court of Appeal, Ashburn, J., held that evidence sustained finding that venture of companies in drilling oil wells was not a corporate opportunity which corporations could have grasped and pursued.

Judgment affirmed.

1. Mines and Minerals ⇐47

Corporation, which entered into a drilling and operating agreement with the Los Angeles Flood Control District for purpose of producing oil from wells drilled in west bank of flood control channel in the City of Long Beach, could not slant drill under neighboring property or bottom any well therein.

2. Husband and Wife ⇐25(1)

Property settlement agreement, which was carried into divorce decree, and which awarded stock in corporations to divorced husband as his separate property, and which contained a covenant by divorced husband to pay divorced wife 25% of sum received by him directly or indirectly from the corporations, their successors, subsidiaries, or assigns, did not make the divorced husband an agent for the divorced wife in the management of the stock awarded to divorced husband. West's Ann.Civ.Code, § 2295.

3. Principal and Agent ⇐3(5)

One cannot be an agent and a trustee at the same time, with respect to the same subject matter. West's Ann.Civ.Code, § 2295.

4. Principal and Agent ⇐132(1)

An agent acts for his principal in a representative capacity so that the principal, rather than the agent, is ordinarily bound by a contract entered into by the agent on behalf of the principal. West's Ann.Civ.Code, § 2295.

5. Trusts ⇐173

A trustee represents only the trust estate, and not the beneficiary, so that he is ordinarily bound as principal.

6. Liens ⇐7

An equitable lien does not create or embrace a trust.

7. Liens ⇐7

An equitable lien is not cognizable until it has been declared by court, whereupon it relates back to the acts giving rise to the equity.

8. Contracts ⇐168

In every contract there is an implied covenant that neither party will do anything which will have the effect of destroying or injuring the right of the other party to receive the fruits of the contract, which means that in every contract there exists an implied covenant of good faith and fair dealing.

9. Trusts ⇐25(1)

Property settlement agreement, which was carried into divorce decree, and which awarded stock in corporations to divorced husband as his separate property, and which contained a covenent by divorced husband to pay divorced wife 25% of sum received by him directly or indirectly from the corporations, their successors, subsidiaries, or assigns, did not make the divorced husband a trustee for the benefit of the divorced wife in his management of his solely owned stock, notwithstanding provision of settlement agreement that neither party would do anything to deprive the other of the fruits and benefits thereof, since such provision did not create a fiduciary relationship.

10. Appeal and Error ⇐931(1)

A reviewing court must accept as established all facts and all inferences which are favorable to respondent, and which find substantial support in the evidence.

11. Appeal and Error ⇐1010(2)

Where an appellant urges the insufficiency of the evidence to sustain the findings, appellant must demonstrate that there is no substantial evidence to support the challenged findings.

12. Appeal and Error ⇐989, 996

When a verdict is attacked as being unsupported, power of reviewing court begins and ends with a determination as to whether there is any substantial evidence, contradicted or uncontradicted, which will support jury's conclusion, and when two or more inferences can be reasonably deduced from the facts, reviewing court is without power to substitute its deductions for those of the trial court.

13. Appeal and Error ⇐999(1), 1008(1)

Though a reviewing court will not uphold a judgment or verdict based on evidence inherently improbable, testimony, which merely discloses unusual circumstances, does not come within that category.

14. Appeal and Error ⇐994(3)

To warrant rejection by reviewing court of statements given by a witness, who has been believed by a trial court, there must exist either a physical impossibility that they are true, or their falsity must be apparent without resorting to inferences or deductions.

15. Appeal and Error ⇐994(3), 1011(1)

Conflicts and even testimony, which is subject to justifiable suspicion, do not justify reversal of a judgment, since it is the exclusive province of the trial judge or jury to determine the credibility of a witness and the truth or falsity of the facts on which a determination depends.

16. Appeal and Error ⇐996

If conflicting inferences may reasonably be drawn from the evidence, even if it is uncontradicted or all facts are admitted, which inference shall be drawn is a question for the trier of facts, and decision of trier of the facts cannot be set aside by the reviewing court.

17. Appeal and Error ⇐1008(1)

Only where there is no conflict in the evidence and no conflicting inferences can be drawn therefrom does the finding of the trial court amount to a conclusion of law and is the finding not binding on reviewing court.

18. Corporations ⇐315

Under the "corporate opportunity doctrine", generally a corporate officer or director may not seize for himself to the detriment of his corporation business opportunities in corporation's line of activities, which corporation has an interest and prior claim to obtain, and if he seizes them in violation of his fiduciary duty, corporation may claim for itself all benefits so obtained by him, but the doctrine does

not exclude him from all business activities of his own in field in which he works for corporation.

See publication Words and Phrases, for other judicial constructions and definitions of "Corporate Opportunity Doctrine".

19. Corporations ⇐315

Directors or officers of a growing, solvent corporation cannot engage in a competing business to detriment of corporation which they represent.

20. Mines and Minerals ⇐73

Where agreement between Los Angeles Flood Control District and corporations, amounting in legal effect to a lease, conferred on corporations exclusive right to drill for, produce, extract, and remove oil in and from west bank of flood control channel in the City of Long Beach together with exclusive right to enter on such lands for such purposes and to place thereon and therein all structures required in carrying on operations, and reserving to district right to occupy lands, and to use, and to permit the use of lands for purposes for which district was organized, other than production of oil, gas, and other hydrocarbon substances, agreement conferred on corporations exclusive use of surface so far as producing oil from premises was concerned.

21. Corporations ⇐315

Power to negate enjoyment of a business opportunity by a third party, who is a stranger, does not constitute the kind of an expectancy which lies at the basis of the corporate opportunity doctrine.

22. Appeal and Error ⇐931(3)

Implicit in trial court's findings were any subsidiary findings which might be necessary to support them.

23. Appeal and Error ⇐1011(1)

Where there was a substantial conflict in the proofs, District Court of Appeal on appeal was precluded from weighing the facts.

24. Mines and Minerals ⇐104

In action by divorced wife against divorced husband, who under property settlement agreement embodied in divorce decree was required to pay 25% of sum received by him from two corporations which he and business associate controlled, to recover under the corporate opportunity doctrine, on ground that he wrongfully appropriated to himself a corporate opportunity belonging to corporations when he and business associate organized certain companies to drill oil wells, evidence sustained trial court's finding that venture of the companies, which drilled the oil wells, was not a corporate opportunity which corporations could have grasped and pursued.

25. Corporations ⇐315

A recovery on corporate opportunity doctrine must proceed solely on basis of a breach of a fiduciary duty, and where no such relationship exists, there is no room for application of the doctrine.

26. Corporations ⇐320(1)

Right of recovery under the corporate opportunity doctrine resides in the corporation and not in its individual stockholders, and they can enforce faithless trustee to disgorge his profits only through a derivative suit wherein they assert the corporate right.

27. Corporations ⇐320(4)

Where property settlement agreement, which was carried into divorce decree, awarded stock in corporations to divorced husband as his separate property and contained a covenant by divorced husband to pay divorced wife 25% of sums received by him directly or indirectly from the corporations, their successors, subsidiaries, or assigns, and divorced husband allegedly appropriated to himself a corporate opportunity which belonged to the corporations, divorced wife had no standing in action against husband under the corporate opportunity doctrine, since she was not a stockholder in the corporation.

Wood, Crump, Rogers, Arndt & Evans, by Guy Richards Crump, Stanley M. Arndt and Morris W. Young, Los Angeles, for appellant.

Hanna & Morton, Harold C. Morton and David A. Thomas, Los Angeles, for respondent.

ASHBURN, Justice.

Plaintiff appeals from a judgment which rejects her claim that defendant, her former husband, wrongfully appropriated to himself a "corporate opportunity" which belonged to two corporations in which he held stock and that he is obligated, by property settlement agreement and decree of divorce, to pay her 25 per cent of the proceeds of such misappropriation.

By property settlement agreement of December 6, 1943, and ensuing divorce decree, the parties divided their community property. The wife received the home and its furnishings together with an automobile, and the husband took a second car. The community property also included 600 shares of capital stock of Continental Corporation and 6 shares of Continental Development Corporation, both incorporated under the laws of California. Each of these corporations had also issued "compensation interests" which were actually certificates of participation in the net proceeds of certain oil properties operated by them respectively. The New holding consisted of a 17 per cent interest in the net income of Continental and 20 per cent of the net income of Development.[1] A 4 per cent interest in Development income was put in trust for the minor child of the parties and the remainder divided equally; each spouse took 8 per cent of Development income and 8½ per cent of that of Continental. The shares of stock in both corporations were awarded to defendant husband as his separate property. The property settlement agreement, in which the wife was designated as first party and the husband as second party, was carried into the divorce decree. Paragraph 14 thereof provides: "Second party hereby covenants and agrees, from and after the date of this agreement, that he will pay first party twenty-five per cent (25%) of any and all sums, proceeds, benefits, remunerations, compensation and emoluments of whatsoever kind or nature (excepting any director's fee which he may be entitled to, and excepting any proceeds or benefits that second party may be entitled to by virtue of the interest which he retains in and under said Assignment of Compensation dated May 15, 1940 after making the assignments provided for in this agreement[)],[2] paid to second party or that second party may receive, or paid to or received by others for the use and benefit of second party, directly or indirectly, from the said Continental Corporation, the Continental Development Corporation, their successors, subsidiaries or assigns, or from any of them by virtue of any interest which second party presently has in said Continental Corporation, Continental Development Corporation or which he may have. Nothing herein contained shall be construed as giving to the second party any interest or any of the proceeds or benefits, remuneration, compensation or emoluments whatsoever for additional interest hereafter acquired by second party by gift, device [sic] or bona fide purchase in and to the Continental Corporation and/or the Continental Development Corporation."

[1] Continental had entered into a Drilling and Operating Agreement with Los Angeles Flood Control District (which designated Continental as Contractor) for the purpose of producing oil from wells drilled in the west bank of the flood control channel in the city of Long Beach; the document in legal effect amounted to a lease, as was held by this court in County of Los Angeles v. Continental Corp., 113 Cal.App.2d 207,

1. We follow counsel in referring to Continental Corporation as "Continental," Continental Development Corporation as "Development," Continental Northern Corporation as "Northern" and Continental Southern Corporation as "Southern."

2. The court found that the parties intended to close the parenthesis at the place where we have placed the appropriate mark but that they inadvertently failed to do so.

226, 230, 248 P.2d 157. The district did not own in fee the entire channel area, having only an easement upon certain parcels of land lying therein; hence, Continental was granted the right to drill for and produce oil only from those portions which were owned in fee by the district. Of course Continental, as a matter of law, could not slant drill under neighboring property or bottom any well therein. Bell Corp. v. Bell View Oil Synd., 24 Cal.App.2d 587, 595, 76 P.2d 167. It was, however, given exclusive use of the surface of the described area for oil drilling and production, the district reserving the "right to occupy the lands herein described and to use, and to permit the use of, same for such uses and purposes for which District is organized other than the production of oil, gas and other hydrocarbon substances." The parcel covered by the agreement was originally 60 feet wide, but an amendment increased the width to 249 feet; because of the existence of Pacific Electric Railway tracks and easement, the property available for drill sites on the west bank was only 25 feet wide; in length it was over a mile. The property was divided into three parcels, A, B and C, and Continental, with consent of the District, assigned all its rights in parcel C to Development which became substituted as to all rights and obligations of the assignor so far as concerned parcel C. Producing wells were developed in all three parcels. By July, 1941, Continental had completed 12 wells, and by 1943 Development had 9 wells, with 6 more to drill. Defendant New was a corporate officer of each company; he and his business associate, Mr. R. F. Ingold, owned enough stock to give them practical control of both Continental and Development (50 per cent of the former and more than 50 per cent of the latter) and they exercised such control at all times.

In May, 1944, Mr. William Smith, then chairman of Los Angeles County Board of Supervisors and chairman of its flood control committee, informed Mr. New that Associated Oil Company was seeking a lease to a portion of the surface of the flood control channel to enable it to slant drill into the area east of the channel, the proposed lease to cover lands already under the Continental drilling agreement. Such drilling was then forbidden by an ordinance of the city of Long Beach, in which the land was located. Indeed, Continental and Development had been able to drill on the west bank of the channel only after procuring a judgment of court declaring said ordinance unenforceable as to them and the property covered by their drilling agreement. Knowing that there were numerous parcels within the channel area which were owned by third parties subject only to an easement in the flood control district, which owners apparently did not realize their possession of drilling rights, New and Ingold were apprehensive lest they come to life and assert their rights to the detriment of Continental and Development. While they did not consider the area east of the channel as an especially good prospect for oil, the fact that Associated desired to slant drill into that property alerted them to the fact that the possibilities might be considerably better than they then thought. They desired to keep Associated out of the channel and later, when Crown Petroleum Company was trying to get such a lease, they were anxious to thwart its desire. Of course that project would require as a condition of success leases from the other fee owners in the channel and community leases from owners east of the channel whose property was to be subjected to the bottoming of directionally drilled wells.

Notwithstanding the apparent obstacles to success, New and Ingold wanted and negotiated for the channel lease. Mr. Smith and another Supervisor told them emphatically that no such lease could be obtained by Continental or Development. This seems to have been based upon certain political considerations. New and Ingold organized Continental Northern Corporation and Continental Southern Corporation, wholly owned by them, and the Flood Control District gave them channel leases which roughly corresponded to the west bank areas held by Continental and Development. This was on October 3, 1944.

The leases conferred oil exploration rights limited to directional drilling, with no wells to be bottomed within the leased lands; they were expressly subject to the rights of Continental and Development under their drilling agreement. The court found: "Under the lease which Northern executed with the District, Northern was a tenant of the District, and occupied portions of the general surface area of said Flood Control right-of-way where wells of Continental and Development were located, but was limited to the production of oil only from areas outside of the Flood Control right-of-way; and Northern did bottom all of its wells in, and did produce oil only from, areas outside of the Flood Control right-of-way." A like finding was made as to Southern. Northern and Southern procured the necessary community leases, obtained a judgment invalidating the obstructing ordinance, and Northern proceeded to drill on February 25, 1946. On March 15th Southern began a well; in April of that year its well No. 102 pierced a virgin oil pool situated just east of a fault, now known as the Golden Avenue fault, which was previously unknown. The wells of Northern and Southern proved to be rich ones, far beyond any expectations.

Defendant sold his stock in Northern to Southern in May, 1946, for $560,000. On or about November 1, 1947, he sold his remaining stock and compensation interests in Continental, Development, Southern and Eastern[3] for $2,764,154.82, of which amount the sum of $2,623,675.14 was allocated to the shares of Southern and Eastern; certain stock which he had turned over to his second wife was also sold for $327,959.39. Of the amount received by defendant $9,960.34 was allocated to his 600 shares of Continental stock and $33,059.00 to his 6 shares of Development stock. The court found that each of said sums "was a fair, equitable amount, and was arrived at in good faith."[4] Accordingly, 25 per cent of each sum was awarded to Mrs. New, the plaintiff, i. e., $2,490.09 on account of Continental, and $8,264.75 on account of Development. She claims to be entitled to 25% of $3,511,634.53, or the sum of $877,908.63, in addition to the said sums awarded to her.

Her second amended complaint, upon which the cause was tried, proceeds upon three theories, (1) that defendant New was her agent and obligated to account as such, (2) that he held the Continental and Development stock in trust and must account for any profits made by him from the slant drilling deal, and (3) that he breached an implied covenant of the settlement agreement that he should act in good faith and deal honestly concerning the subject matter of paragraph 14 thereof. The court held that the Continental and Development stock belonged to defendant as sole owner; that it was not held in trust by him, but that plaintiff had an equitable lien thereon. In effect it was held that there was no agency and no violation of defendant's obligation to act in good faith and do nothing to rob plaintiff of the fruits of her contract.

As a matter of law it appears that there was no agency and no trust. The terms of the settlement agreement preclude any such finding. That document, the ensuing interlocutory decree of divorce which incorporated it substantially in haec verba, and the final decree which again incorporated it by reference to the interlocutory,—these things severed the confidential relationship previously existing between the parties and placed them at arm's length toward each other except to such an extent, if any, as a confidential relationship was created by the agreement. It recites a mutual desire "to make a full and complete property settlement in order that each of the parties can deal with his or her property, the same as though they were sole and unmarried." The wife "does hereby waive, assign, release and quitclaim all and every of her

3. Continental Eastern Corporation, organized by defendant and Ingold to take over one of Southern's leases.

4. Except as it is affected by her claim under paragraph 14 of the settlement agreement appellant does not challenge this finding.

right, title and interest in and to any and all property which may hereafter be acquired by the second party or which he may now have, except as herein set forth, whether the same be separate or community property." Paragraph 16 provides: "That from this day henceforth all earnings and any property, real or personal, whether community or separate, heretofore or hereafter owned or acquired by either of the parties hereto by gift, devise, bequest, distribution, purchase, exchange, or in any other manner whatsoever, as well as the rents, issues, profits, and income therefrom, shall be the sole and separate property and estate of the party earning, owning, or acquiring the same, * * * to the end that the parties may dispose of and deal with such earnings and property hereafter in the same manner as though the marriage between the parties had never been consummated." Paragraph 18: "This agreement is intended to be and shall operate as a full, complete and final settlement of all the property rights of the parties hereto, and each does hereby waive, relinquish, release, grant, bargain, quitclaim, convey, assign, transfer, and set over, unto the other, any and all rights that he or she may have or claim against the other as husband or wife, or otherwise, arising or growing out of the marital relation, or as heir at law of the other, or otherwise, which are inconsistent herewith.

"It is the intention of the parties that hereafter they * * * will acquire, convey, and deal in property and do all business, regardless of the other, the same as if they were not married." The court correctly interpreted the agreement in the following finding: "It was at the time of the execution of said Property Settlement Agreement the understanding and intention of the parties, and the meaning of said paragraph 14 as embodied in said Interlocutory Judgment of Divorce, that defendant should have and own as his sole and separate property the 600 shares of common capital stock of Continental and the 6 shares of common capital stock of Development except that said title and ownership should be subject to the rights in the plaintiff as hereinbefore set forth." Those rights were expressed by paragraph 14 quoted above, and consisted of the right to receive from defendant, when realized by him, 25 per cent of any and all sums, proceeds, benefits, remunerations, compensation and emoluments of whatsoever kind or nature, paid to or received by him, directly or indirectly, from Continental and Development, or either of them, or any subsidiary of either.

[2–5] It is immediately apparent that defendant, in managing his solely owned stock, was not acting as agent for plaintiff. "An agent is one who represents another, called the principal, in dealings with third persons. Such representation is called agency." Civ. Code, § 2295. Certainly one cannot be an agent and a trustee at the same time, with respect to the same subject matter. "An agent acts for his principal in a representative capacity so that the principal, rather than the agent, is ordinarily bound by a contract entered into by the agent on behalf of the principal. On the other hand, a trustee represents only the trust estate, and not the beneficiary, so that he is ordinarily bound as a principal." 2 Cal.Jur.2d § 7, p. 656.

[6, 7] An equitable lien does not create or embrace a trust. 1 Scott on Trusts, § 10.4, p. 76; Restatement of Trusts, § 10, Comment c, p. 33. Indeed, such a lien is not cognizable until it has been declared by court, whereupon it relates back to the acts giving rise to the equity. Hise v. Superior Court, 21 Cal.2d 614, 627, 134 P.2d 748.

The parties expressly set aside a four per cent interest in the income of Development as a trust for the benefit of their daughter. By way of contrast the provisions of the agreement defining their rights with respect to each other (above quoted), studiously avoided any such relationship. Counsel for appellant concede in their briefs that "since the property settlement agreement did not contain a declaration of trust, it was not an express trust." But they insist upon some implied fiduciary obligation in the nature of a trust,

—a "voluntary trust." We perceive no basis for this. Defendant's obligation to plaintiff was to pay her a percentage of anything received by him from Continental or Development, directly or indirectly. When received, he owed her 25 per cent of it, just as if he had agreed to pay her $500 cash per month if he received that much from any source. Defendant was not obligated to create a "corporate opportunity" or to remain a corporate officer or director or so to manage the corporation as to make the stock lucrative. His primary obligation was negative, to refrain from conduct calculated to deprive plaintiff of the legitimate fruits of her bargain. Referring to a somewhat similar factual situation the court said, in Botchford v. Alt, 71 Cal.App. 2d 340, 345, 162 P.2d 984, 987: "It appears therefore, since appellant was to be paid in money, that the relationship between appellant and D. H. Botchford, in the matter of her claim to a percentage of his compensation, was that of creditor and debtor; and that she did not acquire any title to property received by him as compensation." In Downey v. Humphreys, 102 Cal.App.2d 323, 332, 227 P.2d 484, 490: "A debt is not a trust and there is not a fiduciary relation between debtor and creditor as such. If a person receives money and it is the intention that he shall have the unrestricted use thereof, being liable to pay a similar amount to a third person, a debt is created."

The court found that "plaintiff and defendant became obligated, and at all times thereafter remained obligated, to act toward each other with good faith and to deal honestly with each other concerning the subject matter of said paragraph 14 of said agreement as embodied in said Interlocutory Judgment of Divorce.

[8,9] "There was and at all times has been, an implied term in said Property Settlement Agreement, and particularly in paragraph 14 thereof as embodied in said Interlocutory Judgment of Divorce, that neither party would do anything to deprive the other of the fruits and benefits thereof." This is an implied term of every contract. "In every contract there is an implied covenant that neither party shall do anything which will have the effect of destroying or injuring the right of the other party to receive the fruits of the contract, which means that in every contract there exists an implied covenant of good faith and fair dealing. 17 C.J.S., Contracts, § 328, p. 778." Universal Sales Corp. v. California Press Mfg. Co., 20 Cal.2d 751, 771, 128 P.2d 665, 677. Being of universal prevalence it cannot create a fiduciary relationship; it affords basis for redress for breach of contract and that is all. See Gonsalves v. Hodgson, 38 Cal.2d 91, 97–98, 237 P.2d 656. The trial judge properly ruled that the stock in Continental and Development was not held by defendant for the use or benefit of plaintiff.

The trial court's ultimate holding rests upon two broad grounds. First, that there was no "corporate opportunity" for Mr. New to misappropriate, and second, that he did not stand in a fiduciary relationship to plaintiff and owed her personally no duty to refrain from appropriating that opportunity if one did exist.

The first proposition presents a mixed question of law and fact, the solution of which involves numerous complex factors. To that question of the existence of the alleged corporate opportunity we now address ourselves, first adverting to the applicable rule of review of conflicting evidence.

[10–12] The appellate court must accept as established all facts and all inferences favorable to respondent which find substantial support in the evidence. "And where appellant urges the insufficiency of the evidence to sustain the findings * * * the rule is that, 'Such contention *requires defendants to demonstrate* that there is no substantial evidence to support the challenged findings.' Nichols v. Mitchell, 32 Cal.2d 598, 600, 197 P.2d 550, 552. (Emphasis added.) It is said in Crawford v. Southern Pac. Co., 3 Cal.2d 427, 429, 45 P.2d 183, 184, that: 'It is an elementary, but often overlooked, principle of law, that

when a verdict is attacked as being unsupported, the power of the appellate court begins and ends with a determination as to whether there is any substantial evidence, contradicted or uncontradicted, which will support the conclusion reached by the jury. When two or more inferences can be reasonably deduced from the facts, the reviewing court is without power to substitute its deductions for those of the trial court.'" Hartzell v. Myall, 115 Cal.App.2d 670, 673, 252 P.2d 676, 677.

[13–17] Plaintiff argues that certain of the evidence is inherently improbable and hence ceases to be substantial evidence within the doctrine of Herbert v. Lankershim, 9 Cal.2d 409, 471, 71 P.2d 220. That case can have only narrow application, for the general rule is as stated in People v. Huston, 21 Cal.2d 690, 693, 134 P.2d 758, 759: "Although an appellate court will not uphold a judgment or verdict based upon evidence inherently improbable, testimony which merely discloses unusual circumstances does not come within that category. [Citation.] To warrant the rejection of the statements given by a witness who has been believed by a trial court, there must exist either a physical impossibility that they are true, or their falsity must be apparent without resorting to inferences or deductions. [Citations.] Conflicts and even testimony which is subject to justifiable suspicion do not justify the reversal of a judgment, for it is the exclusive province of the trial judge or jury to determine the credibility of a witness and the truth or falsity of the facts upon which a determination depends." Industrial Indem. Co. v. Golden State Co., 117 Cal.App.2d 519, 538, 256 P.2d 677, 689: "[I]t is settled law that if conflicting inferences may reasonably be drawn from the evidence, even if it is uncontradicted or all facts are admitted, which inference shall be drawn is a question for the trier of facts and its decision cannot be set aside by the appellate court. * * * Only where there is no conflict in the evidence *and no conflicting inferences can be drawn therefrom* does the finding of the trial court amount to a conclusion of law and is the finding not binding on a reviewing court."

[18, 19] The corporate opportunity doctrine is stated in the Industrial Indemnity case, supra, 117 Cal.App.2d at page 533, 256 P.2d at page 686, as follows: "Since the leading case of Guth v. Loft, 23 Del. Ch. 255, 5 A.2d 503, it has been generally accepted that a corporate officer or director may not seize for himself to the detriment of his company business opportunities in the company's line of activities which the company has an interest and prior claim to obtain, and that if he seizes them in violation of his fiduciary duty the corporation may claim for itself all benefits so obtained by him. * * * However this doctrine does not exclude the fiduciary from all business activity of his own in the field in which he works for others. '* * * The directors or officers of a going, solvent corporation cannot, however, engage in a competing business to the detriment of the corporation which they represent.' 13 Am. Jur. 953, Corporations, § 999. To the same effect 19 C.J.S., Corporations, § 785, p. 160; 3 Fletcher, Corporations (1947 revision) 214–215, § 856; Ballantine on Corporations (1946 ed.) 203 et seq., § 79. The latter points out (p. 205) that the basis of the doctrine must be found 'in the unfairness on the particular facts of a fiduciary taking advantage of an opportunity when the interests of the corporation justly call for protection,' (to the same effect Prof. Scott in 37 Cal.Law Review 539, 551) and continues: 'This calls for the application of ethical standards of what is fair and equitable to particular sets of facts. The question is indeed often a close one whether the fiduciary duty of loyalty of directors and officers requires them to offer a particular business opportunity which they discover in connection with the corporate business to the corporation * * * or whether they may take it for themselves. This turns * * * upon various factors as to the needs and situation of the corporation, its financial ability and fair expectation under the circumstances, which cannot be reduced to definite rules.' Under these

circumstances the decision in each case depends on its particular facts and citation of examples is not useful. The determination of the particular factual circumstances under which a fiduciary takes business opportunities for himself and the application of the ethical standards of fairness and good faith required from a fiduciary to said set of facts is mainly for the trier of facts. Both the issues of good faith and of sufficient performance of contractual obligations are normally questions of fact (53 Am.Jur. p. 192, § 224; p. 231, § 273)."

[20] The drilling agreement under which Continental and Development held their tenure conferred upon them the exclusive right "to drill for, produce, extract and remove" oil and other hydrocarbon substances "in and from * * * said lands" together with "the exclusive right to enter upon said lands * * * for said purposes," and to place "thereon and therein all * * * structures which Contractor may require in carrying on its operations hereunder." The District reserved "the right to occupy the lands herein described, and to use, *and permit the use of*, same for such uses and purposes for which District is organized, *other than the production of oil, gas and other hydrocarbon substances.*"[5] (Emphasis added.) Though the matter is not free from doubt, we think this instrument conferred upon the contractor exclusive use of the surface so far as producing oil from the premises was concerned. The parties were not thinking about slant drilling when this document was drafted; it gave contractor the exclusive oil exploration and production rights; and the limited nature of the reservation in favor of the District leads us to the conclusion above expressed.[6]

[21] Continental and Development were organized for the purpose of exploiting the rights thus conferred on them; the sole business of each was drilling and operating wells under the drilling agreement, and that was the sole source of revenue of each. At the time the so-called opportunity arose, Continental had completed 12 wells and its drilling program was complete. Its by-laws provided that it should not engage in any other activity, enterprise or undertaking unless authorized by the affirmative vote of four of its six directors. Development had drilled 9 wells and contemplated 6 more to round out its development program. When the possession of a directional lease was suggested to Mr. New he considered that it might be inimical to Continental and Development, and he therefore became active in blocking efforts of Associated Oil Company and Crown Petroleum Company to get such a lease. This he did initially as a matter of protection to the companies in which he was interested. But the chairman and one other member of the Board of Supervisors told him in no uncertain terms that a lease would not be given to Continental or Development, and that if he and Mr. Ingold wanted it they would have to take it in person or through another corporation. At this juncture Continental and Development were in position to block the whole project, for they held the exclusive surface rights, both legally and practically. The law then provided for an acre of land surrounding each well, Pub. Resources Code, § 3600, and Continental or Development was in position to preempt any site which another lessee might desire to occupy. But the power to negate the enjoyment of a business opportunity by a third party, a stranger, does not constitute

5. This is the language of amendment to the agreement (Ex. C) made on March 19, 1940.

6. Factual differences in the cases cited by respondent to the contrary effect prevent their being controlling here. Those citations are: Lineberger v. Delaney Petroleum Corp., 8 Cal.App.2d 153, 47 P.2d 326; Rennie v. Red Star Oil Co., 78 Okl. 208, 190 P. 391; City of Pasadena v. California-Michigan Land and Water Co., 17 Cal.2d 576, 110 P.2d 983, 133 A.L.R. 1186; and Callahan v. Martin, 3 Cal.2d 110, 43 P.2d 788, 101 A.L.R. 871.

the kind of an expectancy which lies at the basis of the corporate opportunity doctrine.

Viewing the matter affirmatively and prospectively, we find that Continental and Development, in order to have the possibility or probability of a profitable venture, would first have to overcome the resistance of the Board of Supervisors. (The trial judge had a right to infer that this was not merely an objection to the use of those corporate names as lessee, but that the board insisted upon an entirely different entity and would not be satisfied with a subsidiary of the existing corporations.) Assuming this resistance could be overcome, it would involve a preliminary change in the scope of the corporate business and a departure into an activity different from that which had been consistently pursued by each existing corporation. While the leases actually obtained by Northern and Southern did not carry any fixed obligation to drill, it would have profited Continental and Development nothing to take (if they could get it) such a lease and do no development work. Directional drilling was not far advanced at that time, and was expensive. Before it could start another successful suit against the city of Long Beach was necessary in order to render the prohibitory ordinance of the city inapplicable to wells drilled into and bottomed within lands east of the flood control channel. That involved substantial expense and uncertainty. Such drilling could not be lawfully done without procuring leases (community) from the landowners east of the channel in whose properties the wells were to be bottomed. That meant a campaign of uncertain duration and dubious outcome. As a matter of prudence it was also necessary to obtain (as New and Ingold ultimately did) leases from the fee owners of lands within the channel over which the District had only an easement. It owned the fee to only about 50 per cent of the whole channel area.

If all this were accomplished successfully it would mean nothing unless pursued by a drilling campaign. While the evidence is conflicting on the point the court was justified in concluding that neither Continental nor Development had the necessary funds or ability to command the same. Continental had sold 86 per cent of its compensation interest (net income) and Development had disposed of 73 per cent of its share. Neither corporation had large working capital or reserve. It appears that Development, in order to complete its existing program by drilling 6 more wells, had to borrow $175,000. This it was able to do only through voluntary subordination of all outstanding compensation interests (net income from existing wells) to the claim of the lending bank; this was done by all holders except Mrs. New who was not asked to join therein. No one was obligated to make such a subordination in order to promote a slant drilling campaign, and it does not appear that the holders thereof could have been induced to do so. Macson Oil Company, which owned 40 per cent of the compensation interest of Continental, had assigned the same to a trustee for creditors and that trustee probably would not have agreed to a new subordination. Relations between New and Ingold on the one hand and the Macson interests on the other were not cordial or friendly.

The prospect of large returns from the proposed new venture were slim. New and Ingold did not consider the geology particularly promising; they thought the oil sands were thinning toward the east. They invested their time and money in the venture chiefly as a gamble, in the belief that the Associated Oil Company had a "smart" group of men in it, and that if both Associated and Crown Petroleum wanted the lease, they could afford to speculate on it too. The Golden Avenue fault and the virgin pool lying east of it (some 700 feet east of the east boundary of the flood control channel) were wholly unknown until drilling proved their existence, and that was about a year and a half after the leases to Northern and Southern were made.

The court found: "The community oil leases obtained by Southern, and the development thereof by Southern, and the

operation of oil wells bottomed therein for the production of oil, gas, and other hydrocarbon substances, were not activities of Continental and Development, or either of them;" that at no time did defendant receive "sums, proceeds, benefits, compensation or emoluments or any thereof, either directly or indirectly, from Continental and Development or from Continental or Development or from Northern or Southern by reason of or growing out of the interest and rights or interest or any right which plaintiff possessed under said Property Settlement Agreement of December 6, 1943 for the use and benefit of plaintiff, or otherwise." Again, "It is not true that all or any of the shares of capital stock of Southern or Northern issued in the name of the defendant, or all money or any money received by defendant from the sale of shares of the capital stock of Southern or Northern, were received, or was received, by defendant directly or indirectly or otherwise from Continental or Development within the meaning and intent or within the meaning or intent of the provisions of said Property Settlement Agreement dated December 6, 1943, or said Interlocutory Judgment of Divorce (Default), or said Order Correcting Interlocutory Judgment of Divorce."

[22, 23] Implicit in these findings are any subsidiary ones which may be necessary to support them. 2 Witkin on California Procedure, § 118, p. 1850; 24 Cal. Jur., § 207, p. 974. There was considerable evidence pointing to inferences and conclusions contrary to those favorable to respondent which we have stated, but the authorities preclude our weighing the facts where, as here, there is a substantial conflict in the proofs.

[24] The trial court found in effect that the venture of Northern and Southern was not a corporate opportunity which Continental and Development, or either of them, could have grasped and pursued. We cannot say that this conclusion is not supported by substantial credible evidence.

[25–27] If the existence and misappropriation of a corporate opportunity be conceded arguendo, it does not follow that plaintiff should prevail herein. The applicable doctrine is stated in Industrial Indem. Co. v. Golden State Co., supra, 117 Cal.App.2d 519, 533–534, 256 P.2d 677. Manifestly a recovery on that theory must proceed solely upon the basis of a breach of a fiduciary duty. Where no such relationship exists there is no room for application of the doctrine. In the case of a corporation the violation of the rule results in a cause of action to compel the faithless trustee to disgorge his profits, but the right of recovery resides in the corporation, not its individual stockholders. They can enforce it only through a derivative suit wherein they assert the corporate right. Anderson v. Derrick, 220 Cal. 770, 773, 32 P.2d 1078; Shenberg v. DeGarmo, 61 Cal.App.2d 326, 330, 332, 143 P.2d 74. Plaintiff herein would have no such standing because she is not a stockholder in Continental or Development.

If that hurdle were overcome it would immediately appear that the proceeds of such misappropriation of the corporate opportunity would not belong to defendant, but to the corporation; as defendant would be obligated to pay the entire amount to the corporation, it could not be said to have been received by him from it or on account of his stock within the purview of the contract. He not being entitled to keep those moneys, any division of same with plaintiff would render her liable to the corporation to that extent, for she affirmatively stands upon the fact of misappropriation and would take with full knowledge, thus making her liable for restitution. Restatement of Trusts, § 291, Comment (a), p. 882. Moreover, such wrongful profits, when restored to the corporation, would go into its treasury and could be used to pay debts, increase surplus or augment working capital. If any part was used for payment of dividends or salary of defendant, he upon receipt of

same would owe plaintiff 25 per cent of it, but only in that event.

Plaintiff also claims that defendant's activities (which she has designated as wrongful appropriation of a corporate opportunity) were actionable upon another ground, namely, a violation of her rights as a holder of compensation interests. This contention must fail for reasons similar to those stated above. In the first place, her ownership is a participation in the net earnings of the corporation derived from the drilling agreement, which is carefully confined to oil produced from the lands described therein. The certificate itself limits the participation to "compensation payable to, or realized or retained by assignor under and by virtue of the said drilling and operating agreement between said District and Assignor." The assignment made by defendant to plaintiff is equally specific. Neither Northern nor Southern ever produced or acquired the right to produce oil originating in the channel or its west bank. Respondent well says: "Thus the rights of Continental and Development under the Drilling and Operating Agreement of January 30, 1939, as amended, were limited to operations on the channel *only*. Therefore, even if Continental and Development, rather than Northern and Southern, had entered with the District the surface leases of October 3, 1944 and thereafter had produced oil from the area east of the channel, as Northern and Southern did, appellant and other holders of compensation interests would not have shared in the proceeds simply because the proceeds would not have been received under the Drilling and Operating Agreement at all. Thus appellant cannot show any injury at all to her compensation interests upon which she can now maintain this action."

Secondly, plaintiff's right as the holder of a compensation interest is to receive from the corporation a share of the net income actually coming into its possession, and her right against defendant with respect thereto (if any such right there were) would be a derivative one,—the proceeds of any suit would go to the corporation, not to her, and she in due course would receive her share from it.

Appellant's counsel make an elaborate argument to show that in acquiring and pursuing the Northern and Southern leases Mr. New, Mr. Ingold, and those corporations improperly used the property, funds and credit of Continental and Development. This, if established, would fall in the same category of corporate wrong. To the extent, if at all, that it diminished the company's assets or income it would have a cause of action, and plaintiff (as a holder of a participation certificate) could pursue a derivative action on its behalf. The present is not such a suit. Plaintiff has no individual cause of action. Anderson v. Derrick, supra, 220 Cal. 770, 773, 32 P.2d 1078; Nielsen v. Gillespie, 97 Cal.App. 319, 320, 275 P. 500; 12 Cal.Jur. 2d §§ 215–216, pp. 769–771. Moreover, the court found that no such wrongdoing occurred: "It is untrue that * * * Continental or Development * * * assigned or transferred * * * to Northern or to Southern valuable or any assets or property * * * owned by Continental or Development including drilling and other rights or drilling or any rights of * * Continental or Development under said Agreement dated January 30, 1939, as amended, or that defendant received for any such transfer of assets or property of Continental or Development any stock or any other interest of great or any value in both Northern and Southern or in either Northern or Southern."

Counsel for appellant do not seek to capitalize the implied covenant to act honestly and not to deprive plaintiff of the fruits of her contract,—to capitalize is except as a basis for imposing a fiduciary obligation upon plaintiff. The complaint allegations of breach of contract are but a paraphrase of the preceding allegations of wrongful appropriation of a corporate opportunity. They add nothing

to those allegations or that argument.[7]

The portions of the judgment from which plaintiff has appealed are affirmed.

MOORE, P. J., and FOX, J., concur.

Hearing denied; CARTER, J., dissenting.



148 Cal.App.2d 456

Mildred Kay STEPHENSON, Petitioner and Appellant,

v.

Mae STONEMAN, Waitresses and Cafeteria Workers Local Union 639, an unincorporated association, et al., Respondents.

Civ. 21722.

District Court of Appeal, Second District, Division 3, California.

Feb. 11, 1957.

Rehearing Denied March 12, 1957.

Hearing Denied April 12, 1957.

Proceeding by union member for writ of mandate commanding union and certain of its officers to place member's name on a ballot as candidate for executive secretary of the union. The Superior Court, Los Angeles County, Lloyd S. Nix, J., denied the petition and member appealed. The District Court of Appeal, Parker Wood, J., held that evidence sustained finding that union's election board acted in good faith and fairly in determining that union member was not eligible for election to office.

Judgment affirmed.

1. Mandamus ⇐187(9)

In proceeding by union member for writ of mandate commanding union and certain of its officers to place member's name on a ballot as candidate for executive secretary of the union, question of whether or not election board, which had authority to determine all questions of eligibility of members to run for office, accorded union member a fair hearing was one of fact for trial court.

2. Mandamus ⇐168(4)

In proceeding by union member for a writ of mandate commanding union and certain of its officers to place member's name on a ballot as candidate for executive secretary of the union, evidence sustained finding that union's election board acted in good faith and fairly in determining that union member was not eligible for election to office.

3. Mandamus ⇐187(9)

In proceeding by union member for writ of mandate commanding union and certain of its officers to place member's name on a ballot as candidate for executive secretary of the union, finding of failure to exhaust union remedies would be reviewed even though unnecessary to determination of appeal, where union's constitution provided that any member who brought action against local union without first exhausting all remedies of appeal provided therein should thereafter be ineligible as a candidate and should be subject to charges for violation of union constitution.

4. Mandamus ⇐168(4)

In proceeding by union member for a writ of mandate commanding union and certain of its officers to place member's name on a ballot as a candidate for executive secretary of the union, evidence did not sustain finding that member failed to exhaust remedies provided by Constitution and bylaws of union prior to commencing action.

Kenny & Morris, Robert W. Kenny, Richard Richards, and John R. Crowe, Los Angeles, for appellant.

7. Counsel for both parties are to be commended for the careful, thorough and excellent briefs presented in this case. They have been of considerable help in easing the weight of a voluminous record.

Alexander H. Schullman and Jack R. Berger, Los Angeles, for respondents.

PARKER WOOD, Justice.

Petitioner sought a writ of mandate (in the superior court) commanding respondents to place her name on a ballot as a candidate for executive secretary of respondent union. Her petition was denied, and she appeals from the judgment.

Respondent Mae Stoneman is, and for approximately 26 years has been, executive secretary of respondent Waitresses and Cafeteria Workers Local Union, No. 639.

On June 7, 1955, petitioner herein and respondent Stoneman were nominated for the office of executive secretary.

Section 11 of the bylaws of the local union provided, in part: "No member of this Union shall be eligible for any office * * * unless she shall have been a member in continuous good standing for two (2) years prior to nominations and shall have attended at least one (1) meeting a month, unless excused by the Union. All members may secure a permanent meeting attendance record by presenting their union membership book to the Inside Guard for a meeting attendance stamp."

Section 10 of the bylaws provided, in part: "Seven members appointed, four by the President and three by the Vice-President, at the nomination meeting on the first Tuesday in May, shall constitute the Election Board. The Election Board shall determine all questions of eligibility of members to run for office, subject to appeal to the General President."

The election board determined that petitioner was not eligible. Apparently the basis for the determination was that she had not attended the required number of meetings. Petitioner appealed from that decision to the General President of the International Union, at Cincinnati, Ohio. He sustained the decision of the board.

Petitioner contends (on appeal from the judgment of the superior court) that she was not given a fair hearing by the board; and that certain findings of the trial court were erroneous. She argues that the board received evidence in her absence; that she was denied the right to confront and cross-examine witnesses; and that she did not have proper notice that certain evidence (enlarged photographs of her union book) had been presented to the board.

On June 13, 1955, the election board held a meeting to determine the eligibility of candidates for various offices in the local union. At that meeting respondent Stoneman went with petitioner into the room, where the board was in session, and introduced petitioner to the members of the board. Petitioner testified that she was in the room 5 to 10 minutes; after she was introduced, the respondent Stoneman asked her for her union book; she (petitioner) complied with the request; then said respondent asked petitioner to leave the room; petitioner complied with the request. The book which petitioner presented at the meeting contained "stamps" which indicated that she had attended at least one meeting a month for two years prior to her nomination.

The minutes of that meeting (June 13, received in evidence as a part of plaintiff's Exhibit 3) recite, in part, that: Petitioner was introduced to the board members by respondent Stoneman; petitioner, upon request of the chairman, presented her dues (union) book, and then petitioner was excused by the chairman; such procedure was carried out until each candidate had been interviewed and had submitted her union book; secretary Stoneman submitted the membership file card of each candidate of her meeting attendance record for the past two years; Grace Finnigan, who is inside guard of the local union and custodian of the "meeting stamp" and attendance cards, requested permission to appear before the board; such permission was granted, and she stated that the meeting stamps recorded in petitioner's union book were not inserted by her (Finnigan) with the exception of three or four dating back to April, 1953, that she (Finnigan) had never had a substitute as inner guard and had not missed a meeting for the past 10 years;

after examining the file card of petitioner, and hearing the report of secretary Stoneman that one of the "meeting stamps" had disappeared from the office after the last December meeting, and after observing discrepancies in the meeting stamps in petitioner's book and meeting stamps in other books, and finding that petitioner's book was the only one without the official meeting stamp, a motion that petitioner was not eligible was unanimously carried; the board ruled as to other candidates (names were stated); the board called secretary Stoneman into the meeting, announced that its work had been completed, and adjourned.

The minutes of a meeting of the board held on June 15, 1955 (part of Exhibit 3), recite in part: This meeting was called at the request of Winnie Somers, a member of the board, who advised the board she had additional information to submit; all members were present; (the board declared whether or not eight nominees, separately referred to, were eligible) then board member Williams made a motion, with reference to petitioner, "that according to office records she [petitioner] is not eligible to run for office of Secretary-Treasurer but according to her book she is eligible and that the Committee [board] request an immediate investigation and decision of the validity of the meeting stamps in her Union book by the International Union. Carried unanimously."; then the board called secretary Stoneman into the meeting and inquired if the record submitted at that meeting would be referred to the International Union; the secretary replied in the affirmative.

At the meeting of June 15, respondent Stoneman presented to the board a photostatic enlargement of petitioner's union book, showing the meeting stamps. Respondent Stoneman testified (at the trial) that Mr. Slott, who works under her supervision, "may have come in there [board room] with me for the purpose of explaining the" enlargements.

On June 20, 1955, Mr. Miller, the general president, sent a telegram to respondent Stoneman which stated: "You are directed to have your election committee review all the material concerning the eligibility of each candidate for election and to make a determination of eligibility based upon the evidence presented. Each candidate should then be advised of the ruling by the election committee and the reasons for such ruling. Any candidate wishing to protest the ruling may appeal to this office. * * * This office will then pass upon all such appeals promptly."

On June 20 respondent Stoneman sent a telegram to petitioner stating, in part, that the chairman of the board had instructed her (Stoneman) to invite petitioner to appear at a meeting of the board on June 21; and that evidence "has been presented to the board raising doubt" as to petitioner having attended certain meetings within the last two years. Also on June 20, respondent Stoneman mailed a letter to petitioner stating, in part, that evidence had been presented to the board that she had not attended meetings "for which you have an attendance stamp in your union book"; according to the office records petitioner attended meetings only in 7 months (specifically designated) in the past 24 months; the committee was in receipt of evidence that petitioner had worked on 6 certain days, during the time union meetings were being held, "for which [dates] there appears an attendance stamp in your book"; this evidence has raised a serious question as to the validity of the attendance stamp in petitioner's book; you are requested to appear at the meeting and present any additional evidence you may have to establish that you attended one meeting a month for the past two years.

The minutes of a meeting of the board held on June 21 (part of Exhibit 3) recite, in part: All members of the board were present; secretary Stoneman and petitioner were called into the meeting by the chairman; Stoneman said the meeting was called pursuant to the direction of the general president; she also said that she had a letter from Mr. Cooper, president of the local joint executive board, indicating the payroll records of the Hayward Hotel pertaining to

the employment of petitioner at the hotel during the past two years (approximately); she (Stoneman) also said that those records indicated that petitioner had been employed on 6 certain days (specifically designated) during the meeting hours of the union on those days; petitioner said that she had brought a witness, Mrs. Hunt (manager of the Hayward Hotel bars), to corroborate her claim that she (petitioner) had not worked on the dates referred to; the witness was called into the meeting; the payroll record of the hotel, as shown by the letter from Mr. Cooper, was read by respondent Stoneman; the witness said that she had encouraged all union members to attend membership meetings and that "on occasion she had even worked for the waitresses herself or assigned bartenders to waitresses' duties and had punched the time cards for them herself."; the chairman asked petitioner if she had any further evidence; petitioner replied in the negative; the chairman excused petitioner, the witness, and Stoneman; a motion was carried that petitioner was not eligible; all members, except Winnie Somers, voted for the motion.

On June 23, 1955, petitioner appealed, by telegram, from the decision of the election board to the general president. On June 24 respondent Stoneman sent a letter to the general president, pursuant to his request, enclosing copies of the minutes of the three meetings of the board, and a copy of the notice of meeting which was sent to petitioner. In that letter respondent Stoneman said, among other things: "I was not in that hearing room one minute when Sister Stephenson [petitioner] was not also present." On June 27 the general president sent a letter to petitioner stating that he sustained the decision of the local board.

At the trial in the superior court, Mrs. Hunt, the manager of the bars at the Hayward Hotel where petitioner was employed, testified to the effect that on certain occasions in October, November and December, 1953, she excused petitioner from her work at the time of union meetings. (The letter of Mr. Cooper, regarding dates of union meetings when petitioner was working at the hotel, included dates in October, November and December, 1953.) Mrs. Hunt testified further that, after she had finished her testimony before the board, respondent Stoneman said that her testimony was no good because she (Mrs. Hunt) was no longer an employee of the hotel and was not a union member.

Also at the trial, Miss Williams, a board member, testified to the effect that respondent Stoneman did not participate in, and was not present at the time of, the deliberations of the board regarding the eligibility of petitioner.

Also at the trial, Miss Williams and Mrs. Parker, another board member, testified to the effect that a comparison of the photostatic enlargements of the stamps in petitioner's book with enlargements of stamps in other books caused them to vote that petitioner was not eligible.

The court found, among other things, that the election board, acting in good faith and in accordance with the Constitution of the International Union and the bylaws of the local union, after proper notice having been served, met on June 13, 15, and 21, 1955, and considered evidence and determined that petitioner was ineligible to run for the office of secretary; that said actions and determination of the board were validly done and made in good faith; that the board was not dominated by respondent Stoneman or any other individual; that the minutes of the board meetings of June 13, 15, and 21, representing Exhibit 3, set forth a true record of the proceedings before the board; petitioner did not appeal the decision of the general president to the general executive board of the International Union in accordance with the provisions of the Constitution of the International Union; petitioner did not exhaust all her remedies as provided by said constitution and the bylaws of the local union.

[1, 2] As above stated petitioner (appellant) contends that she was not given a fair hearing by the board. She argues, with respect to unfairness, that the state-

ments of inner guard Finnigan, made before the board on June 13 regarding petitioner's union book, were made when petitioner was not present; that respondent Stoneman submitted a photostatic enlargement of petitioner's book to the board on June 15 when petitioner was not present; that petitioner did not have an opportunity to confront or cross-examine those persons; that she was not given notice of any discrepancies, based upon enlargements, with respect to the stamps in her book; and that she had no knowledge that evidence regarding discrepancies in her book had been considered by the board until she saw the minutes of the meetings, which was after the petition herein had been filed. The bylaws provided, as above shown, that the board has authority to "determine all questions of eligibility of members to run for office." Whether or not the board accorded petitioner a fair hearing was a question of fact for the trial court. There were three meetings of the board. Prior to the last meeting (June 21) petitioner was notified by telegram and letter that the meeting would be held, and she was invited to be present and submit any additional evidence she might have to establish that she attended one meeting a month for the past two years. Also prior to that meeting she was advised by letter, sent by respondent Stoneman, that the office records of the union showed that during the past two years she had attended meetings only in April, May and June, 1953, December 1954, and March, April and June, 1955; and that the board was in receipt of evidence that petitioner worked from 4:30 p. m. to 12:30 a. m. on October 6 and 20, November 3 and 17, and December 1 and 15, 1953, "for which [dates] there appears an attendance stamp in your book." (The meetings commenced at 8 p. m.) That letter also stated that there was "a serious question as to the validity of the meeting attendance stamp recorded in your union membership book." Petitioner attended the last meeting and presented testimony of Mrs. Hunt, who was the manager of the place where petitioner allegedly was working when the 6 union meetings were held. That testimony was to the effect that Mrs. Hunt had encouraged all union members to attend union meetings, and on occasions she or the bartenders had worked for the waitresses, and she had punched the time cards for the waitresses. After that testimony had been presented, petitioner was asked if she had any further evidence. She replied in the negative. Mrs. Hunt did not specify any time when she allegedly excused petitioner from her employment so that she might attend the union meetings. It thus appears that petitioner knew, prior to the last meeting, that the validity of attendance stamps in her book was in question. The evidence at that meeting included the letter from Mr. Cooper regarding petitioner's employment at the Hayward Hotel. The letter stated that petitioner was working during certain hours on certain days in October, November and December, 1953. Those hours included hours when union meetings were held. Under the evidence presented at the last meeting, the board could have found that petitioner was not present at some or all of the 6 union meetings which were held when petitioner allegedly was at her place of employment. It does appear that, at the first meeting, the inner guard Finnigan told the board, in the absence of petitioner, that she (Finnigan) had not placed the meeting stamps in petitioner's book except on three or four occasions during the two years involved. It also appears that, at the second meeting, photostatic enlargements of stamps in petitioner's union book were presented to the board in the absence of petitioner. As above stated, petitioner asserts that she did not know that evidence regarding discrepancies in her book had been considered by the board until after she had filed the petition herein. Apparently, that assertion was intended as an explanation of her failure to present evidence, other than the testimony of Mrs. Hunt, at the last meeting. The substance of that assertion was alleged in the amended petition, and it was not denied in the answer. Regardless of whether petitioner knew at the time of the last meeting that evidence regarding such discrepancies had been considered by the board, she knew at that time that the validity of attendance stamps in her book

was an issue. She had an opportunity at that meeting to prove that her employer's records were not correct as to the dates when she worked or to prove that she was excused from her employment on those specific dates so that she might attend the union meetings. As above stated, Mrs. Hunt did not mention any specific date when she or anyone worked for petitioner. It does not appear that petitioner made any statement before the board as to where she was on the dates specified in her employer's records. On the appeal to the general president no point was made by petitioner as to any bias or prejudice on the part of the board or as to any unfairness regarding notice of the issue. It cannot be said as a matter of law that petitioner did not have a fair hearing before the board and on appeal to the general president. The finding of the trial court to the effect that the election board acted in good faith and fairly is supported by substantial evidence.

[3, 4] Petitioner also contends that the court erred in finding that she had not exhausted her remedies as provided by the constitution and bylaws of the union. The above conclusion regarding the hearing before the board is determinative of the present appeal, irrespective of whether petitioner had exhausted the remedies available to her within the union. It is appropriate, however, that this contention regarding exhaustion of remedies be determined, for the reason there is a provision in the constitution of the union (article XX § 21) to the effect that any member of a union who brings a legal action against a local union without first exhausting all remedies of appeal provided therein shall thereafter be ineligible as a candidate for any office in any union, and shall be subject to charges for such violation of the constitution. We have examined the bylaws and constitution and have concluded that the finding that she had not exhausted such remedies was erroneous.

The judgment is affirmed.

SHINN, P. J., and VALLÉE, J., concur.

Hearing denied; CARTER, J., dissenting.

The PEOPLE of the State of California, Plaintiff and Respondent,

v.

Homer C. MILLS and J. Frank Cavanaugh, Defendants and Appellants.

Cr. 5725.

District Court of Appeal, Second District, Division 2, California.

Feb. 8, 1957.

As Modified on Denial of Rehearing Feb. 25, 1957.

Hearing Denied April 2, 1957.

Prosecutions for violation of Corporate Securities Act, grand theft and conspiracy to commit such crimes. The Superior Court, Los Angeles County, Bayard Rhone, J., entered judgments of conviction. Defendant appealed therefrom and from order denying new trial motion. Codefendant convicted for violation of the act and for conspiracy appealed from order granting probation and from order denying new trial. Both defendants attempted to appeal from order denying motion in arrest of judgment. The District Court of Appeal, Ashburn, J., held, inter alia, where after arrest of defendant for violation of the Corporate Securities Act, all documents relating to specific crime for which arrest was made were in arresting officer's possession, a search of defendant's premises without a warrant, directed not toward discovery of evidence of crime for which arrest was made, but toward discovery of evidence of other crimes, was unlawful, and documents seized as result thereof were inadmissible in evidence.

Attempted appeals dismissed; judgment and order partly reversed and partly affirmed as to defendant, and reversed as to codefendant.

1. Criminal Law ⇐183

The defendants' consent inherent in their mistrial motion, which was granted, precluded a later claim of double jeopardy.

2. Criminal Law ⇐183

Where defendant who conducted his trial in propria persona showed that he had

adequate court experience, he would not be deemed to have been placed in double jeopardy on any theory that he waived consent inherent in motion for mistrial in that his motion was made under duress caused by fear of contempt should he decline to follow court's suggestion that he move for a mistrial.

3. Arrest ⇐71

Where a defendant was arrested for violation of Corporate Securities Act, even if defendant was also arrested for grand theft, that fact would not enlarge scope of a legitimate search of defendant's premises without warrant, in view of fact that arresting officers did not claim to have any ground for charging defendant with grand theft. West's Ann.Corp.Code, § 26104(a).

4. Arrest ⇐63(4)
Searches and Seizures ⇐3(1)

The results of a search without a warrant, considered alone, cannot justify fact of search or any arrest based upon what was discovered.

5. Criminal Law ⇐394

Burden rests upon a prosecutor to show existence of reasonable cause at time of an arrest and search without a warrant.

6. Arrest ⇐71

An exploratory search without a warrant in a quest for evidence of crimes other than the one for which an arrest is made, is unlawful.

7. Arrest ⇐71

The right to search without a warrant, pursuant to a lawful arrest, is not limited strictly to a search for instrumentalities of the crime, but may be exercised in aid of discovery of evidence of the particular crime for which the arrest is made.

8. Criminal Law ⇐395

Where the bounds of a reasonable search without a warrant have been exceeded, neither the evidence wrongfully seized, nor any of its derivatives may be used against a defendant.

9. Arrest ⇐71
Criminal Law ⇐395

Where, after arrest of defendant for violation of the Corporate Securities Act, all documents relating to specific crime for which arrest was made were in arresting officer's possession, a search of defendant's premises without a warrant, directed not toward discovery of evidence of crime for which arrest was made, but toward discovery of evidence of other crimes, was unlawful, and documents seized as result thereof were inadmissible in evidence. West's Ann. Corp.Code, § 26104(a).

10. Criminal Law ⇐1177

Where evidence on one count of violation of Corporation Code was sufficient to sustain a conviction without direct or indirect aid of wrongfully seized evidence, such conviction would stand regardless of disposition of other counts based on wrongfully seized evidence. West's Ann.Corp. Code, § 26104(a).

11. Criminal Law ⇐1159(2)

In a criminal proceeding, District Court of Appeal will not attempt to determine weight of the evidence, but will decide only whether upon the face of the evidence it can be held that sufficient facts could not have been found by a jury to warrant inference of guilt.

12. Criminal Law ⇐412(1)

In a criminal case, as in civil actions, a statement against interest made by a party constitutes original and independent evidence of the facts so stated.

13. Licenses ⇐18½(5)

A sale of stock or other undivided interest in a corporation which is the seller's alter ego spells a sale by the issuer in legal contemplation, for purposes of requiring seller to secure a permit for such sale from the Commissioner of Corporations. West's Ann.Corp.Code, §§ 25152, 26104(a).

14. Licenses ⇐40

Even though a decoy does not intend to consummate purchase of corporate shares which a defendant attempts to sell to him, a

defendant may nevertheless be guilty of violation of code section requiring a permit for such sale, since an offer or attempt to make a sale comes within statutory definition of sale. West's Ann.Corp.Code, §§ 25009, 26104(a).

15. Licenses ⇐42(4)

In prosecution for violation of Corporate Securities Act, prohibiting sale of corporate stock without a permit, evidence failed to show exempt sale of securities by owner on his own account, and was sufficient to sustain conviction. West's Ann. Corp.Code, §§ 25152, 26104(a).

16. Criminal Law ⇐695(3)

Where, in prosecution for violation of Corporate Securities Act, and conspiracy to commit such crimes, evidence used against a codefendant consisted of documents unlawfully seized in search of defendant's room, and testimony flowing from them and built upon them, violation of defendant's constitutional rights was available to codefendant whether or not he himself made an appropriate objection in trial court, and conviction of codefendant based on such evidence would be set aside. West's Ann. Corp.Code, § 26104(a).

17. Criminal Law ⇐1023(8)

An appeal from an order denying a motion in arrest of judgment will not lie.

Homer C. Mills in pro. per.

J. Frank Cavanaugh in pro. per.

Edmund G. Brown, Atty. Gen., Norman H. Sokolow, Deputy Atty. Gen., for respondent.

ASHBURN, Justice.

Convicted on ten charges of violation of the Corporate Securities Act, two counts of grand theft and one accusation of conspiracy to commit those crimes, defendant Mills appeals from the judgment and from an order denying his motion for new trial. His codefendant, Cavanaugh, was jointly charged with him and convicted on the conspiracy count and three counts of violation of the Corporate Securities Act. He appeals from an order granting him probation, Pen.Code, § 1237, subd. 1, and from an order denying his motion for new trial. Each defendant also attempts to appeal from an order denying his motion in arrest of judgment. The conspiracy charge originally included one Paul H. Kroger, as did certain other counts of the information. Near the close of the People's case he was dismissed on motion of the prosecution because of insufficiency of the proof against him. The appeals will be considered separately for reasons which will be readily apparent as the discussion progresses.

Mills raises three major contentions, (1) former jeopardy, (2) unlawful search and seizure, and (3) insufficiency of the evidence.

[1] As to former jeopardy. At a previous trial upon the same information the judge, when he resumed the bench for the afternoon session, stated that the prosecutor and police lieutenant William C. Hull had that morning been guilty of misconduct of such grievous nature that a motion for mistrial would be entertained if defendants should elect to make one, pointing out that they alone could take advantage of the situation. Defendants promptly made the motion and it was granted. The consent inherent in such a motion precludes a later claim of double jeopardy. People v. Kelly, 132 Cal.App. 118, 121–122, 22 P.2d 526; People v. Baillie, 133 Cal.App. 508, 513, 24 P.2d 528; People v. Agnew, 77 Cal.App.2d 748, 760, 176 P.2d 724; People v. Finch, 119 Cal.App.2d Supp. 892, 898–899, 258 P.2d 1124.

[2] In an attempt to neutralize the effect of that general rule Mills asserts that his motion was made under duress brought about by the fear of contempt should he decline to follow the judge's suggestion. In his testimony defendant referred to himself as a retired lawyer (he had been disbarred, Mills v. State Bar, 6 Cal.2d 565, 58

P.2d 1273), and "expert lawyer," and further said, "I have had a great many years' experience in the practice of law, previous to that time, and since that time, attending to my own affairs." His conduct of the trial in propria persona, and his briefs on appeal, show that he has had adequate court experience and is at home in that field. The claim of fear of contempt does not possess a semblance of merit. The court did not err in denying the plea of double jeopardy.

[3–5] The claim of an unlawful search and seizure presents a serious question. Count 14 of the information charges Mills with violation of the Corporate Securities Act, Corporations Code, § 26104(a), through sale and issuance to William C. Hull of shares of stock in Searchlight Uranium Corporation, a Nevada corporation, without having applied for or secured from the Commissioner of Corporations of the State of California a permit to do so. Hull, a lieutenant of police, posing as a prospective investor, agreed to buy from Mills 30,000 shares of stock in said corporation for the sum of $3,000. Mills represented himself to be sole owner of the corporation and the Blossom Mine which it operated. He gave Hull a written memorandum of the sale, which is set forth in the margin.[1] That was on December 16, 1954. On the following day Hull took a witness with him to Mills' office in the Clark Hotel in Los Angeles, and there delivered to Mills a certified check for $3,000, payable to Hull but not endorsed. Mills handed him a certificate of stock (No. 69) issued in favor of Hull and wife as joint tenants. It was signed by Mills as president, and Kroger as secretary. While Mills was examining the check Hull handed him an identification card showing his official status, told him he was under arrest for violation of the Corporate Securities Act, took possession of the check and kept the stock certificate. Hull knew Mills had no permit to sell stock in California; he had representatives of the Division of Corporations waiting outside, Messrs. Stern and Naslund. Following the arrest of Mills, Lieutenant Hull called into the room the investigators just mentioned and two police officers who were also waiting. Mills had two rooms in the hotel, one of which was used as an office and the other as a bedroom. Off the office was a small closet-like room or recess. It will be noted that Hull had in his possession all the knowledge and evidence he needed to make a case on the sale of the stock to him. He knew there was no corporate permit; he had the written contract of sale, the stock certificate and the check; he also had a witness to the transaction, Mrs. Asdell, a policewoman; and Mills in her hearing had told Hull that he owned all the stock in the corporation and in effect that the proceeds of the same would be used for

1.
"December 16th, 1954.
"Mr. W. C. Hull,
"Statler Hotel,
"Los Angeles, Calif.
"Dear Mr. Hull:

"In consideration of $3,000.00 receipt of which is hereby acknowledged, you are to have 10% of the smelter checks as received from the Blossom Mine at Searchlight, Nevada, until you shall have received back a total of $6,000.00, which must be earned and paid back within one year from December 17th., 1954. After you have received back said $6,000.00, within one year as above stated, your percentage in the production from the mine ceases but in lieu thereof you will own outright without further consideration 30,000 shares of Searchlight Uranium Corporation which are to be assigned and transferred and delivered to you on this date, and said shares shall be fully paid and non-assessable.

"You are hereby given a 60 day option to increase your holdings in said transaction on the same basis with an additional $5,000.00 and with the same results and benefits, or in any amount up to $5,000.00. All shipments go to U.S. Smelting Refining and Mining Co., at Salt Lake City, Utah. and you will be notified when each shipment is made.

"Sincerely,
"[signed] Homer C. Mills
"Homer C. Mills."

corporate purposes, thus making a case in which the statutory exemption concerning sales of one's own stock would not apply (authorities, *infra*). With respect to the crime for which Mills was arrested, Lieutenant Hull had no occasion to make any search whatever.[2] He had no search warrant and it is not claimed that Mills consented to the search.

What happened in that connection is told by Lieutenant Hull in his testimony: "I told the officers that were with me at that time and the investigators from the Division of Corporations that * * * Jack Stern and Naslund from the Division of Corporations, and Lorrettivich and James and one or two other officers from the Bunco Division, Detective Bureau, Los Angeles Police Department. * * * I told Mr. Stern and Mr. Naslund and Officer Nelson and James and the other officers that I wanted the entire office searched as well as the adjoining room. I told them that I was looking for all things having to do with stock, stock promotion, assays, mines, ores, letters, letters that showed, that would reveal other investors, books and ledgers and various papers that would pertain to stock promotion, stock activities, and to call my attention to anything they found, and to let me see, and see where it was before they removed it and we would obtain—I directed one of them to obtain two or three cartons, cardboard cartons, and then Mr. Mills was seated there in the office and the various officers and investigators began a search of the premises. * * Various pieces of—various items were called to my attention and I reached the decision as to whether they were of evidentiary value. * * * Various items were called to my attention. I directed items to be placed in the cartons and other items to be left where they were." The witness further testified that the officers searched through file cabinet drawers, the desk, the table, desk drawers, a correspondence file, all in the front room; that he directed Jack Stern of the Division of Corporations to make a thorough search of the bedroom, which Stern reported he had done. There were at least six persons conducting the search in addition to Lieutenant Hull and Mrs. Asdell. It took 45 minutes or more and produced a large volume of incriminating evidence, somewhere from 500 to 1,000 documents. It was not directed toward discovery of the instrumentalities or evidence of the crime for which Mills was arrested, but for evidence of commission of other similar crimes. Throughout the search police photographers were present and busily engaged in taking pictures. Before it was started Lieutenant Hull had never heard of the other persons named in the information as victims of Mills' violations of the law; neither had the deputy district attorney who prepared the information; it was based upon facts obtained from the seized documents. The trial judge remarked that "it is true that the evidence shows that the arresting officer and for all we know, any other law enforcement agency, at least the Police Department and the District Attorney's office, knew nothing about these various persons named in counts 1 to 12 until the search and seizure, however, the arrest was a lawful arrest." At

2. If, as investigator Stern testified, Lieutenant Hull told defendant he was arrested for grand theft as well as violation of the Corporate Securities Act that would not enlarge the scope of a legitimate search, for Hull does not claim to have had any ground for charging grand theft in the transaction with him, and, indeed, the search did not bring forth any such charge with respect to that deal. Of course the results of the search, considered alone, could not justify the fact of search or any arrest based upon what was then discovered. People v. Brown, 45 Cal.2d 640, 643–644, 290 P.2d 528. The burden rests upon the prosecutor to show existence of reasonable cause at the time of arrest and search, Badillo v. Superior Court, 46 Cal.2d 269, 272, 294 P.2d 23; there being no showing that Hull had reasonable ground for arrest for grand theft any statement of his that such was the basis for apprehending defendant would not enlarge his right one jot or tittle.

the trial the prosecution witnesses who testified to charges other than count 14, which related to the Hull transaction, were persons whose identity and testimony had been discovered and procured through the seized documents. The testimony of each revolved around one or more of the seized instruments.

If the search and seizure were unlawful, the heart of the proof upon each count other than 14 "was a fruit of the poisonous tree." [3] With substitution of names we agree that "if only the fate of the Millses and the Cavanaughs were involved, one might be brutally indifferent to the ways by which they get their deserts." [4] But as our Supreme Court observed in People v. Cahan, 44 Cal.2d 434, 439, 282 P.2d 905, 907: "[W]hen consideration is directed to the question of the admissibility of evidence obtained in violation of the constitutional provisions, it bears emphasis that the court is not concerned solely with the rights of the defendant before it, however guilty he may appear, but with the constitutional right of all of the people to be secure in their homes, persons, and effects." And again, 44 Cal.2d at page 446, 282 P.2d at page 912: "Thus, no matter how guilty a defendant might be or how outrageous his crime, he must not be deprived of a fair trial, and any action, official or otherwise, that would have that effect would not be tolerated. * * * Today one of the foremost public concerns is the police state, and recent history has demonstrated all too clearly how short the step is from lawless although efficient enforcement of the law to the stamping out of human rights. This peril has been recognized and dealt with when its challenge has been obvious; it cannot be forgotten when it strikes further from the courtroom by invading the privacy of homes." Judge William C. Mathes puts the matter aptly when he says: "We do not forget * * * the eternal truth that the rights of good men are secure only so long as the rights of bad men are also protected." [5]

[6] This search occurred on December 17, 1954, before the police had the benefit of the restraining influence of the Cahan decision, supra, which was rendered in April, 1955. The search was wholly exploratory, a quest for evidence of other crimes. Such a procedure has been condemned repeatedly and for many years. People v. Roberts, 47 Cal.2d 374, 303 P.2d 721, involved an entry by police into defendant's room in an apartment house in response to what they believed to be cries of physical distress. They were at the time in pursuit of some stolen articles, such as radios. When they entered Roberts' room there stood in plain sight a new radio which answered the description of those which had been stolen. They took its number and after checking and finding it to have been stolen they seized it under a search warrant. In rejecting the claim that there had been an unlawful search the court said: "The privilege to enter to render aid does not, of course, justify a search of the premises for some other purpose. An arrest may not be used as a pretext to conduct a general search of one's premises for incriminating evidence, and it has been repeatedly said that where the right to conduct a search is obtained ostensibly for one purpose it may not be used in reality for another." See Harris v. United States, 331 U.S. 145, 153, 67 S.Ct. 1098, 91 L.Ed. 1399; Love v. United States, 4 Cir., 170 F.2d 32, 33. Thus the officers in the present case could properly make only that kind of search reasonably necessary to determine whether a person was actually in distress somewhere in the apartment. They could not, for example, ransack the premises or

3. Mr. Justice Frankfurter in Nardone v. United States, 308 U.S. 338, 341, 60 S.Ct. 266, 268, 84 L.Ed. 307, 312.

4. Quoting the same learned Justice in Harris v. United States, 331 U.S. 145, 156, 67 S.Ct. 1098, 91 L.Ed. 1399, 1409.

5. "A New Order of the Ages: Free Speech and Internal Security," October, 1956, issue of the American Bar Association Journal, page 929.

rummage through desk drawers. On the other hand, in the course of conducting a reasonable search they did not have to blind themselves to what was in plain sight simply because it was disconnected with the purpose for which they entered. * * * In formulating the rules governing lawful searches and seizures the United States Supreme Court has repeatedly recognized the distinction between the seizure of evidence which was readily visible and accessible to the officers and that which was uncovered only after a general, unreasonable ransacking of the premises. See United States v. Lefkowitz, 285 U.S. 452, 52 S.Ct. 420, 76 L.Ed. 877, [82 A.L.R. 775]; Go-Bart Importing Co. v. United States, 282 U.S. 344, 51 S.Ct. 153, 75 L.Ed. 374; cf. Harris v. United States, 331 U.S. 145, 67 S.Ct. 1098, 91 L.Ed. 1399, where an intensive search was held reasonable under the circumstances. The decisions also make a sharp distinction between the seizure of property which is stolen or contraband and property which is inoffending of itself and merely evidentiary. Harris v. United States, 331 U.S. 145, 154, 67 S.Ct. 1098, [91 L.Ed. 1399]; United States v. Lefkowitz, 285 U. S. 452, 465, 52 S.Ct. 420, 76 L.Ed. 877, [82 A.L.R. 775]; Weeks v. United States, 232 U.S. 383, 392–393, 34 S.Ct. 341, 58 L.Ed. 652, [L.R.A.1915B 834]; Gouled v. United States, 255 U.S. 298, 309–310, 41 S.Ct. 261, 65 L.Ed. 647; Boyd v. United States, 116 U.S. 616, 623, 6 S.Ct. 524, 29 L.Ed. 746.

"Applying these principles and distinctions to the facts of the present case we are satisfied that the officers did not act unreasonably or in violation of defendant's constitutional rights." 47 Cal.2d at page 380, 303 P.2d at page 723.

This condemnation of exploratory searches is fully supported by decisions of the United States Supreme Court and other Federal and State tribunals; and the exclusion of illegally seized documents extends to other evidence which is derived from those documents directly or indirectly.

The vice of such searches has been exposed often. United States v. Lefkowitz, 285 U.S. 452, 52 S.Ct. 420, 76 L.Ed. 877, involved a charge of conspiracy to violate the National Prohibition Act, 27 U.S.C.A. § 1 et seq. Government agents made a search of office desk drawers, towel cabinet, waste baskets and other containers and delivered all seized papers to the prosecutors. Upon a motion to suppress that evidence the government contended "that, since the arrests were lawful, the search of the place where they were made was lawful, and that, having the right to search the premises, the officers were bound to do it thoroughly." 285 U.S. at page 462, 52 S.Ct. at page 422. The court said, in holding that the motion should have been granted: "The only question presented is whether the searches of the desks, cabinet and baskets and the seizures of the things taken from them were reasonable as an incident of the arrests. And that must be decided on the basis of valid arrests under the warrant. Save as given by that warrant and as lawfully incident to its execution, the officers had no authority over respondents or anything in the room. The disclosed circumstances clearly show that the prohibition agents assumed the right contemporaneously with the arrest to search out and scrutinize everything in the room in order to ascertain whether the books, papers or other things contained or constituted evidence of respondents' guilt of crime, whether that specified in the warrant or some other offense against the Act. Their conduct was unrestrained. * * *" 285 U.S. at pages 463–464. 52 S.Ct. at page 423

"Here, the searches were exploratory and general and made solely to find evidence of respondents' guilt of the alleged conspiracy or some other crime. Though intended to be used to solicit orders for liquor in violation of the act, the papers and other articles found and taken were in themselves unoffending. The decisions of this court distinguish searches of one's house, office, papers or effects merely to get evidence to convict him of crime from searches such as those made to find stolen goods for return to the owner, to take property that has

been forfeited to the government, to discover property concealed to avoid payment of duties for which it is liable, and from searches such as those made for the seizure of counterfeit coins, burglars' tools, gambling paraphernalia and illicit liquor in order to prevent the commission of crime. * * *" 285 U.S. at pages 465–466, 52 S. Ct. at page 423.

"An arrest may not be used as a pretext to search for evidence. The searches and seizures here challenged must be held violative of respondents' rights under the Fourth and Fifth Amendments." 285 U.S. at page 467, 52 S.Ct. at page 424. To the same effect are: Go-Bart Importing Co. v. United States, 282 U.S. 344, 51 S.Ct. 153, 75 L.Ed. 374; Harris v. United States, supra, 331 U.S. 145, 67 S.Ct. 1098, 91 L.Ed. 1399; Nardone v. United States, supra, 308 U.S. 338, 60 S.Ct. 266; United States v. 1013 Crates of Empty Old Smuggler Whiskey Bottles, 2 Cir., 52 F.2d 49, 51; Drayton v. United States, 5 Cir., 205 F.2d 35; Lott v. United States, 5 Cir., 218 F.2d 675, 678.

[7] Though some of the authorities would limit the search to instrumentalities of the crime, Freeman v. United States, 9 Cir., 160 F.2d 72; Henderson v. United States, 4 Cir., 12 F.2d 528, 51 A.L.R. 420; Worthington v. United States, 6 Cir., 166 F.2d 557, 566; Takahashi v. United States, 9 Cir., 143 F.2d 118, 123, the right is not so narrowly confined in this jurisdiction. It may be exercised in aid of discovery of evidence of the particular crime for which the arrest is made. In People v. Allen, 142 Cal.App.2d 267, 280, 298 P.2d 714, 722, this court, referring to United States v. Rabinowitz, 339 U.S. 56, 70 S. Ct. 430, 94 L.Ed. 653, said: "While the court condemned 'general, exploratory searches,' it did not suggest as violative of the constitution a reasonable search for specific evidence at the locale of the crime." See also, People v. Coleman, 134 Cal.App.2d 594, 599, 286 P.2d 582; People v. Ortiz, 147 Cal.App.2d 248, 305 P.2d 145; People v. Morgan, 146 Cal.App.2d 722, 304 P.2d 138; People v. Smith, 142 Cal. App.2d 287, 293, 298 P.2d 540.

[8, 9] Where the bounds of a reasonable search have been exceeded, as here, neither the evidence wrongfully seized nor any of its derivatives may be used against defendant. Silverthorne Lumber Co. v. United States, 251 U.S. 385, 40 S. Ct. 182, 64 L.Ed. 319, is the leading case on this point. After unlawful seizure of certain documents, which were ordered to be returned to the defendant, the prosecutors made photostats and other copies of same, brought a new indictment and subpoenaed the originals of the papers previously returned to the defendant. In holding that there was no contempt in refusal to obey those subpoenas the court, through Mr. Justice Holmes, said, 251 U. S. at page 391, 40 S.Ct. at page 182: "The proposition could not be presented more nakedly. It is that although of course its seizure was an outrage which the Government now regrets, it may study the papers before it returns them, copy them, and then may use the knowledge that it has gained to call upon the owners in a more regular form to produce them; that the protection of the Constitution covers the physical possession but not any advantages that the Government can gain over the object of its pursuit by doing the forbidden act. * * * The essence of a provision forbidding the acquisition of evidence in a certain way is that not merely evidence so acquired shall not be used before the Court but that it shall not be used at all. Of course this does not mean that the facts thus obtained become sacred and inaccessible. If knowledge of them is gained from an independent source they may be proved like any others, but the knowledge gained by the Government's own wrong cannot be used by it in the way proposed."

The same holding was made in People v. Berger, 44 Cal.2d 459, at page 462, 282 P.2d 509, at page 511, where an attempt was made to use photostats of documents which had been wrongfully seized, the

court saying: "Since the photostats are as much a product of the illegal search and seizure and are as tainted by it as the original papers themselves, Silverthorne Lumber Co. v. United States, 251 U.S. 385, 392, 40 S.Ct. 182, 64 L.Ed. 319, [24 A.L.R. 1426], the deception practiced by the prosecution in this case cannot circumvent the rule adopted in People v. Cahan, 44 Cal.2d 434, 282 P.2d 905." The rule is well stated in Walder v. United States, 347 U.S. 62, 64, 74 S.Ct. 354, 356, 98 L.Ed. 503: "The Government cannot violate the Fourth Amendment * * * and use the fruits of such unlawful conduct to secure a conviction. Weeks v. United States [232 U.S. 383, 34 S.Ct. 341, 58 L.Ed. 652], supra. Nor can the Government make indirect use of such evidence for its case, Silverthorne Lumber Co. v. United States, 251 U.S. 385, 40 S.Ct. 182, 64 L.Ed. 319 [24 A.L.R. 1426], or support a conviction on evidence obtained through leads from the unlawfully obtained evidence, cf. Nardone v. United States, 308 U.S. 338, 60 S.Ct. 266, 84 L.Ed. 307. All these methods are outlawed, and convictions obtained by means of them are invalidated, because they encourage the kind of society that is obnoxious to free men." This language was quoted in People v. Martin, 45 Cal.2d 755, 760, 290 P.2d 855.

The Silverthorne doctrine was recognized and applied in Badillo v. Superior Court, supra, 46 Cal.2d 269, 273, 294 P.2d 23, and People v. Dixon, 46 Cal.2d 456, 458, 296 P.2d 557, 559. In the latter case it was held that defendant's own testimony "was impelled by the erroneous admission of the illegally obtained evidence and cannot be segregated from that evidence to sustain the judgment."

People v. Martin, 382 Ill. 192, 46 N.E.2d 997, is factually foursquare with the case at bar, and it was held that the witnesses discovered through the wrongfully seized documents could not testify to the other crimes disclosed by those documents. At page 1002 of 46 N.E.2d it is said: "To permit the illegal action of the officers of the law in this case to redound to its advantage would impair the constitutional safeguards under consideration. Under the circumstances presented here it requires more than a mere assertion by the State's Attorney that the evidence used against defendants was obtained from an independent source. On the face of it it could not be an independent source. No showing is made of any kind that the name of any one of the witnesses was obtained in any other manner than by an examination of the papers of the plaintiffs in error. * * *

"It is only necessary for us to determine whether it has been shown the testimony of the witnesses was received from independent sources, and upon that question we find there is nothing in the record to substantiate the claims of the prosecution, but upon the other hand it is almost conclusive that the information to be given by all of the material witnesses in the case was obtained from the matters illegally seized, and this being our conclusion, the evidence should have been suppressed and excluded. If it be urged the prosecution of plaintiffs in error is thus made difficult, the fault does not grow out of the provisions of the constitution, but from a disregard of such provisions by the officers sworn to support and enforce them." Simmons v. State, Okl.Cr., 277 P.2d 196, makes the same holding, as do other cases cited in an annotation appearing in 50 A.L.R.2d at page 569.

[10] At all stages of the case Mills objected to the use of the seized documents and sought to exclude evidence based thereon or derived therefrom. This is true of all counts except 14, which deals with the Hull transaction and which was expressly excluded from the motion to strike made after the close of the prosecution's case. The evidence on count 14 being sufficient, as we shall see, to sustain the conviction without the direct or indirect aid of wrongfully seized matters, that conviction may stand regardless of the disposition of the

other counts. See People v. Tarantino, 45 Cal.2d 590, 596–597, 290 P.2d 505.

Mills asserts the evidence to be insufficient to sustain a conviction upon the charge of count 14. In support of this position he asserts that the evidence shows only a loan transaction or a sale made by him of individually owned stock, and that it falls within the exemption of § 25152, Corporations Code, which reads: "Except as expressly provided in this division, the Corporate Securities Law does not apply to the sale of securities when (a) made by or on behalf of a vendor not the issuer or underwriter thereof who, being a bona fide owner of the securities, disposes of his own property for his own account, and (b) the sale is not made, directly or indirectly, for the benefit of the issuer or an underwriter of the security, or for the direct or indirect promotion of any scheme or enterprise with the intent of violating or evading any provision of the Corporate Securities Law." Defendant's own testimony would have sustained a finding in his favor on this issue, but it was disbelieved by the trial judge; moreover, he was impeached by the former conviction of a felony, issuing checks without sufficient funds.

[11] The rule governing a court of review with respect to sufficiency of the evidence is stated in People v. Newland, 15 Cal.2d 678, 681, 104 P.2d 778, 779: "The court on appeal 'will not attempt to determine the weight of the evidence, but will decide only whether upon the face of the evidence it can be held that sufficient facts could not have been found by the jury to warrant the inference of guilt. For it is the function of the jury in the first instance, and of the trial court after verdict, to determine what facts are established by the evidence, and before the verdict of the jury, which has been approved by the trial court, can be set aside on appeal upon the ground' of insufficiency of the evidence, 'it must be made clearly to appear that upon no hypothesis whatever is there sufficient substantial evidence to support the conclusion reached in the court below. * * * We must assume in favor of the verdict the existence of every fact which the jury could have reasonably deduced from the evidence, and then determine whether such facts are sufficient to support the verdict.' If the circumstances reasonably justify the verdict of the jury, the opinion of the reviewing court that those circumstances might also reasonably be reconciled with the innocence of the defendant will not warrant interference with the determination of the jury."

That this was not a sale made by an owner for his own account appears from the memorandum dictated by defendant and delivered to Lieutenant Hull (quoted in footnote 1, supra). It evidences a sale to Hull of ten per cent "of the smelter checks as received from the Blossom Mine," until payments shall have totaled $6,000 within one year; Hull is to "be notified when each shipment is made," and according to his testimony, "my check would come directly from the ore being shipped to the smelter, and would be sent to me from the smelter, American Smelting and Refining, as I recall, in Salt Lake City." After receiving the agreed $6,000 within the specified time, "your [Hull's] percentage in the production from the mine ceases but in lieu thereof you will own outright without further consideration 30,000 shares of Searchlight Uranium Corporation." This transaction involved two corporate securities, first, an undivided interest in the gross income of the corporation and its mine, Corporations Code, § 25008; People v. Sidwell, 27 Cal.2d 121, 129, 162 P.2d 913, and second, shares of stock in that corporation.

Clearly, the sale of an interest in the proceeds of the mine does not fall within the exemption of § 25152, unless perchance Mills was, as he represented, the sole owner of the mine and the corporation. But in that event he would become the issuer and thus be excluded from the exemption.

[12, 13] Mills' evidence as to the transaction having been rejected by the trial

judge, that which was accepted established him to be the issuer of the stock which he sold. He represented to Hull that he owned all the stock of the corporation, was sole owner of the mine, and that Hull would be the first outside holder of stock. Those statements, adverse to his own present interests, constitute independent and affirmative evidence of the fact. "It is true in a criminal case as in civil actions that a statement against interest made by a party constitutes original and independent evidence of the facts so stated." People v. Goldstein, 136 Cal.App.2d 778, 785, 289 P.2d 581, 584. A sale of stock or other undivided interest in a corporation which is the seller's alter ego spells a sale by the issuer in legal contemplation. So held in People v. Murphy, 17 Cal.App.2d 575, 582–584, 62 P.2d 592; People v. Smith, 111 Cal.App. 177, 186, 295 P. 105; People v. Allen, 47 Cal.App.2d 735, 745, 118 P.2d 927. Especially is this true where the seller's own shares are transferred to the corporation and it in turn issues a certificate to the buyer. That is what was done in this case, assuming the truth of defendant's testimony. Castle v. Acme Ice Cream Co., 101 Cal.App. 94, 99, 281 P. 396.

Referring to the exemption provision of the former statute (in language almost identical with present § 25152), the court said, in People v. Mason, 86 Cal.App.2d 445, 454, 195 P.2d 60, 65: "This language is tantamount to declaring it to be a felony if by the sale of a security prior to the issuance of a permit to the issuer by the corporation commissioner the vendor causes the issuer thereof to profit or to be advanced by such sale." That Mills was selling for the benefit of the corporation is fairly inferable. If it, not Mills, was the issuer, then the statutory exemption would not apply. The representations made to Hull by defendant as an inducement for the purchase by him support an implied finding that the sale was being made for the benefit of the corporation. Indeed, that is the only fair deduction to be made from the terms of the memorandum, Exhibit 4. Otherwise, Hull would not be receiving ten per cent of the smelter checks directly from U. S. Smelting Refining and Mining Co., of Salt Lake City, as his "percentage in the production from the mine." In fact, appellant's opening brief says, at page 2, that Hull "as such potential investor was to advance $3,000.00 to aid in carrying on such mining operations."

[14] Mills does not claim entrapment, but does argue that Hull committed a fraud upon him and, as Hull never intended to consummate a purchase, the transaction was vitiated and there was no sale. Reliance is placed on People v. Schroeder, 132 Cal.App.2d 1, 281 P.2d 297, and People v. Werner, 16 Cal.2d 216, 105 P.2d 927, but those cases are not in point. Each dealt with a charge of grand theft or attempted grand theft and held that there could be no such crime when the alleged victim voluntarily transferred the property to the defendant. That is not the question here. Insofar as Mills was concerned he had delivered the stock with intent to transfer title to the shares. Moreover, an offer or an attempt to make a sale comes within the statutory definition of sale. Corporations Code, § 25009; People v. Sidwell, supra, 27 Cal.2d 121, 127; 162 P.2d 913; People v. Whelpton, 99 Cal.App.2d 828, 831–832, 222 P.2d 935. There is no merit in the claim that the statute was not violated by a sale to Hull.

[15] It follows that the judgment against Mills and the order denying his motion for a new trial must be affirmed as to count 14.

[16] Defendant Cavanaugh, who is a layman, appeared in propria persona. At the beginning of the trial defendant Mills stated the following stipulation to which Cavanaugh and Kroger agreed: "The three defendants want to agree to a stipulation amongst themselves that any questions which I may ask any witness, or any statement I make, or any motion in the case, will be agreeable to them unless they object to it at the time. I will bear

the brunt of the work in this case because of my experience, and any testimony introduced on behalf of either of us may be considered the testimony in favor of each of us, wherever material." To this Cavanaugh added: "I have decided to let Mr. Mills handle it." This course was pursued throughout the hearing, Mills speaking for Cavanaugh and the latter following his lead.

The evidence against Cavanaugh consisted of documents seized in the search of Mills' rooms and testimony flowing from them and built upon them; aside from that type of evidence there was not enough to hold Cavanaugh on any count. His own testimony related to transactions disclosed by the seized documents.

The violation of Mills' constitutional rights was available to Cavanaugh, as has been held in People v. Martin, supra, 45 Cal.2d 755, 761, 290 P.2d 855; People v. Kitchens, 46 Cal.2d 260, 264, 294 P.2d 17; People v. Gale, 46 Cal.2d 253, 257, 294 P.2d 13; People v. Silva, 140 Cal.App.2d 791, 794, 295 P.2d 942. Moreover, as held in People v. Dixon, supra, 46 Cal.2d 456, 458, 296 P.2d 557, testimony thus forced from a defendant by the use of unlawfully seized evidence and its progeny cannot be used against him. Cavanaugh makes this point in his "statement" attached to Mills' opening brief. His right to avail himself of a wrongful search and seizure of Mills' property is not dependent upon whether he himself made an appropriate objection in the trial court. While we think the record shows that he did so, the question of whether he did cannot control the judgment. In McDonald v. United States, 335 U.S. 451, 69 S.Ct. 191, 93 L.Ed. 153, it appeared that defendant McDonald had moved for return of certain property which had been wrongfully seized from him. The lower court denied the motion and this was held to have been erroneous. At page 456 of 335 U.S., at page 193 of 69 S.Ct., the court said: "It [the motion] was, however, denied and the unlawfully seized evidence was used not only against McDonald but against Washington as well, the two being tried jointly. Apart from this evidence there seems to have been little or none against Washington. Even though we assume, without deciding, that Washington, who was a guest of McDonald, had no right of privacy that was broken when the officers searched McDonald's room without a warrant, we think that the denial of McDonald's motion was error that was prejudicial to Washington as well. * * * If the property had been returned to McDonald, it would not have been available for use at the trial. We can only speculate as to whether other evidence which might have been used against Washington would have been equally probative." Mr. Justice Jackson, in a concurring opinion, said this on the same subject, 335 U.S. at page 461, 69 S.Ct. at page 196: "As to defendant Washington: He was a guest on the premises. He could have no immunity from spying and listening by those rightfully in the house. But even a guest may expect the shelter of the rooftree he is under against criminal intrusion. I should reverse as to both defendants." The McDonald case was discussed with apparent approval in People v. Martin, supra, 45 Cal.2d 755, 760–761, 290 P.2d 855, 857, our Supreme Court saying: "In McDonald v. United States, 335 U.S. 451, 456, 69 S.Ct. 191, 93 L.Ed. 153, it gave effect to this policy by reversing the conviction of both defendants although only the rights of one had been violated. It pointed out that had the evidence been returned to the defendant from whom it was illegally taken, it would not have been available for use against the other defendant, and held therefore that its admission was prejudicial as to both. [Citations.] It is true that in the McDonald case a pretrial motion for the return of the evidence by the defendant whose rights were violated had been erroneously denied. There is no basis for concluding, however,

that a defendant whose rights have not been violated should have standing to challenge a pretrial ruling against his codefendant, if he has no standing to challenge the legality of the original seizure. In either situation his right to object to the use of the evidence must rest, not on a violation of his own constitutional rights, but on the ground that the government must not be allowed to profit by its own wrong and thus encouraged in the lawless enforcement of the law.

"Since all of the reasons that compelled us to adopt the exclusionary rule are applicable whenever evidence is obtained in violation of constitutional guarantees, such evidence is inadmissible whether or not it was obtained in violation of the particular defendant's constitutional rights." See also, Anderson v. United States, 318 U.S. 350, 356, 63 S.Ct. 599, 87 L.Ed. 829, and United States v. Haupt, 7 Cir., 136 F.2d 661, 672, which have to do with the prejudicial effect of confessions which are inadmissible as to certain defendants and have been received against them and others charged with them who did not confess. As it is necessary to reverse as to Mills upon all counts which include Cavanaugh, it would be a miscarriage of justice to require the latter to pay the penalty from which his codefendant has beeen exonerated, at least temporarily.

[17] An appeal from an order denying a motion in arrest of judgment will not lie, People v. Tidwell, 108 Cal.App.2d 60, 62, 238 P.2d 21; 3 Cal.Jur.2d, § 91, p. 542, and those attempted appeals are dismissed.

The judgment and the order denying new trial are reversed as to defendant Cavanaugh in their entirety. The judgment and order denying new trial are reversed as to defendant Mills upon counts 1 to 12 of the information,[6] but affirmed as to the charge of count 14.

MOORE, P. J., and FOX, J., concur.

Hearing denied; GIBSON, C. J., and SHENK and SPENCE, JJ., dissenting.

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J. A. ZINN, H. Kemp, W. M. Nelson, L. P. Nelson, H. E. Ellis, Elizabeth C. McLaughlin, Ethel M. Zinn and Herbert Schroeder, Plaintiffs and Respondents,

v.

EX-CELL-O CORPORATION and H. Glen Bixby, Defendants and Appellants

No. 16372.

District Court of Appeal, First District, Division 1, California.

Jan. 29, 1957.

Rehearing Denied Feb. 28, 1957.

Hearing Denied March 27, 1957.

Action was brought for damages, on ground that defendants fraudulently induced plaintiffs to sell their stock in corporation organized by plaintiffs to distribute milk packaging machines for the corporate defendants. The Superior Court, City and County of San Francisco, Twain Michelsen, J., entered judgment for plaintiffs, and defendants appealed. The District Court of Appeal, Bray, J., held that evidence sustained finding that plaintiffs had no knowledge of the facts and therefore were justified in acting in reliance on alleged misrepresentations of defendants.

Portions of judgment allowing interest prior to judgment reversed and, in all other respects, judgment affirmed.

1. Fraud ⇐3

The general elements of a cause of action for fraudulent misrepresentation are misrepresentation, consisting of false representation, concealment or nondisclosure, knowledge of falsity or "scienter," intent to induce reliance, justifiable reliance, and resulting damage. West's Ann.Civ.Code, §§ 1572, 1709, 1710.

See publication Words and Phrases, for other judicial constructions and definitions of "Scienter".

2. Fraud ⇐17

Mere nondisclosure of facts is ordinarily not enough to constitute fraud, but it may be actionable under certain circumstances, as where defendant, who has no

6. Count 13 was dismissed.

duty to speak, nevertheless does so, and in such a case he is bound to speak truthfully and to speak the whole truth. West's Ann.Civ.Code, §§ 1572, 1709, 1710.

3. Fraud ⇐58(2)

In action for damages, on ground that defendants fraudulently induced plaintiffs to sell their stock in corporation organized by plaintiffs to distribute milk-packaging machines of corporate defendant, evidence sustained trial court's finding that individual defendant not only intentionally concealed from plaintiffs the sale of machines to third party but actually represented to plaintiffs that no such sale had taken place, for purpose of prevailing on plaintiffs to acquiesce in termination of distribution agency and to sell their stock in corporation. West's Ann.Civ.Code, §§ 1572, 1709, 1710.

4. Fraud ⇐52, 58(1)

In fraud action, testimony of an interested party concerning alleged misrepresentations is competent and admissible, and, if believed by trial court, is sufficient to determine issue. West's Ann.Civ.Code, §§ 1572, 1709, 1710.

5. Appeal and Error ⇐1008(3)

Where trial judge interprets a document solely from the writing within four corners, the interpretation is a matter of law, and the reviewing court may give the writing a different interpretation if the trial judge's interpretation appears to be unreasonable.

6. Fraud ⇐58(4)

In action for damages, on ground that defendants fraudulently induced plaintiffs to sell their stock in corporation organized by plaintiffs to distribute milk-packaging machines of corporate defendant, evidence sustained trial court's finding that plaintiffs did not know the true facts when they acted on misrepresentations of defendants and were therefore justified in acting in reliance on misrepresentations.

7. Evidence ⇐584(3)

The testimony of one witness may be sufficient, as against any number of witnesses testifyng to the contrary, for the proof of a fact in a civil case.

8. Appeal and Error ⇐989

A reviewing court ordinarily looks only at the evidence supporting the successful party, and disregards the contrary showing.

9. Appeal and Error ⇐989

All evidence must be examined on appeal, but it is not weighed.

10. Appeal and Error ⇐931(1), 989

All evidence most favorable to the respondent must be accepted as true by reviewing court on appeal, and unfavorable evidence disregarded as not having sufficient verity to be accepted by the trier of facts.

11. Appeal and Error ⇐1010(1)

Where evidence most favorable to respondent is accepted as true and that unfavorable to respondent is disregarded as not having sufficient verity to be accepted by the trier of fact, and the evidence, so viewed, is sufficient as a matter of law, the judgment must be affirmed.

12. Fraud ⇐39

Action for damages, on ground that defendants fraudulently induced plaintiffs to sell their stock in corporation organized by plaintiffs to distribute milk-packaging machines of corporate defendant, involved a cause of action inhering in each person wronged by the alleged fraud, and not a cause of action by the corporation organized by plaintiffs. West's Ann.Civ.Code, §§ 1572, 1709, 1710.

13. Fraud ⇐58(1)

In action for damages, on ground that defendants fraudulently induced plaintiffs to sell their stock in corporation organized by plaintiffs to distribute milk-packaging machines of corporate defendant, evidence sustained trial court's finding that there was no failure on part of plaintiffs and corporation organized by them to comply with terms of distribution contract between corporation organized by plaintiffs and defendant corporation, other than failure to comply with stipulations as to time of placement of machines, and that such noncom-

pliance was waived by defendant corporation. West's Ann.Civ.Code, §§ 1572, 1709, 1710.

14. Principal and Agent ⇐28

Rule that a contract of agency, which specifies no term or period of duration, is terminable at the will of either party without liability, is not applicable where the intentions of the parties may be ascertained by reference to the circumstances under which it was made, and the matter to which it relates. West's Ann.Civ.Code, § 1647.

15. Appeal and Error ⇐996

Where parol proof is admitted to assist trial court to ascertain intention of parties to contract, and conflicting inferences may be drawn, it is the constitutional function and duty of the trial court to determine the meaning of the parties, and such finding is binding on the reviewing court.

16. Fraud ⇐58(1)

In action for damages, on ground that defendants fraudulently induced plaintiffs to sell their stock in corporation organized by plaintiffs to distribute milk-packaging machines of corporate defendant, evidence sustained trial court's finding that distribution contract was terminable only for good cause, and not at will, and that therefore contract continued in effect at time of alleged misrepresentations. West's Ann. Civ.Code, §§ 1572, 1709, 1710.

17. Fraud ⇐50

Considerable latitude is allowed a plaintiff in proving damages in a fraud case, and defendant must bear the risk of the uncertainty which his own wrong created.

18. Fraud ⇐58(1)

In action for damages, on ground that defendants fraudulently induced plaintiffs to sell their stock in corporation organized by plaintiffs to distribute milk-packaging machines of corporate defendant, evidence sustained trial court's finding with respect to damages. West's Ann.Civ.Code, § 3343.

19. Fraud ⇐60

In action in California for damages for alleged fraud which occurred in Washington, Washington law governed question whether interest was allowable. West's Ann.Civ.Code, § 3288.

20. Evidence ⇐43(4)

California court could take judicial notice of Washington decisions. West's Ann. Code Civ.Proc. § 1875 subd. 3.

21. Damages ⇐69

Under Washington law, interest is not allowable on unliquidated damages in tort cases.

22. Appeal and Error ⇐170(1)

Where question was one strictly of law and not of evidence, it could be raised for the first time on appeal.

23. Trial ⇐18

The conduct of a trial is primarily in the trial court's discretion.

24. Depositions ⇐7

Where none of the plaintiffs appeared at the trial, and, over objection of defendants, testimony given by plaintiffs on former trial was used on ground of absence of plaintiffs from the state, and defendants moved to strike such testimony, and plaintiffs stated that there was a remote possibility that defendants' contention as to admissibility of former testimony might be good and desired to eliminate any question by having depositions of plaintiffs taken, trial court did not abuse its discretion in reopening case to permit the taking of the depositions of the plaintiffs.

25. Evidence ⇐584(3)

The testimony of one witness, believed by the trial court, is sufficient to support a judgment.

26. Appeal and Error ⇐1046(5)

Statement of trial judge, who was the trier of the facts, that third parties reprehensibly had importuned him to disclose his frame of mind toward his ultimate disposition of the case, and that "the dollar sign has been written" did not constitute prejudicial error.

27. Trial ⇐23

It was not improper for inexperienced reporter, who felt that he did not get all

of the trial judge's remarks, to go to the trial judge's home and receive assistance from the judge in preparing the transcript.

28. Appeal and Error ⇐1046(5)
Trial ⇐29(4)

It was improper for trial judge to ask one of the attorneys for the plaintiffs to act for the judge in a narcotics prosecution in which an effort was being made to disqualify the judge, but it was not reversible error to do so.

Walter K. Olds, San Francisco, Pillsbury, Madison & Sutro, Eugene M. Prince, Francis N. Marshall, Lloyd A. Carlson, San Francisco, of counsel, for appellants.

Livingston & Livingston, David Livingston, Lawrence Livingston, San Francisco, for respondents.

BRAY, Justice.

Defendants appeal from several judgments awarding plaintiffs damages in the sum of $628,284.85 principal plus $643,049.51 interest from April 13, 1939, to date of judgment—total, $1,271,334.36.[1]

Questions Presented.

1. Defendants were charged with fraudulently inducing plaintiffs to sell capital stock held by them in a distributing corporation which plaintiffs had organized. Defendants concede that there was a conflict of evidence as to whether defendants were guilty of misrepresentation in connection with their purchase of plaintiffs' stock, but contend that *as a matter of law* the evidence establishes that plaintiffs knew the allegedly concealed facts and did not act in reliance upon said representations, and that said representations were not material. Hence, say they, there was no actionable fraud.

2. Did plaintiffs state a cause of action?

3. Was Sealed-Pure's default waived, so that Ex-Cell-O had no right to terminate the agency contract?

4. Was the agency contract terminable at will?

5. Was there any basis for damages?

6. Were plaintiffs entitled to interest?

7. Were defendants denied a fair and impartial trial?

(1) Rulings of the court. (a) Reopening of case for deposition of plaintiffs. (b) Disregard of defendants' evidence.

(2) Remarks of trial judge.

(3) Changes in transcript.

(4) Trial judge employs one of plaintiffs' counsel in another matter.

General Facts.

This is the story of a revolution in the type of container used for retail marketing of milk on the Pacific Coast. In 1934 Zinn and others organized the Gold Star Creameries. He was president. The corporation distributed cheese. In 1935–36 it constructed a building in Everett, Washington, for milk distribution in paper containers. During this time Zinn corresponded with Ex-Cell-O Corporation inquiring about leasing or purchasing its Pure-Pak milk packaging machine. Ex-Cell-O was a Michigan corporation manufacturing machine tools, which had developed said machine for use in packaging and distributing milk in paper containers. Zinn also conceived the idea of establishing a distributorship for the Pure-Pak machine. Zinn spent considerable time and effort in interesting others with him and in contacting Ex-Cell-O to obtain such an agency. Eventually, on October 31, 1937, a final distributorship agreement was executed.

1. This is the third trial and the second appeal. The first trial resulted in judgment for defendants. That judgment on appeal was affirmed as to one Malkson who was president and member of the board of directors of Sealed-Pure, a corporation, and reversed as to all other defendants. Zinn v. Ex-Cell-O Corp., 1944, 24 Cal.2d 290, 149 P.2d 177. At the end of the second trial the late Hon. James G. Conlan, who presided, made a minute order awarding plaintiffs $87,543.28 damages and disallowing interest. Due to his death before findings were signed, no judgment could be entered, and hence the case had to be retried. Additional evidence was adduced at the third trial.

This provided that a Washington corporation with a capital stock of 10,000 no par value shares was to be formed by Zinn, Kemp and Malkson.[2] Six thousand shares were to be issued to be paid for by $5,000 to be advanced by Malkson. The remaining 4,000 shares were not to be issued at this time but were to be used later to raise additional capital. From the 6,000 shares, 500 were to be transferred to Ex-Cell-O. The agreement granted Zinn, Kemp and Malkson the exclusive rights to distribute Ex-Cell-O's machines in the eleven western states and Hawaii, and provided that upon the formation of the corporation these rights were to be assigned by them to it. The machines could not be sold, only leased, and orders would be binding on Ex-Cell-O only if accepted by it. The agents agreed to place three machines in said territory within 90 days and within 6 months to have installations in three dairies in specified areas, and within two years in 15 dairies in the territory. The agents were to receive 12½ per cent of all rental payments as commissions. For a period of two years, Ex-Cell-O was to set aside 2½ per cent of the royalties collected to be expended under the joint direction of the parties for advertising and promotional services. The agreement recited that a licensing agreement had been entered into between Fibreboard Products, Inc., and Ex-Cell-O under which Fibreboard was given the exclusive right to manufacture blanks for the Ex-Cell-O machines, paying Ex-Cell-O therefor a 5 per cent royalty on all its net mill sales. This sum when received by Ex-Cell-O was to be paid to the agents. Fibreboard was required to pay an additional royalty of .00675 per cent for a period of two years, which Ex-Cell-O was to be set aside for establishing and supporting a distributing agency.

Preparing for the agency contract, the Sealed-Pure corporation was organized October 21, 1937. Malkson put up $5,000 for the issuance of 6,000 shares. Of these, 1,667 went to Zinn, who was president, 1,667 went to Kemp, who was secretary, 1,667 to Malkson, who was treasurer, 499 to Ellis and 500 to Ex-Cell-O as agreed. Later Zinn bought 1,875 shares of the treasury stock at $1 per share. Seven hundred ninety-one shares of the treasury stock were issued to Kemp who transferred 625 of them to L. P. Nelson. Fifty shares were issued to Schroeder and the remaining 1,284 shares were issued to Malkson. Gold Star was issued 1,875 shares of that stock. Of the Gold Star stock 875 shares were transferred to W. M. Nelson, 40 shares to McLaughlin and 60 shares to Ethel Zinn. Within five months of the incorporation all of the Sealed-Pure stock had been issued. Most of its capital, plus $1,875 which Ex-Cell-O had paid it as advance commission on a machine placed with Gold Star, had been loaned to Gold Star, the parties feeling that in order for the agency to succeed, the Gold Star paper container operation, the first in the west, must be successful. By early 1938 Sealed-Pure had only about $800 as working capital. This bred dissension between Malkson, Zinn and Kemp, which was increased by the fact that the operation of the machine leased to Gold Star was delayed by a Seattle ordinance prohibiting the sale of milk in cartons. Huffman, an Ex-Cell-O employee, went to Seattle to assist in setting up the Ex-Cell-O machine. By this time Sealed-Pure was near default of the requirement that within 90 days it place three machines. Huffman, at Malkson's request, wired Ex-Cell-O requesting extension of "four months from time of dairy opening for shipment of second machine." Scott replied that Ex-Cell-O appreciated the delay and "Will gladly cooperate in extending installation date * * * provided aggressive sales effort is made." Huffman then reported to Ex-Cell-O in more detail concerning Sealed-Pure's situation. Zinn wired and then

2. The defendant in whose favor the judgment at the first trial was affirmed on appeal. Obviously, he was not a party (although a witness) in the subsequent trials, nor is he here.

wrote Scott giving his story of the situation, and accusing Huffman and Malkson of collusion. Late in February, 1938, Scott met plaintiffs in Seattle, and told them that Bixby, the president of Ex-Cell-O was "terribly dissatisfied" with the conduct of the business and threatened to cancel the agency contract unless the matter was straightened out. Scott made suggestions. He then wrote Bixby his impression of the situation.

March 9, 1938, Zinn, Kemp and Malkson met with Scott and told him their differences had been resolved, and that they were ready to make the changes suggested by him. Accordingly, Malkson was made president of Sealed-Pure, in place of Zinn, and also treasurer and general manager. Zinn was elected vice president, and Scott and Malkson's brother directors. A headquarters for Sealed-Pure was established in San Francisco. Scott and Malkson then called upon all the major dairies in several California areas. They called upon Sneed, president of Lucerne Cream & Butter Co., a subsidiary of Safeway, who had previously visited the Gold Star plant and was unfavorably impressed with the operation of the Pure-Pak machine, although, having tested consumer acceptance of the milk sold in paper cartons by Gold Star he found that favorable. Sneed told Malkson and Scott that he was not ready for a trial installation. They both reported this to Zinn.

April 30th, the six months given by the contract to install machines in dairies in three specified areas, elapsed, without such installations. May 2, 1938, Malkson wrote Zinn that he had seen Sneed and that the latter's final decision as to whether he would take a machine depended on "what the Everett stores do the next few months" and that Scott had agreed to make trial installations at "Los Angeles and here," and if they could get the right dairy, "So, we are still in the ring." May 9, 1938, Malkson wrote Kemp that Petersen, a Sealed-Pure salesman, was making some progress in the Los Angeles area and new contacts in the San Francisco area, and that Ex-Cell-O "has given us authority to place a machine either in Bellbrook, Safeway or Marin Dell on a trial basis." As will later appear, Ex-Cell-O on July 25, 1938, accepted an order from Safeway for one machine on a 90 day trial with fixed amounts to be paid if it kept that machine and desired more.

At the time Bixby was negotiating with Safeway, he told Malkson that he was dissatisfied with the way Sealed-Pure had functioned and that he could see nothing to do but to cancel the contract. Malkson said he did not blame him but that he did not want the contract cancelled. He then asked Bixby for a job if the contract were cancelled. Bixby then said he planned to go to Seattle to look into the Gold Star affairs and perhaps work something out with Zinn and Kemp. At Seattle on July 28, 1938, Bixby met with Zinn, W. M. Nelson, Kemp and Ellis and told them of his dissatisfaction with the way Gold Star was meeting its obligations on the machine leased to it. Bixby told them that Ex-Cell-O was going to cancel the contract. The stock in Sealed-Pure which Gold Star had bought had been paid for with Gold Star notes. Bixby stated that if they would take these notes as part payment he would try to get Ex-Cell-O to buy their shares at $1 per share.[3] On returning to Detroit, Bixby, on August 1st, wrote to plaintiffs cancelling the agency contract. On August 17th Bixby wrote Zinn stating terms for the purchase of the stock. August 24th, Zinn wrote Bixby, expressing his understanding of the terms offered, accepting them, and enclosing the stock certificates. They were unendorsed. Bixby on August 26th sent Zinn a check for the amount required, and a receipt to be signed evidencing the entire transaction. He also returned the stock for endorsement. August 31st, Zinn forwarded the endorsed

3. The discussion concerning Safeway will be considered later.

stock and the receipt to Bixby. Plaintiffs testified that they would not have sold had they known the true Safeway transaction.

1. Plaintiffs' Knowledge of the Safeway Transaction.

As before stated, defendants concede that the evidence upon the question of Bixby's misrepresentation or failure to disclose was conflicting and that therefore this court is bound by the trial court's determination of that subject. So, we will consider only plaintiffs' version of the representations, and then, only sufficiently to lay the background for the evidence concerning plaintiffs' knowledge of the Safeway transaction, which evidence defendants contend is conclusively against plaintiffs. Here, again, if there is any conflict on the subject, we are bound by the court's finding that plaintiffs had no such knowledge.

Safeway came into the picture in February, 1938, when Sneed, president of Lucerne Cream & Butter Co., a subsidiary of Safeway, visited the Gold Star plant. While unfavorably impressed with the operation of the Pure-Pak machine leased from Ex-Cell-O by Gold Star, he had tested customer acceptance of milk sold in Gold Star cartons and found it favorable. In March Scott and Malkson called upon Sneed who stated that he was not ready for a trial installation. They reported this to Zinn. On May 2nd, Malkson wrote Zinn that he had seen Sneed and that his final decision on whether he would buy a machine depended upon what the Everett stores did during the next few months. July 15, 1938, Sneed wired Bixby for a copy of Ex-Cell-O's form of Pure-Pak machine contract and inquired if he was willing to install a machine in Safeway's San Francisco plant. He stated that he was taking the liberty of wiring direct as Malkson was out of town. The next day Bixby airmailed forms of the lease agreement and expressed Ex-Cell-O's willingness to make a trial installation. July 18th, Kirkland, a Safeway executive, in Malkson's presence, phoned Bixby, at Detroit, that Safeway was ready to accept Ex-Cell-O's trial offer and would need 15 to 18 machines, but he did not like the terms of the agreement and asked that a representative of Ex-Cell-O come to Oakland, authorized to agree to changes in the agreement. July 22nd, Bixby, Malkson, Kirkland and Sneed discussed a revised agreement. It was not satisfactory to Bixby, who then suggested that Safeway might buy the machines outright, $32,500 for the first machine, $37,500 for additional machines. A purchase order, accepted by Bixby on July 25th, was given by Safeway. This provided that Safeway was to have 90 days free use of one machine. If not satisfactory it would be returned without cost, except that Safeway would pay shipping costs both ways. If Safeway kept the machine over 90 days it was to pay Ex-Cell-O $32,500 therefor. Further machines ordered before December 31, 1939, were to cost $37,500 each. Kirkland and Sneed told Bixby that they wanted Safeway to introduce the first paper milk container in the area without Safeway's competitors knowing of it, and asked that the installation be kept secret.

Malkson, of course, was in on these negotiations with Safeway, but plaintiffs were not. Bixby at this time told Malkson that he was going to have to cancel the agency contract, and Malkson asked Bixby for a job if the contract was cancelled. Bixby then went to Seattle and conferred with Zinn and the other plaintiffs. Bixby denies the representations claimed to have been made by him at these conversations but admits that he did not tell any of the plaintiffs concerning the Safeway purchase of a machine. He claims that he did tell Wm. Campbell, the Ex-Cell-O mechanic who was working on the machine leased by Gold Star, that a machine was to be placed with Safeway on a trail order. Of course, this was not telling plaintiffs. Campbell claims that when on August 13th he left Gold Star he told Zinn that he was going to California to install a machine. He did not state for whom. Zinn denies this. The plaintiffs testified that Bixby told them that he had talked with Malkson and had interviewed all

possible prospects, but none of them was ready to buy or try the machines, and stated positively that no deals, orders or sales had been made. It was in reliance on these statements that plaintiffs sold Ex-Cell-O their stock. August 10th, Petersen had written Zinn that the prospects of putting over some deals looked good, and stated that he had been forbidden to write Zinn. On August 17th Bixby wrote in a letter that Safeway was trying to get the Oakland ordinance against paper containers changed, "but as yet they have not placed an order with us for equipment to be installed in Oakland." In that letter Bixby requested that all Gold Star stock be forwarded to him and stated what he had agreed at Seattle to pay for it. He then offered, however, to make an allowance of $2,000 instead of $1,000 for the outstanding Gold Star notes. On August 13th, Jerseymaid in Los Angeles signed a lease agreement for a machine and sent it to Ex-Cell-O for approval. August 17th, Malkson was hired by Ex-Cell-O as its agent to solicit orders for machines.

Up to this point there is no evidence to contradict the testimony of plaintiffs that they had no knowledge of the true Safeway situation.

August 27th, the Oakland Wholesale Grocery Co. wired Gold Star asking confidential information as to the operation of the Ex-Cell-O machine and the competitive success of the milk containers. Zinn then wrote Bixby asking what answer he should make and stating: "Knowing of your deal in Calif. thru the local Safeway I do not wish to answer this until you let me know what your pleasure is." August 30th Zinn wrote Bixby stating, among other things, that Campbell had written Gordon (Gold Star's machine operator) "also that Safeway would open on the 4th in Frisco," that Gordon had not told Zinn about "Campbell's writing about Frisco deal" but had told another who told Zinn. "If that is o. k. with you it is with me—just question effect on Safeway if they hear it and I don't want to be blamed for letting out any 'advance news.'"

On August 30th, Campbell was in Seattle. Campbell testified he then told Zinn of the Safeway installation in San Francisco. When asked why he did not investigate the use of the machine by Safeway, Zinn testified that he believed in Bixby's integrity and his statement that Safeway had not purchased any machines, that he knew offers had been made to install them (this is what he meant by his statement in the August 27th letter "Knowing of your deal in Calif. thru the local Safeway"), that it would involve the expenditure of some $30,000 to open up the territory and that possibly Ex-Cell-O might have placed some machines on trial. In an undated letter but contained in an envelope postmarked August 31, 1938, Zinn wrote Petersen that Ex-Cell-O had cancelled the agency contract and bought the Sealed-Pure stock "at a time when Safeway bought a machine for S. F. which opens Sept 4th 1938." This letter was not produced at the prior trials, and for some reason no questions were asked Zinn concerning it.

September 1st, Bixby wrote Zinn in response to Zinn's August 30th letter in which Zinn had stated that he had learned that Campbell had informed "that Safeway would open on the 4th in Frisco." Bixby stated that the Safeway people had pledged him to absolute secrecy "in connection with their San Francisco installation" and "we have been very careful not to expose this news to anyone" but that, as the news was now out in San Francisco, the fact that the news was out in Seattle would make no difference.

When asked if he knew at the time he received this letter that the Safeway people had a Pure-Pak machine, Zinn testified that he had heard that Safeway had placed an order for blanks, but not that they had an installation. He took it to be a confirmation from Bixby of what he had already been told, that Safeway had bought blanks, "and I would naturally think that they were going to have a machine, but as to whether it was installed or not at that time I did not know." The letter indicated

to him, not that they had installed a machine, but that they were going to install one.

September 6th, Safeway advertised the sale in San Francisco of milk in Pure-Pak containers. W. M. Nelson and Zinn saw the ad in the early part of that month. Plaintiffs testified that although they now knew that Safeway had a machine, they assumed it was purchased after they had sold Ex-Cell-O their stock, and that the first time they suspected that Safeway had a machine from Ex-Cell-O prior to August 1, 1938, was when Zinn, on January 1, 1939, visited the Fibreboard plant at Port Angeles, Washington, and was told that Safeway had purchased on August 1, 1938, 100 tons of paper carton blanks.[4] Zinn then had an attorney investigate, and for the first time actually learned of the Safeway order of late July, 1938.

[1] "Actual fraud" and "deceit" are defined in similar terms by the code. Civil Code, §§ 1572, 1709, 1710. The general elements of a cause of action for fraudulent misrepresentation are (1) misrepresentation (false representation, concealment, or nondisclosure); (2) knowledge of falsity (scienter); (3) intent to induce reliance; (4) justifiable reliance; and (5) resulting damage. See Seeger v. Odell, 1941, 18 Cal. 2d 409, 414, 115 P.2d 977, 136 A.L.R. 1291; Rest. Torts. § 525 et seq.

[2] Mere nondisclosure of facts is ordinarily not enough to constitute fraud, but it may be actionable under certain circumstances. One situation is where the defendant, who has no duty to speak, nevertheless does so. In such a case he is bound to speak truthfully and to speak the whole truth. Dyke v. Zaiser, 1947, 80 Cal.App.2d 639, 652, 182 P.2d 344; Sullivan v. Helbing, 1924, 66 Cal.App. 478, 483, 226 P. 803; Civ.Code, § 1710, subd. 3; Rest. Torts, § 529.

[3, 4] The evidence supports the court's finding that Bixby not only intentionally concealed from plaintiffs the sale to Safeway but actually represented to them that no such sale had taken place, for the purpose of getting them to acquiesce in the termination of their agency and to sell their stock in Sealed-Pure. While it is true that most of the evidence supporting this finding is what defendants call "self-serving," the testimony of an interested party is competent and admissible, Divani v. Donovan, 214 Cal. 447, 6 P.2d 247, and if believed by the trial court, is sufficient to determine the issue. Here the trial court believed plaintiffs.

Defendants rely strongly on Zinn's letter of August 31st in which he stated that Ex-Cell-O had purchased the stock at a time when Safeway had bought a machine "which opens Sept 4th." It must be remembered that on August 17th, after Zinn on August 7th had written him "I learned about the possible placing of a machine in Oakland this month of which I knew nothing," Bixby wrote that Safeway had been working to have the Oakland ordinance changed "but as yet they have not placed an order with us for equipment to be installed in Oakland." This letter also gave Bixby's terms for the purchase of the stock. Believing Bixby, Zinn on August 24th mailed the stock to Bixby, although unendorsed. August 26th, Bixby sent payment for the stock. Zinn's explanation as to his statement in his August 27th letter "Knowing of your deal in Calif.," his statement in his letter of August 30th about the "Frisco deal," and his statement in his letter of August 31st (at this time the sale of stock had been consummated) that Safeway had bought a machine, while consistent with a finding that Zinn knew that a sale to Safeway had been made prior to the cancellation of the agency agreement and to the sale of the stock, is not compellingly so and is not inconsistent with a finding to the contrary.

No evidence was introduced by either side concerning exhibit XX (the letter of August 31st). It stands alone. Ex-Cell-O, in essence, relies on it principally for re-

4. The evidence that the Fibreboard books did not contain the data Zinn claimed to have seen there merely caused a conflict in the evidence which the court resolved.

versal of the case on the liability issue. Ex-Cell-O, relying heavily upon Bassett v. Johnson, 1949, 94 Cal.App.2d 807, 211 P.2d 939, argues that this letter is so positively at variance with the oral testimony of plaintiffs as to their knowledge of the fraud, that there ceases to be a substantial conflict in the evidence on that issue.

[5] The findings do not specifically refer to exhibit XX. However, by implication the trial judge found that it did not conclusively establish the fact of plaintiffs' knowledge of the fraud before the purchase of the stock. The rule seems to be that where the trial judge interprets a document solely from the writing within its four corners, the interpretation is a matter of law, and the appellate court may give the writing a different interpretation if the trial judge's appears to be unreasonable. In re Estate of Platt, 1942, 21 Cal.2d 343, 352, 131 P.2d 825.

Certainly the letter is ambiguous. If taken as true that Zinn meant "bought" when he wrote "bought," it still is not conclusive that he knew of the Safeway transaction before the plaintiffs' stock was purchased. In the first place, Safeway had not bought a machine; it had only an option to buy. The sale of the stock is said by defendants to have been consummated on August 31, 1938. But this does not mean that the actual sale did not occur earlier. The sale of the stock appears to have actually occurred no later than the date of August 26, 1938, when Bixby sent the payment for the stock, which had been previously sent to him by Zinn. Patently, Bixby and Zinn felt this to be so.[5] Thus, it is by no means unreasonable to interpret the sentence "Cancellation and purchase of Sealed Pure Stock came at a time when Safeway bought a machine for S.F. * * *," to mean that Zinn was not aware that the Safeway contract was executed before the purchase of the stock.

[6–11] Ex-Cell-O contends that the testimony of disinterested witnesses, to the effect that Zinn had knowledge of the Safeway deal before the sale of the stock, establishes that "the great current of the evidence is against the finding." Without stating this testimony, it suffices to say that there is testimony by the plaintiffs to the contrary; and by Zinn, denying that the conversations testified to above ever took place. All this testimony is merely a compilation of conflicting evidence. There is substantial evidence here from which the trial judge could find in accordance with Zinn's testimony. The testimony of one witness may be sufficient, as against any number of witnesses testifying to the contrary, for the proof of a fact in a civil case. Menning v. Sourisseau, 1933, 128 Cal.App. 635, 639, 18 P.2d 77. The appellate court ordinarily looks only at the evidence supporting the successful party, and disregards the contrary showing. "Of course, all of the evidence must be examined, but it is not weighed. All of the evidence most favorable to the respondent must be accepted as true, and that unfavorable discarded as not having sufficient verity to be accepted by the trier of fact. If the evidence so viewed is sufficient as a matter of law, the judgment must be affirmed." In re Estate of Teel, 1944, 25 Cal.2d 520, 527, 154 P.2d 384, 388.

Ex-Cell-O asserts that Zinn's testimony on the discovery he made at Fibreboard's Port Angeles plant, along with plaintiffs' bare testimony that none of them had knowledge until January 1, 1939, of the Safeway transaction, do not serve to meet the definition of "substantial evidence," when balanced against the positive, direct evidence in exhibit XX, the "new and disinterested witnesses," and the Port Angeles record. The answer to that is, again, given in the Teel case, supra.

Certainly Zinn had scattered scraps of information that something was astir in San Francisco or Oakland. But Zinn knew that Ex-Cell-O had authorized Sealed-Pure to place machines on a trial basis. Knowing this and that Bixby, upon whom he relied, had told him that no deal had been made, we cannot say that he was not justified in be-

5. In Bixby's letter of August 26th he stated, "Now that we are the sole shareholder in Sealed Pure * * *"

lieving that no deal had been made and in not making an investigation. Nor in view of this situation can we say that his letter of August 31st shows that he had knowledge of the fraud before plaintiffs sold their stock. Correspondence between Malkson and Zinn who had charge of Sealed-Pure's San Francisco office had ceased during the critical months of July and August, because plaintiffs were unable to send Malkson any finances. At this time, too, Malkson was negotiating with Bixby for a job and was not desirous of giving plaintiffs any information as to the progress with Safeway.

Defendants' contention that Bixby's representation that no order had been given by Safeway is not a material one is well answered by the foregoing recital of facts. While it is true that both Gold Star and Sealed-Pure were in financial difficulties, and that plaintiffs had not performed the agency contract according to its terms (such performance, however, had been waived by Ex-Cell-O) it is obvious that plaintiffs would have valued their Sealed-Pure stock more highly had they known the true situation.

2. Plaintiffs' Cause of Action.

[12] Defendants seem to think that this action is for wrongful termination of the agency contract and contend that such a cause of action would lie only in the Sealed-Pure Corporation and not in the individuals who assigned their contract to it. This action, however, is not for that cause, but is for fraud in inducing plaintiffs to sell their stock. That obviously is a cause of action inhering in each person so wronged. The law of the case as set forth in Zinn v. Ex-Cell-O, supra, 24 Cal. 2d 290, 149 P.2d 177, is that in fixing the amount of damages sustained by plaintiffs the claim that the agency was wrongfully terminated may be considered. "Whether by reason of the termination of the agency contract Sealed-Pure was entitled to recovery against Ex-Cell-O for wrongful repudiation of the agency contract is a matter bearing upon any possible additional damages." 24 Cal.2d at page 298, 149 P.2d at page 181.

3. Termination of Contract.

[13] The court found that there was no failure to comply with the terms of the contract other than the failure to comply with the stipulations as to time of placement of machines, and that such noncompliance was waived by Ex-Cell-O, in addition to which Ex-Cell-O up to the very moment of cancellation was inducing Sealed-Pure to continue with the agreement. The evidence supports this finding.

Admittedly the corporation had little capital for the project it had undertaken, but it was organized and capitalized according to the terms of the agency contract. Its diversion of capital to Gold Star was obviously the wisest expenditure of its money because there was reluctance by all potential lessees of the Pure-Pak machines to employ this revolutionary method of packaging milk until it had been proved. It is true that some success had been shown by the users of the machines in the eastern United States, but the degree of perfection of the machines and customer acceptance of the cartons was still unsettled in the minds of potential western users.

The evidence clearly shows that all parties were agreed that the success of distributing Ex-Cell-O's machines on the west coast depended primarily upon Gold Star making a success of the operation of its machine (the first on the coast) and the use of its paper cartons, and that if the Gold Star operation failed, Ex-Cell-O's opportunity to dispose of its machines would likewise fall. Scott, in a letter to Bixby, March 7, 1938, so stated and also stated that that also was the opinion of Fibreboard, from whom the carton blanks were to be obtained. About May 2nd Sneed had told Malkson that his interest depended almost entirely upon the success of Gold Star's paper containers in the Everett stores during the next few months. On January 20, 1938, Ex-Cell-O in a telegram replying to one of Malkson's asking for extension

of four months from time of dairy opening for shipment of second machine, stated that it would cooperate in extension of the installation date, providing aggressive sales effort was made. A reasonable interpretation of these telegrams is that the time for all installations was extended provided aggressive sales efforts were made. While there were expressions by Ex-Cell-O of dissatisfaction with the way matters were going, Ex-Cell-O consistently aided and encouraged Sealed-Pure in its efforts. Scott suggested, and obtained a reorganization of the management. In May, 1938, Ex-Cell-O helped reduce Sealed-Pure's financial difficulties by its purchase of Gold Star notes from Malkson. July 1st, Scott wrote Malkson that the Ex-Cell-O management and he believed that "you are doing a very, very good job there on the Coast." Sneed's telegram to Bixby was made in Malkson's presence, and Bixby's interviews with Sneed were likewise. All of Ex-Cell-O's acts up to about the time of the actual signing of the Safeway order showed a desire on the part of Ex-Cell-O to continue relations with Sealed-Pure and to waive any default in its contract.

4. Terminability at Will.

The court found that from the contents of the agreement and the circumstances it was the intention of the parties that the contract was terminable only for good cause, and was to give Sealed-Pure the right to continue as the exclusive distributor of machines in the territory as long as it performed the terms of the contract and the objects and purposes of the agreement could be served.

[14, 15] There is no express provision in the agency contract as to its term. Ex-Cell-O contends that it is well settled in this state that a contract of agency which specifies no term or period of duration is terminable at the will of either party without liability. This may be true in some circumstances. See Speegle v. Board of Fire Underwriters, 1946, 29 Cal.2d 34, 39, 172 P.2d 867 and citations therein. But that is not true where the intentions of the parties may be ascertained "by reference to the circumstances under which it was made, and the matter to which it relates." Civ. Code, § 1647. Also, the contract itself may have indications as to the intentions of the parties, even though not express. And "where parol proof is admitted for the purpose of assisting the court to ascertain the intention of the parties and where conflicting inferences may be drawn, it is the constitutional function and duty of the trial court to determine the meaning of the parties and such finding is binding on the reviewing court." In re Estate of Guasti, 1953, 117 Cal.App.2d 612, 617, 256 P.2d 629, 633.

[16] The agency contract here itself indicates that the parties did not contemplate termination at will. Paragraph 8 provides that Ex-Cell-O can terminate upon Sealed-Pure's default and after 15 days' notice. The definite times for the accomplishment of certain machine placements, in paragraph 6, tends to negative an intention that it be terminable at will. The provisions of paragraph 11 indicate that the contract was to continue well beyond the time limit established for the placement of machines, when it provided for the payment or royalties to Sealed-Pure for a 2 year period for "advertising or promotional services." Again, in paragraph 12, royalties were to go to Sealed-Pure "during the life of this agreement * * *" The requirements of paragraphs 1 and 3 that a corporation be formed to carry out the contract implies permanency.

Additionally, as evidence of Ex-Cell-O's interpretation of the contract, Scott wrote Malkson July 8, 1938, to the effect that he hoped that Sealed-Pure's association with Ex-Cell-O remained successful and pleasant for a great many years to come. The notice of termination of the agreement did not purport to terminate because of any right to terminate at will, but because of alleged default. The very nature and size of the undertaking which burdened plaintiffs once they executed the agency contract indicates that there was no intention that

it should be terminable at will. Otherwise plaintiffs could be denied the fruits of their labors even on the threshold of success. Equitable principles would prohibit such an oppressive result. The above also supports the finding that the contract continued "beyond September 30, 1949."

5. Basis for Damages.

Defendants contend that as a matter of law plaintiffs have proved no damages from the wrongful termination of the agency agreement, in that Sealed-Pure's business was unestablished, it had realized no profits and its commissions were dependent upon performance. While all of these statements are true, nevertheless plaintiffs were damaged. If defendants' contention were true, then there never could be any damages suffered by the breach of a contract near its inception. It is clear that Sealed-Pure laid the foundation for the placement of the machine with Safeway before the cancellation of the contract. The placement of the machine and the tentative order, if known to plaintiffs, would have had a tremendous impact upon the value of their stock. Lacking knowledge of this, they sold their stock for $1 per share. Certainly the *fact* of damage is thus established. "Section 3343 of the Civil Code provides that one defrauded in the sale of property is entitled to recover the difference between the actual value of that with which he parted and the actual value of that which he received. The value of the stock is to be determined by the worth of the corporate assets, not the 'market value' of the stock. [Citations.] Future profits may be shown for the light that they throw on the value of the stock at the time of its fraudulent purchase. [Citations.] * * * One whose wrongful conduct has rendered difficult the ascertainment of the damages cannot escape liability because the damages could not be measured with exactness. [Citations.]" Zinn v. Ex-Cell-O Corp., supra, 24 Cal. 2d at page 297, 149 P.2d at page 181.

Clearly the amount of income Sealed-Pure would have had but for the cancellation of the contract can be calculated with sufficient certainty by application of the terms of the agency contract to the income Ex-Cell-O had from the placement of machines in the period subsequent to the cancellation of the contract. The fact that Sealed-Pure had an exclusive contract within a certain area aids in the certainty of the calculation. Yaguda v. Motion Picture Publications, Inc., 1934, 140 Cal.App. 195, 199, 35 P.2d 162.

Ex-Cell-O argues that the amount of revenue earned by it does not establish that Sealed-Pure could have accomplished the same amount of business. The answer to this is in Hacker Pipe & Supply Co. v. Chapman Valve Mfg. Co., 1936, 17 Cal. App.2d 265, 267–268, 61 P.2d 944, 946 where the court, in a somewhat similar situation, said: "It is held generally that the breach of an exclusive sales agency contract through the invasion of the territory of the agent * * * will entitle the latter to the profits he would have made upon sales in the amount of those made by his principal in the invaded territory. * * * The fact that the goods were sold by defendants furnished sufficient proof that they could have been sold by plaintiff." Every case cited by Ex-Cell-O for the proposition that damages for the breach of agency contracts is too speculative, involve fact situations where the plaintiffs attempt to prove what business could have been done but for the breach of the contract. They are not in point in this case where there is proof of what *was actually done* by the principal, and could have been done by the plaintiffs but for the breach of the contract.

Defendants contend that the Fibreboard royalties cannot be considered as Ex-Cell-O might have terminated the Fibreboard agreement. The answer to this is that had the agency contract not been wrongfully cancelled, Ex-Cell-O could not legally destroy Sealed-Pure's right to part of the Fibreboard royalties by releasing Fibreboard from its duty to pay. In Universal Sales Corp. v. California Press Mfg. Co., 1942, 20 Cal.2d 751, 771, 128 P.2d 665, 677 the court said: "In every contract there is

an implied covenant that neither party shall do anything which will have the effect of destroying or injuring the right of the other party to receive the fruits of the contract * * *."

The agency agreement set forth that Ex-Cell-O had entered into an agreement with Fibreboard for the exclusive right in the territory to manufacture blanks for its machines and provided that Sealed-Pure would receive certain proportions of the royalties to be received from Fibreboard. As pointed out before, an additional percentage for a period of two years was to be used by Ex-Cell-O for the purpose of establishing and supporting Sealed-Pure as a distributing agency. Moreover, in the agreement between Ex-Cell-O and Fibreboard, Ex-Cell-O agreed to pay such royalty to a distributing agency in order to bring about the installation of as many machines as possible to increase Fibreboard's sale of blanks. The same rule applies to the Kieckhefer Container Co. royalties which the court considered in fixing damages. Because Fibreboard could not meet the demand, Ex-Cell-O on May 1, 1947, also licensed Kieckhefer to manufacture blanks for Pure-Pak machines in the Pacific Coast territory for which Kieckhefer was to pay royalties. The court found that Sealed-Pure's share of those royalties would have been $283,610.10. While, of course, there is no mention of Kieckhefer in the agency contract, the contract provides that the agents were to receive a percentage of the royalties from the Fibreboard contract. In that contract Fibreboard was to have the exclusive right in the territory to produce the blanks to be used in the Ex-Cell-O's machines. The fact that Ex-Cell-O saw fit to divide the blank business with another concern than Fibreboard could not deny Sealed-Pure the royalties it was promised from all sales of blanks within its territory.

[17, 18] The trial court properly found that there must be deducted from the royalties that Sealed-Pure would have received, the expenses Sealed-Pure would have incurred in transacting the business required by the contract. This amount the court found to be $138,900. The court added the expenses of Sealed-Pure during its operation, the cost of a trained supervisor which Sealed-Pure was required to employ, and the amounts paid by Ex-Cell-O over a period of 11 years as salary and expenses of its service men. While Ex-Cell-O claims the true expenses would have been $700,000, the trial court resolved the conflict in favor of plaintiffs. It must be remembered that considerable latitude is allowed a plaintiff in proving damages in a fraud case. "'* * * the wrongdoer shall bear the risk of the uncertainty which his own wrong has created * * *.'" Speegle v. Board of Fire Underwriters, supra, 29 Cal.2d at page 46, 172 P.2d at page 874. The evidence supports the finding.

6. Interest.

[19] The trial court allowed interest from the date of filing suit, applying section 3288, Civil Code, which permits, in the discretion of the trier of fact, the allowance of interest in a fraud action. Defendants contend this was improper for the reason that they claim that the wrong occurred in Washington, and that therefore the law of that state, which they claim does not allow interest in a tort action, applies. We agree with their contentions.

The question of whether interest as part of the damages for a tort is to be allowed is to be determined by the law of the place of wrong or the place of the forum, has never been determined in California. The Restatement, Conflict of Laws, section 419, states that the law of the place of the wrong governs. 11 Cal.Jur.2d 206, states that the Restatement on this subject is not supported by California authority, "although authority to the contrary is meager and has little persuasive value." Actually, there appears to be no authority on it here. The three cases relied upon by the California Jurisprudence article dealt not with torts but with breaches of contract. The holding in each instance was that the law of the forum applies as to granting in-

terest for breach of contract, contrary to the statement in Restatement, Conflict of Laws, section 418, that the place of performance of the contract governs. Thus, Perkins v. Benguet Cons. Min. Co., 55 Cal. App.2d 720, 132 P.2d 70, involved the question of the failure of a corporation to pay stock dividends to the owner of the stock. In holding that the law of the forum governed, the court treated the case as one of contract. All of the authorities mentioned upon which its decision was based dealt with contracts. Nesbit v. MacDonald, 203 Cal. 219, 263 P. 1007, and Bank of United States v. Foreman, 102 Cal.App. 756, 283 P. 874, each dealt with the question of whether interest was allowable on a foreign note which did not provide for interest. Thus the California Jurisprudence statement is erroneous. It is interesting to note that the California courts have followed the Restatement, section 420, which provides that in an action on a foreign judgment the rate of interest allowed for delay in satisfying the judgment is determined by the law of the place where the judgment was rendered. Thompson v. Monrow, 2 Cal. 99; Cavender v. Guild, 4 Cal. 250; Stewart v. Spaulding, 72 Cal. 264, 13 P. 661. Likewise, on the question of damages generally in a tort action California has followed the Restatement, Conflict of Laws, section 412: "The measure of damages for a tort is determined by the law of the place of wrong." See Klaffki v. Kaufman, 52 Cal.App. 48, 198 P. 36, action for statutory penalties for nonpayment of wages. The court there distinguishes between the law of contract which applies to the employment contract and the law of tort which applies to the statutory penalty. See also Ponsonby v. Sacramento Suburban Fruit Lands Co., 210 Cal. 229, 291 P. 167. That was an action for damages for fraudulent representations by which the plaintiffs were induced to exchange real property in Minnesota for property of much less value in California. An attachment had been issued on the theory that the action was for "damages, arising from an injury to property in this State * * *" Code Civ.Proc. § 537, subd. 3. In holding that the attachment was properly based the court in order to find that an injury to property had occurred in this state rather ingeniously worked out the theory that by misrepresenting the value of California property the defendants had caused a diminution in the plaintiff's funds previously banked here, and expended in making improvements on the California land. As said in Loranger v. Nadeau, 215 Cal. 362, 363, 366, 10 P.2d 63, 65, 84 A.L.R. 1264: "It is the settled law in the United States that an action in tort is governed by the law of the jurisdiction where the tort was committed, and, as it is a transitory action, it may be maintained in any jurisdiction where the defendant may be found. It is the general rule in tort actions that the court will, if it has jurisdiction of the necessary parties and can do substantial justice between them in accordance with its own forms of procedure, enforce the foreign law if it is not contrary to the public policy of the forum, to abstract justice, or pure morals, or injurious to the welfare of the people of the state of the forum." To the same effect, Grant v. McAuliffe, 1953, 41 Cal.2d 859, 862, 264 P.2d 944, 42 A.L.R.2d 1162. The comment on section 412 of the Restatement states: "The right to damages in compensation or punishment for a tort is to be distinguished from the right of access to the courts and from the procedure provided to obtain the damages. The creation of a right to have damages necessarily involves the measurement of that right in so far as the law can measure it. While the actual finding of the amount of damages is a function of the jury or other fact-finding body at the forum, the law that creates the right determines what items of loss are to be included in the damages. Since the right is created by the law of the place of wrong, it is measured by that law."

While ordinarily it would be rather anomalous to hold that the law of the forum applies to the allowance of damages but does not apply to the allowance of one of the elements of damages—interest, it must be

remembered that when the Supreme Court on the prior appeal applied section 3343, Civil Code, it did so without any issue having been raised as to its application and without any discussion of a reason for its application. While that application became the law of the case as to the general measure of damages, such application should not necessarily be extended to a matter which was not then before the court. Particularly is this so when we realize that the doctrine applied is contrary to prior holdings in this state which were not considered or even mentioned on the prior appeal. Thus, when our courts have considered the matter after issue raised upon the point they have held that damages in a fraud action are to be awarded in accordance with the law of the place of wrong, thereby following section 412, Restatement. Logically, if California, in effect, adopts the Restatement as to the general measure of damages in a fraud case, it should adopt it as to one of the elements of damages—interest.

Section 419, Restatement, reads: "The rate of interest allowed as a part of the damages for injury to property by a tort is determined by the law of the place of wrong." Plaintiffs contend it could not apply here (1) because, say they, it deals only with the *rate* of interest, and (2) because, they say, it applies only to injury to property. It seems obvious that if the law of the place of the wrong determines the measure of damages it necessarily must determine whether or not interest may be a part of that measure. The one necessarily includes the other. That a fraud of the kind committed here constitutes an injury to property in the sense of section 419 clearly appears from the definition of "property" given in Ponsonby v. Sacramento Suburban Fruit Lands Co., supra, 210 Cal. 229, 291 P. 167. The same meaning is included in the definition of "property" as given in "Introductory Note" to "Property" in Restatement. Conflict of Laws, page 296: "The word 'interest' is used throughout the Restatement of this Subject as indicating the normally beneficial side of a legal relation as a right power, privilege or immunity. The word 'property' is used throughout the Restatement as a synonym for interest as thus explained." Moreover, section 419 is merely an application of a general principle. The comment on that section says: "The rule stated in this Section is a specific application of the general rule as to measure of damages in tort stated in § 412." That section, as we have heretofore shown, states that the measure of damages for a tort is determined by the law of the place of the wrong.

This brings us to the question of whether the law of Washington, the place where the wrong occurred, permits the allowance of interest.[6]

[20] There is no statute on the subject in Washington. No evidence was introduced in the trial court as to the case law in that state upon the subject. Therefore, contend plaintiffs, the California courts may not take judicial notice of the Washington decisions as they are not interpreting statutes but are applying the common law and must assume that the Washington law is the same as California law as expressed in section 3288, Civil Code. Section 1875, subdivision 3, Code of Civil Procedure, as amended in 1927, provides that our courts may take judicial notice of "* * * the laws of the several states of the United States and the interpretation

6. Plaintiffs contend that some of the acts constituting the wrong took place in Michigan where they claim the law allows interest as a matter of right, and also in California. However, the wrong was the misrepresentations. These as well as the sale of the stock occurred only in Washington. No matter where the intention to misrepresent was formed, nor the acts which were misrepresented took place, no wrong was committed until the misrepresentations were communicated to plaintiffs and this took place in Washington. See Restatement, Conflict of Laws, section 377, to the effect that the place of the wrong is in the state where the last event necessary to make an actor liable for an alleged tort takes place.

thereof by the highest courts of appellate jurisdiction of such states; * * *." Prior to the amendment it was held that California courts could not take judicial notice of the decisions in other states. Since the amendment although there are cases elsewhere that interpret the word "laws" as used in a statute not to include case law in the form of judicial decisions[7] we have been cited to no case in California nor have we found one, placing such a narrow interpretation on the word "laws" in section 1875, subdivision 3. On the other hand, in Worthley v. Worthley, 1955, 44 Cal.2d 465, 283 P.2d 19, the court after determining that the effect of a Nevada divorce decree upon the defendant's preexisting obligations under a New Jersey maintenance decree must be decided by the law of New Jersey, took judicial notice, without discussion of its right to do so, of a recent New Jersey Supreme Court decision upon the subject. In In re Wolfson, 30 Cal.2d 20, 180 P.2d 326, again without discussion, the court took judicial notice of a Pennsylvania decision holding that the elements of the offense of larceny, under a Pennsylvania statute which made larceny punishable, but did not define it, were those of the common law offense of larceny. Bracker v. American Nat. Food, Inc., 1955, 133 Cal.App.2d 338, 284 P.2d 163, after stating "The courts of California take judicial notice of the laws of Missouri," 133 Cal.App.2d at page 344, 284 P.2d at page 167, cited a Missouri decision as controlling. First-Trust Joint S. L. Bk. of Chicago v. Meredith, 1936, 5 Cal.2d 214, 53 P.2d 958, was a suit upon a promissory note made in Iowa. After stating that the parties conceded that the question as to whether the defendant was to be held personally liable on the note was governed by the law of the state of Iowa, the court said, 5 Cal.2d at page 219, 53 P.2d at page 960: "The law of that state is therefore assumed to be the applicable law [citation] *of which the court will take judicial notice.*" (Emphasis added.) As pointed out in McCormick on Evidence (1954) page 697, the modern conception is that counsel as officers of the court are available to find and present decisions of other states to the judge "in just the same informal and convenient fashion as if they were arguing a question of local law."

[21] That Washington does not allow interest on unliquidated damages in tort cases is clearly apparent from the decisions of that state. See Ikeda v. Curtis, 1953, 43 Wash.2d 449, 261 P.2d 684, 691 (fraud in sale of hotel property); Kiessling v. Northwest Greyhound Lines, Wash.1951, 229 P.2d 335 (negligence in operating a bus); Buob v. Feenaughty Machinery Co., 1940, 4 Wash.2d 276, 103 P.2d 325, 337 (Misrepresentations and breach of warranty concerning a tractor); Edwards v. Powell, 1923, 121 Wash. 598, 212 P. 163 (fraud).

While plaintiffs contend that the decisions on this subject in Washington are "in a state of hopeless confusion" on this subject, we fail to find them so. 30 Washington Law Review 128, cited by plaintiffs, deals only with interest in contract cases. Mall Tool Co. v. Far West Equipment Co., Wash. 1954, 273 P.2d 652, involved an action upon contracts. Likewise Sweeney v. Lewis Const. Co., 1913, 74 Wash. 303, 133 P. 441, and Parks v. Elmore, 1910, 59 Wash. 584, 110 P. 381. Grays Harbor County v. Bay City Lumber Co., 1955, 47 Wash.2d 879, 289 P.2d 975, is not contrary to the rule above mentioned. It holds that in conversion cases the Washington courts follow the general rule expressed in 36 A.L.R.2d 337, 348, 349, "the general rule in actions of trover and conversion is that interest is allowed from the date of the conversion." At page 982 of 289 P.2d. In Petersen v. Graham, Wash. 1941, 110 P.2d 149, interest was allowed for fraud in a real estate transaction because "the demand was a liquidated one." 110 P.2d at page 154. Barnett v. Cobb, 1926, 140 Wash. 538, 250 P. 57, was an action for rescission for misrepresentation of the ren-

7. Swanson v. City of Ottumwa, 131 Iowa 540, 106 N.W. 9, 13, 5 L.R.A.,N.S., 860; Mooney v. Brotherhood of Railroad Trainmen, 162 Minn. 127, 202 N.W. 341, 342; United States Savings & Loan Co. v. Harris, C.C., 113 F. 27, 35.

tal value of real property. Without discussion or consideration of any Washington cases, the court apparently applied the rule in conversion cases and allowed interest.

[22] Plaintiffs point out that defendants did not raise the conflict of laws question in the trial court, raising it for the first time on appeal, and hence they claim it may not be raised now. Defendants, however, at all times did maintain that the trial court had no right to grant pre-judgment interest. Inasmuch as the question is one strictly of law and not of evidence, we believe that the ruling in Panopulos v. Maderis, 47 Cal.2d 337, 303 P.2d 738, should apply and the question should be determined by us. In that case the court said: "* * * the defendant asserts that where a cause has been tried on a theory acquiesced in by the parties, an appellant cannot seek a reversal on an entirely new theory. [Citations.] It is the general rule that a party to an action may not, for the first time on appeal, change the theory of the cause of action. [Citations.] There are exceptions but the general rule is especially true when the theory newly presented involves controverted questions of fact or mixed questions of law and fact. If a question of law only is presented on the facts appearing in the record the change in theory may be permitted. [Citation.] * * * [W]hen as here the facts with reference to the contention newly made on appeal appear to be undisputed and that probably no different showing could be made on a new trial it is deemed appropriate to entertain the contention as a question of law on the undisputed facts and pass on it accordingly." 47 Cal.2d at page 340, 303 P.2d at pages 740, 741.

7. Fairness of Trial.

(1) Rulings.

(a) Reopening Case for Depositions of Plaintiffs.

[23, 24] Several of the assignments under the contention that defendants were denied a fair and impartial trial are based upon certain rulings of the court. None of the plaintiffs appeared at the trial. Over defendants' objection their testimony, formerly given, was used on the ground of their absence from the state. Defendants moved to strike this testimony, which motion was denied. The case was submitted for decision after briefs filed and oral arguments had, in which defendants again urged the inadmissibility of plaintiffs' former testimony. The judge rendered his decision, giving plaintiffs the same judgment as later entered. Before findings were made, plaintiffs moved to vacate submission, reopen the case, continue it for trial and grant permission to plaintiffs to take their depositions at Seattle. Plaintiffs stated that there was a remote possibility that defendants' contention as to the admissibility of the former testimony might be good and in an excess of caution desired to eliminate any question. They gave as a reason for not moving to take depositions before submission that they desired to avoid the unnecessary expense which would have been incurred if the court should decide the case in defendants' favor on the merits. The court granted the motion in toto, stating that so doing would "cure a possible error and would obviate a retrial of the issues in the event the appellate court might agree that the former testimony was inadmissible." Depositions of plaintiffs were thereafter taken, the trial resumed and the depositions read into evidence. Plaintiffs then moved to strike the former testimony of plaintiffs from the record. After the court granted the motion, defendants then offered the stricken testimony for purposes of impeachment and admission, and it was readmitted. Over three years prior to the granting of plaintiffs' motion to take their own depositions defendants had moved to take such depositions and the court had denied the motion on the ground of lack of diligence and insufficiency of the affidavit upon which the motion was based. The conduct of a trial is primarily in the trial court's discretion. We can see no abuse of discretion here. Although the trial court stated that it was fully convinced of the soundness of its ruling on the admissibility of the former testimony, we see no reason why out of an ex-

cess of caution, particularly in a case which was now being tried for the third time, and each trial of which consumed a considerable length of time, the court could not permit steps to be taken which would assure that a new trial might not have to be had, not because of a question on the merits, but because of a question of procedure. See Bazet v. Nugget Bar Placers, Inc., 1931, 211 Cal. 607, 611, 296 P. 616; Farmer v. Orme, 1933, 131 Cal.App. 628, 630, 21 P.2d 977.[8]

(b) Disregard of Defendants' Evidence.

[25] Defendants contend that Zinn's testimony upon which the court's decision principally depends, was shown to be false and is conclusively refuted by defendants' evidence. We cannot say as a matter of law either that Zinn's testimony was false or was refuted by defendants' evidence. The testimony of one witness, believed by the court, is sufficient to support a judgment. In the deposition of Zinn defendants for the purpose of attacking his credibility attempted to show that he had been in California during some portion of the time the first trial was taking place. That trial extended from 1945 to 1949 during portions only of which time actual trial was taking place. Defendants failed to show that Zinn was in California during any of the actual trial. We fail to see that the fact that he was here between sessions of the trial affected his credibility to the extent that his testimony as a matter of law must be disregarded.

(2) Remarks of Trial Judge.

[26] In response to an argument by defendants' counsel opposing the taking of the deposition of plaintiffs in which counsel complained of the amount of work thereby falling on their shoulders, the trial judge stated in effect that counsel on neither side should complain about additional work as undoubtedly they would be properly compensated therefor. Then followed a statement by the trial judge that is a little difficult to understand. He started out by saying that third parties reprehensibly had importuned him to disclose his frame of mind toward his ultimate disposition of the case. "The dollar sign has been written—insofar as the suggestion that third parties who might—importune me to commit myself—" Counsel for defendants assumed that the judge was impugning their integrity and so stated. The judge then said that he never had questioned their integrity or good faith nor that of any of the counsel in the case nor of any of the parties, and that no one representing themselves as having been procured by any of the counsel or parties had approached him. The judge then went on to say that he would permit nothing to interfere with a just disposition of the case, and would "pursue a straight, undeviating course in effecting a final disposition of this litigation * * *" While the remarks should not have been made, we fail to see that they indicated any prejudice towards defendants. The judge in effect so stated. It appears that the judge wanted everyone to know how virtuous he was in spite of third parties' attempted interference. He stated that "in due time" he would state for the record what this importuning was. He did not do so, even when later again requested by defendants to explain those remarks. He should have done so, but his failure so to do cannot be taken as prejudice towards defendants. Injudicious statements by a trial judge do not necessarily indicate a denial of a fair trial.

(3) Changes in Transcript.

[27] It appears that the reporter went to the judge's home and asked for assistance in transcribing the above mentioned statements. Defendants' counsel did not agree with the transcription when made, and invited the reporter to their office to question him. Unbeknown to him his statements

8. Defendants contend at great length that the showing for the admission of the former testimony was not sufficient and therefore it was improperly admitted. We deem it unnecessary to determine this question for two reasons: (1) the court finally struck the testimony from the record, and (2) defendants thereafter for their own purposes had it readmitted.

were recorded by a machine connected with a dictaphone. Apparently the only substantial difference between what the defendants claim the court said and what the transcript shows is as follows: Defendants contend that the judge said "The dollar sign has been written all over this case," the transcript, "The dollar sign has been written—insofar as the suggestion that third parties who might—importuned me to commit myself—" We do not consider this difference as significant. Nor do we see anything wrong in the fact that a green reporter who felt he did not get all of the judge's remarks requests and receives assistance from the judge in preparing the transcript.

(4) Judge's Employment of Counsel.

After the trial judge had set aside the submission of the case and while plaintiffs' depositions were being read, the judge stated that an effort was being made to disqualify him from trying a narcotics prosecution then pending, and that he might ask one or more of the counsel in this case to help him resist the charge of disqualification. Thereafter and before this case was finally submitted, he asked Lawrence Livingston, one of plaintiffs' counsel, to assist the attorney who was then acting for him in the criminal case. After considering the alleged disqualification statement, Livingston advised the judge to ask the San Francisco Bar Association to take the burden of the defense and to ask the then president of the Bar Association, Mr. Gerald Levin, who was a member of the firm of attorneys representing defendants herein, to talk to Livingston about the matter. The judge reported to Livingston that Levin would discuss the matter with him. Livingston then contacted Levin, and at the former's request the latter agreed to present the matter to the board of directors of the association. The board declined to enter the proceeding. Thereafter Livingston, at the judge's request, assisted the judge's attorney in the preparation of the answer to the disqualification charges.

[28] It certainly was highly irregular for a judge before whom a case was being tried, to employ as his attorney in another matter one of the attorneys in that matter. Although here that employment was open and not surreptitious, that fact does not detract from the impropriety of the action. While we have no reason to doubt the judge's statement that the relationship with Mr. Livingston in no wise influenced him in any way in this case, a judge in the trial of a case should so conduct himself as to leave all of his actions completely above suspicion. The fact that the relationship of attorney and client exists between the judge and a lawyer for the successful side, hardly engenders a comfortable feeling in the losing side. While the judge's action in this respect is highly to be condemned, we do not feel that it requires us to hold that it influenced him in his determination of this case.

Those portions of the judgment allowing interest prior to judgment are reversed. In all other respects the judgment is affirmed. Each party shall bear its own costs.

PETERS, P. J., and FRED B. WOOD, J., concur.

Hearing denied; TRAYNOR, J., dissenting.



148 Cal.App.2d 479

Elizabeth OLSON, Plaintiff and Respondent,

v.

Andrew OLSON, Defendant,

Henrietta HOGAN, Executrix of the Estate of Andrew Olson, deceased, and Sole Devisee and Legatee thereof, Appellant.

Civ. 8974.

District Court of Appeal, Third District, California.

Feb. 11, 1957.

Hearing Denied April 10, 1957.

Divorce action. The Superior Court, Lake County, Benjamin C. Jones, J., after death of husband, entered an order vacating an interlocutory decree of divorce

in favor of wife and vacating a property settlement agreement and denied a motion to vacate such order made by decedent's executrix, and executrix appealed. The District Court of Appeal, Schottky, J., held that trial court had no power to cancel, and set aside property settlement agreement entered into between wife and husband pursuant to divorce proceeding and approved by interlocutory decree in proceedings under statute providing court may relieve a party from a judgment taken through mistake or excusable neglect.

Affirmed in part and reversed in part.

1. Judgment ⇐363

Statutes providing that a court may relieve a party from a judgment taken through mistake or excusable neglect was designed to enable courts to call into requisition their equitable powers, and thus authorize them, where it is in the furtherance of justice, to relieve against an honestly made mistake, inadvertence or excusable neglect. West's Ann.Code Civ.Proc., § 473.

2. Judgment ⇐382

Even though statute providing for relief from judgment provides that the party against whom a judgment has been taken may be relieved therefrom, such statute entitles a plaintiff as well as a defendant to move for vacation of judgment or order, and a party in whose favor judgment has been rendered is entitled to relief under such section, as well as the party against whom it was rendered. West's Ann.Code Civ.Proc., § 473.

3. Divorce ⇐165(5½)

In proceeding on motion for relief from an interlocutory divorce decree, evidence was sufficient to support an order vacating such decree upon grounds of mistake, inadvertence, surprise, or excusable neglect. West's Ann.Code Civ.Proc., § 473.

4. Appeal and Error ⇐982(1)
Judgment ⇐344

It is primarily a question of fact for trial court to determine whether or not justice requires that a judgment or order be set aside, and the granting of a motion to vacate a judgment or order under statute providing for such relief rests largely in the discretion of the trial court and the ruling of the trial court will not be disturbed on appeal unless an abuse of discretion clearly appears. West's Ann.Code Civ.Proc., § 473.

5. Divorce ⇐254

Property rights approved under an interlocutory divorce decree become final after six months, and until period has passed in which a party may make a motion to vacate the judgment on the ground of mistake or excusable neglect the court retains power to act. West's Ann.Code Civ. Proc., § 473.

6. Divorce ⇐254, 255

A property settlement incorporated into a divorce decree and made a part thereof is merged into the decree and the only way the decree can be set aside is by appeal, or by a motion for relief from judgment under statute providing for such relief on the ground of mistake or inadvertence. West's Ann.Code Civ.Proc., § 473.

7. Divorce ⇐254

Trial court had jurisdiction to entertain a motion made under statute providing for relief from judgment on ground of mistake or excusable neglect, to vacate an interlocutory decree of divorce approving property settlement agreement, notwithstanding death of defendant's husband. West's Ann.Code Civ.Proc., § 473.

8. Divorce ⇐165(1)

Where, in proceeding on motion by wife to set aside an interlocutory divorce decree in her favor, attorney for deceased husband's executrix was served with notice, appeared in court, answered ready, filed affidavits and interrogated witnesses in contesting the motion to vacate, court had power to entertain the motion to vacate the interlocutory decree, notwithstanding fact that it failed to enter an order substituting executrix for deceased husband. West's Ann.Code Civ.Proc., § 473.

9. Divorce ⇐254

Trial court had no power to cancel and set aside property settlement agreement entered into between wife and husband pursuant to divorce proceeding and approved by interlocutory decree in proceedings under statute providing court may relieve a party from a judgment taken through his mistake or excusable neglect. West's Ann. Code Civ.Proc., § 473.

Gesford P. Wright, Lakeport, for appellant.

Nichols, Richard, Allard, Morgan & Digardi, Jesse E. Nichols and Anthony R. Brookman, Oakland, and Philip N. Crawford, Lakeport, for respondent.

SCHOTTKY, Justice.

This is an appeal from an order of November 30, 1954, vacating an interlocutory decree of divorce and vacating a property settlement agreement and also from a subsequent order denying a motion to vacate the said order of November 30, 1954.

The record shows that the respondent, Elizabeth Olson, and the decedent, Andrew Olson, were husband and wife. Marital difficulties occurred and Elizabeth filed suit for divorce. A property settlement agreement was executed and a stipulation was then entered into that the case could be heard without any notice to Andrew. On May 10, 1954, the court entered an interlocutory decree of divorce in favor of Elizabeth, and the property settlement agreement which was on file with the court was approved and made a part of the decree. On May 26, 1954, Andrew executed a will in which Henrietta Hogan, the appellant, was named as executrix and sole legatee. On August 22, 1954, Andrew died. His will was then offered for probate, and appellant was appointed executrix.

On November 9, 1954, respondent Elizabeth Olson filed a notice of motion that on November 10, 1954, she would move to vacate the interlocutory decree of divorce upon the ground "that the same was entered through the mistake and surprise of said Plaintiff in that Plaintiff mistakenly believed that the property settlement agreement approved by said Decree was a necessary prerequisite to said Decree and on the further ground that said property settlement agreement purports to divest the above-named Plaintiff of property rights which were never intended by her to be divested, all of which is a surprise to Plaintiff and wholly without her consent." Said notice was served on the attorney for the executrix, and on November 10, 1954, the attorney for respondent and the attorney for the appellant appeared in court and answered ready. The attorney for respondent made the motion to vacate, and then requested a continuance for the hearing of the motion to November 29th. The attorney for appellant stated that he had no objection to that date. The further hearing of the motion was continued to November 29th at which time this matter was heard upon affidavits filed by the respective parties and also upon the oral testimony of several witnesses. The court denied the motion of counsel for appellant that appellant be made a party to the action, but allowed her counsel to participate in the hearing. Following the hearing the court, on November 30, 1954, made an order granting respondent's motion to vacate, the order providing in part as follows:

> "It Is Hereby Ordered, Adjudged and Decreed that the Interlocutory Decree of Divorce herein dated May 10, 1954, be, and the same is hereby vacated and set aside and that the same is of no effect whatever.
>
> "It Is Further Ordered, Adjudged and Decreed that the Property Settlement Agreement dated April 29, 1954, between the parties hereto, which is by the terms of said Decree, approved and made a part thereof, and which is recorded in Judgment Book 12, of the Superior Court of the County of Lake, State of California, at page 400, and which is on file herein, be, and the same is hereby cancelled vacated and set aside, and the same is of no effect whatever, and all instru-

ments executed to give effect to said Property Settlement Agreement and Decree, be, and the same are hereby cancelled, annulled, vacated and set aside."

Thereafter, appellant executrix made a motion to set aside the order of November 30, 1954, and the court made an order denying said motion. This appeal is from both of said orders.

Section 473 of the Code of Civil Procedure, under which the motion to vacate the interlocutory decree was made, provides in part that:

"The court may, upon such terms as may be just, relieve a party or his legal representative from a judgment, order, or other proceeding taken against him through his mistake, inadvertence, surprise or excusable neglect."

[1, 2] This section has been construed as remedial, and it has, therefore, been given a liberal construction. It was designed to enable the courts to call into requisition their equitable powers, and thus authorize them, where it is in the furtherance of justice, to relieve against an honestly made mistake, inadvertence or excusable neglect. Brasher v. White, 53 Cal. App. 545, 200 P. 657. Even though section 473 provides that the party against whom a judgment or order has been taken may be relieved therefrom, it is well established that this entitles a plaintiff as well as a defendant to move under said section for a vacation of a judgment or order, Lemon v. Hubbard, 10 Cal.App. 471, 102 P. 554; Grannis v. Superior Court, 143 Cal. 630, 632, 77 P. 647; Gray v. Lawlor, 151 Cal. 352, 90 P. 691, and that a party in whose favor a judgment has been rendered is entitled to relief under section 473, as well as the party against whom it was rendered. Palace Hardware Co. v. Smith, 134 Cal. 381, 66 P. 474; Wetzel v. Wetzel, 71 Cal. App.2d 168, 162 P.2d 299; see also 40 A.L.R.2d 1138.

[3, 4] In the instant case the affidavit of respondent, Elizabeth Olson, set forth, among other things, that her deceased husband had by violence and intimidation forced her to commence the action for divorce; that the property settlement agreement was entered into by her under a mistaken impression as to her rights and that she was informed that the divorce could not proceed unless the property settlement was entered into. Counter affidavits were filed by appellant and there was also oral testimony which does not appear in the transcript. In view of the fact that appellant makes no attack upon the sufficiency of the evidence to support the order vacating the interlocutory decree it is sufficient for the purposes of this appeal to state that the evidence is sufficient to support the order vacating the interlocutory decree upon the grounds set forth in said section 473, namely, "mistake, inadvertence, surprise or excusable neglect." As has been often declared by our appellate courts, it is primarily a question of fact for the trial court to determine whether or not justice requires that a judgment or order be set aside, and the granting of a motion to vacate a judgment or order under Code of Civil Procedure, section 473, rests largely in the discretion of the trial court, and the ruling of the trial court will not be disturbed on appeal unless an abuse of discretion clearly appears.

Appellant's first contention is that a divorce action does not survive the death of either party and that therefore the court was without jurisdiction to make any order affecting the status of the defendant in a divorce action or to modify the judgment. Appellant cites Kirschner v. Dietrich, 110 Cal. 502, 42 P. 1064. In that case service was made by publication of summons, and the interlocutory decree was entered on July 13, 1893. The plaintiff died on February 22, 1894, and on June 8, 1894, on ex parte motion of defendant, the court ordered the administrator of plaintiff substituted in place of deceased, and directed that the action be in his name. Thereafter, the defendant moved the court to vacate the judgment on the ground that summons had not been personally served on him and on

other grounds. The court denied the motion and in affirming the order upon appeal the Supreme Court said at page 504 of 110 Cal., at page 1065 of 42 P.:

"It is difficult to understand upon what principle the court made the order substituting the administrator of the plaintiff in the place of his intestate, or directed a continuance of the action in his name after the death of the original plaintiff. But, as the respondent does not appear to have objected thereto, we are not required to determine the correctness of the order. The court, however, properly denied the defendant's motion to vacate the judgment and allow him to answer the complaint. The action was solely for the purpose of procuring a judgment of divorce between the parties—a purely personal action which would not survive the death of either party, and which, upon the death of the plaintiff, could not be further prosecuted or defended, whether her death was before or after the judgment. If she had died prior to the entry of judgment, there could have been no judgment in the case, and her death subsequent to the entry of judgment deprived the court of all power to review its action and determine her right to a divorce. The action having been brought to change the personal *status* of the plaintiff in her relations toward the defendant, it is evident that, upon the termination of her life there was no personal *status* which a judgment could change."

In reply, respondent cited Britton v. Bryson, 216 Cal. 362, at page 369, 14 P.2d 502, at page 505, in which the court said:

"* * * It is argued in the instant case that by virtue of the death of the husband, the *res*—that is to say, the marital status—ceased to exist, and any action involving the marital status of the parties must necessarily cease to be an action *in rem* and becomes one *in personam*. We do not think this necessarily follows. It is now well settled in California that subsequent to the death of one of the parties, the other may have said decree set aside upon proof that the judgment of divorce was procured by extrinsic fraud. McGuinness v. Superior Court, 196 Cal. 222, 237 P. 42, 40 A.L.R. 1110; Tomb v. Tomb, 120 Cal.App. 438, 7 P.2d 1104. It is evident, therefore, that regardless of the existence of the *res*—that is to say, the marital status—the court had sufficient jurisdiction to render a valid judgment with reference thereto. It would seem, therefore, that the power to render such a judgment is based not upon the continued existence of the marital status, but upon the court's control of its own records, and its inherent power to purge its records of judgments obtained by fraud. In other words, in such an action the *res* is not the marital status, which has ceased to exist, but the former judgment itself over which the court continues to retain power. That this is so is, we think, indicated by the language of Mr. Justice Richards in the case of McGuinness v. Superior Court, supra, 196 Cal. 222, 237 P. 42, 47, 40 A.L.R. 1110. In that case the wife, after the death of her husband, sought and secured a decree setting aside a final decree of divorce entered by her husband without her knowledge and without her consent subsequent to their reconciliation following the entry of an interlocutory decree of divorce. It was there urged that the divorce action being one brought solely to sever the marriage relation between the parties thereto, the said action abated upon the death of the party defendant subsequent to the entry of the final decree, and the trial court thereby lost jurisdiction to take any action whatever in said case. Mr. Justice Richards, speaking for the court, said: 'The plaintiff by her own motion made in the divorce action is not seeking to reopen said action for the purpose of

further litigating the question as to whether she, or the defendant either, is entitled to a divorce. That question has been settled by the defendant's death, and as to it or any further litigation regarding it in said action it has been abated. But the plaintiff, notwithstanding the abatement of the action in so far as the issues therein are involved, is seeking to invoke the power of the court over its own records, by suggesting and offering to show to the court that it has been imposed upon by the extrinsically fraudulent acts and concealments of the defendant. * * * This is the principal purpose of her said motion. * * * To such a purpose the death of the defendant in said action is merely incidental, and is in nowise controlling upon the power of the court to purge its records of orders and decrees which the court has been wrongfully misled into making through the fraudulent imposition of a party to an action pending, at the time of such imposition, before it. To hold that the party having accomplished such imposition could by dying deprive the court of the right when properly advised to so purge its own records would be to abridge to the point of denial one of the most salutary of the inherent powers of the court.'"

[5–7] While the setting aside of an interlocutory decree of divorce, which made a property settlement agreement a part of the decree, would of course have no effect on the marital status which was terminated by death, it would have the effect of vacating the approval of the property settlement. Property rights approved under an interlocutory decree become final after six months. Leupe v. Leupe, 21 Cal.2d 145, 130 P.2d 697. Until the six month period has passed in which a party may make a motion to vacate under Code of Civil Procedure, section 473 (eliminating the question of appeal), the court retains power to act under section 473. If death precluded the court from acting, a person who had property rights decided adversely to him would be without a remedy by the death of his adversary. It would be inequitable to allow property rights to become final because of the fortuitous circumstances of death. A property settlement incorporated into a decree and made a part thereof is merged into the decree. Hough v. Hough, 26 Cal. 2d 605, 609, 160 P.2d 15. The only way it can be set aside is by appeal or by a motion under section 473. The fact that one party has died should not foreclose relief under section 473. We are therefore of the opinion that the court had jurisdiction to entertain a motion made under section 473 to vacate the interlocutory decree of divorce notwithstanding the death of the defendant.

[8] The next point raised by appellant is that the court was without power to entertain the motion to vacate without a substitution of the appellant executrix where the court was aware of the death of decedent. While we believe a formal order of substitution of the executrix for the decedent should have been made, we are satisfied that the failure to enter such an order did not prejudice the rights of the appellant as her attorney appeared on November 9, 10 and 29, and contested the motion on the 29th. As was said in Mooney v. Superior Court, 183 Cal. 705, at page 708, 192 P. 542, at page 543:

"* * * But, assuming that there should have been a substitution, notice of the motion for dismissal having in fact been served upon his duly qualified personal representative, she appeared and contested the motion upon its merits, thus practically making herself, in her official capacity as executrix of the will of contestant, a party to the proceeding in his place. She was in fact fully authorized to be substituted in his place; she did proceed therein and was recognized as proceeding therein as if formally substituted, and at most all that was lacking was the entry of a formal order of substitution. This at best was a mere irregularity in procedure, not affecting any substantial

right, which, in view of the circumstances, would hardly warrant a reversal of the judgment of dismissal on appeal."

Where, as in the instant case, the attorney for appellant executrix was served with notice, appeared in court, answered ready, filed affidavits and interrogated witnesses, in contesting the motion to vacate, we are satisfied that the contention that the court was without power to entertain the motion to vacate the interlocutory decree cannot be sustained.

[9] Appellant's final and most serious contention is that the court had no power to cancel, vacate and set aside the property settlement agreement and all instruments executed to give effect to it. With this contention we agree.

The property settlement agreement contained the following provision:

"Seventeenth: That this Agreement shall be effective from and after the date hereof, and this Agreement may, if desired by either of the parties hereto, be submitted to the Court in any action for divorce or separate maintenance now pending or hereafter instituted by either party against the other for the approval of said Court, but this Agreement shall not depend for its effectiveness on such approval nor be affected thereby."

While the court undoubtedly had the power, upon a motion under section 473, to vacate the interlocutory decree, it could do no more than vacate the approval of the property settlement agreement contained in the decree. The only issue that could be determined by the court on a motion under section 473 was whether there was sufficient evidence to justify the court in concluding that the judgment should be vacated because of the mistake, inadvertence, surprise or excusable neglect of respondent. Having so determined, the court could then only set aside and vacate the interlocutory decree which would have the effect of restoring the property settlement agreement to the same position it was in before the interlocutory decree was entered. While it may be said that the property settlement agreement was merged in the interlocutory decree and approved thereby, it must be held that the vacating of the interlocutory decree withdrew the approval.

In Bowman v. Bowman, 29 Cal.2d 808, at page 813, 178 P.2d 751, at page 754, 170 A.L.R. 246, the court said:

"Section 473 also provides that a trial court may relieve a party from 'a judgment, order, or other proceeding taken against him through his mistake, inadvertence, surprise or excusable neglect.' * * * The purpose of this provision, however, is to enable trial courts to set aside the judgment, order or proceeding in order to allow the party to proceed on the merits rather than to allow him to be defeated by a determination or proceeding caused by his mistake, inadvertence, surprise or excusable neglect. Riskin v. Towers, 24 Cal.2d 274, 279, 148 P.2d 611, 153 A.L.R. 442; In re Estate of Simmons, 168 Cal. 390, 396, 143 P. 697. The trial court in the present case did not attempt to vacate the judgment on the ground or surprise or inadvertence, but attempted to grant defendant's request by modifying the interlocutory judgment to correct the supposed error of law. Trial courts can modify or amend their judgments only as prescribed by statute and the summary modification of judgments to correct errors of law is not authorized by section 473."

And as stated in Cann v. Parker, 84 Cal. App. 379, at page 381, 258 P. 105, at page 106:

"* * * Undoubtedly it is the general rule that the only question to be passed upon in such a motion is whether the facts are sufficient to establish a case of excusable neglect. It was never intended that the merits of issues of fact should be passed upon in any such proceeding, * * *."

Respondent, in arguing that the court had jurisdiction to vacate the property settle-

ment, relies strongly on Gregory v. Gregory, 92 Cal.App.2d 343, 206 P.2d 1122. In that case husband and wife entered into a property settlement agreement which was approved in the interlocutory decree. Thereafter the defendant wife made a motion under section 473 to set aside the interlocutory judgment on the ground that it was entered through mistake, inadvertence and excusable neglect. On the hearing of this motion the court set aside and vacated the judgment, granting defendant leave to file the answer and cross-complaint accompanying the motion. Plaintiff appealed from this order. In affirming the order setting aside the judgment the court, 92 Cal.App.2d at page 351, 206 P.2d at page 1127, used the following language quoted by respondent:

"The only reference to the property settlement agreement in the judgment is: 'The property settlement agreement between the parties, dated April 24, 1947, is hereby approved.' Plaintiff contends that by reason of this language the agreement is no part of the court's decree, and that to set the agreement aside will require an action in equity, citing Howarth v. Howarth, 81 Cal.App.2d 266, 183 P.2d 670, as authority therefor. The case is not in point. There the wife was endeavoring to enforce the provisions of the property settlement agreement. The court held that the agreement had not been incorporated into the decree so as to preclude subsequent action on the agreement itself. There is nothing in the case concerning setting aside the agreement. In a divorce action the court has the power to approve or disapprove a property settlement agreement, or to set aside the agreement if the facts justify it. Lorraine v. Lorraine, 8 Cal.App.2d 687, 48 P.2d 48. Incidentally, defendant testified that plaintiff agreed that the property settlement agreement was to be made a part of the decree. Now he attempts to take advantage of his failure to keep that agreement."

Respondent argues that the Gregory case is authority for the proposition that the court upon a motion under section 473 had the power to set aside, vacate and annul the property settlement agreement itself. We do not so construe it, as what the court said must be construed in relation to the facts and record in that case. The motion was to set aside the decree and permit the filing of an answer and cross-complaint. The setting aside of the decree in the Gregory case only set aside the approval of the property settlement agreement but did not set aside the agreement itself, and after the answer and cross-complaint were filed and the case was again at issue the property settlement agreement would again come before the court for approval or disapproval in the settlement of the property rights of the parties.

We conclude that the record supports that part of the order which vacated and set aside the interlocutory decree of divorce, but that the court erred in decreeing that the property settlement agreement be cancelled and vacated.

That part of the order of November 30, 1954, which decrees that the interlocutory decree "be, and the same is hereby vacated and set aside and that the same is of no effect whatever" is affirmed.

That part of the order of November 30, 1954, which decrees that the property settlement agreement "be, and the same is hereby cancelled, vacated and set aside, and the same is of no effect whatever, and all instruments executed to give effect to said Property Settlement Agreement and Decree, be, and the same are hereby cancelled, annulled, vacated and set aside" is reversed.

Appellant to recover her costs on appeal.

VAN DYKE, P. J., and PEEK, J., concur.

Hearing denied; SHENK and CARTER, JJ., dissenting.

148 Cal.App.2d 447

Mabel Arletta DILLON, Plaintiff and Respondent,

v.

Sidney WALLACE, doing business under the firm name and style of Sid's Market, and James Kent, Defendants and Appellants.

Civ. 16683.

District Court of Appeal, First District, Division 2, California.

Feb. 11, 1957.

Rehearing Denied March 13, 1957.

Hearing Denied April 10, 1957.

Personal injury action by store patron against store owner and manager for injuries received when patron allegedly slipped on parsley on floor of store. The Superior Court, Alameda County, Cecil Mosbacher, J., entered judgment on verdict for patron, and defendants appealed. The District Court of Appeal, Dooling, Acting P. J., held that admission of evidence, over defendants' objection, that plaintiff's invalid husband was taken to and died in another hospital while plaintiff was hospitalized as result of her injuries constituted prejudicial error, even though admitted for purpose of determining mental suffering caused to plaintiff by the injuries.

Judgment reversed.

1. Appeal and Error ⇐930(1)

Upon judgment for plaintiff in personal injury action, evidence upon issue whether one defendant was general manager of store in which plaintiff was injured as result of fall would be construed most favorably in support of the judgment.

2. Negligence ⇐136(22)

In action by store patron against store manager and operator for injuries sustained in fall allegedly caused by patron's slipping on parsley on floor of store, question of defendants' negligence was for jury.

3. Negligence ⇐121(1)

Ordinarily, plaintiff, who is injured in fall on floor of store, must prove that defective condition, which caused the fall, existed long enough so that, by use of ordinary care, it should have been discovered and remedied.

4. Negligence ⇐48

Where business invitor has knowledge that a course of conduct of third persons on his premises may endanger safety of his invitees, invitor has duty to exercise ordinary care to forestall such injury.

5. Evidence ⇐123(11)

In personal injury action by store patron against store owner and manager, manager's statement, upon finding patron in pain at scene of her fall and being shown the parsley upon which she allegedly had slipped, that she should not worry about the injury and that "we" had insurance and would pay her bills was properly held admissible against owner as part of the res gestae.

6. Trial ⇐127

Where reference to insurance is an integral part of an otherwise admissible declaration, the whole is properly admitted.

7. Evidence ⇐261

Where, some time after store patron had been injured in fall, manager told her that the accident was "the store's fault" and that "we" would pay all bills, and, in subsequent personal injury action against store owner and manager, such statement was admitted in evidence, leaving to jury question of manager's authority to bind owner by such statement acknowledging liability was error.

8. Evidence ⇐242(1)

Ordinarily, agent lacks authority to make admissions binding on his principal, and more than mere authority to act for principal in the transaction must be shown to make such admissions admissible against principal.

9. Appeal and Error ⇐1050(1)
Damages ⇐178

In personal injury action, admission of evidence, over defendants' objection, that plaintiff's invalid husband was taken to and died in another hospital while plaintiff was hospitalized as result of her injuries con-

stituted prejudicial error, even though admitted for purpose of determining mental suffering caused to plaintiff by the injuries.

10. Master and Servant ⇐310

Store manager had duty, by exercise of ordinary care, to protect store patrons from injury, and manager owed such duty to customers as well as to store owner, and breach of that duty to customers would render manager liable to them.

Healy & Walcom, San Francisco, F. A. Plank, San Francisco, of counsel, for appellants.

J. Oscar Goldstein, P. M. Barceloux, Burton J. Goldstein, Goldstein, Barceloux & Goldstein, San Francisco, for respondent.

DOOLING, Acting Presiding Justice.

[1] Defendants appeal from a judgment for $12,500 entered following the verdict of a jury. The plaintiff was injured as a result of a fall caused by her slipping on a piece of parsley on the floor of the grocery department of a market owned and operated by appellant Wallace and of which appellant Kent was manager. (There was a conflict in the evidence as to whether Kent was manager of the entire market or only of the grocery department. The complaint alleged that Kent was the general manager of the store and this was not denied in the answer. In any event the evidence on this, as on every issue, must be construed most favorably in support of the judgment.)

The fall occurred at about 10:10 a. m. on December 26, 1952, while respondent, who was in the market to make some purchases, was walking down one of the aisles in the grocery department. Shortly thereafter another customer called the appellant Kent. When he arrived respondent was leaning against a counter above the place where she had fallen. She testified that she showed him the piece of green vegetable upon which she had slipped. He looked at her knee and said that it looked to him as if it was broken. "He said, 'We can't take you home, we have got to take you to the hospital.' He said, 'Don't you worry about this,' he said, 'we are insured and we will pay your bills.' "

Respondent was then taken to a storage room where she was seated on a chair waiting to be taken to the hospital. There was testimony of a further conversation with Kent while respondent was resting there in which he said: "Now, this is the store's fault, don't you worry about a thing, we will pay all bills."

The floors of the market had last been cleaned after closing hours on December 24. The market was closed on December 25. It reopened on December 26 at 8 a. m. Kent made an inspection of the floors before the market opened. He made no further inspection before the accident. Appellant Wallace testified that he had instructed his clerks to continually make inspections of the floor while working rather than have somebody do it hourly or every two hours, but no evidence was introduced that any employee had inspected the aisle where the parsley was found between Kent's inspection and the time of the accident. Kent further testified that wire mesh grocery carts were supplied for customers' use, and that customers frequently put unwrapped vegetables, including sprigs of parsley, into these carts. He was then asked the question: "Isn't it true that to your own knowledge that on many occasions, make that a number of occasions, loose bits of vegetables, parsley, carrot tops and the like fell out through those baskets onto the floor?" He answered: "They do fall through the baskets."

"Q. That is right. You knew that, didn't you? A. That is right."

[2-4] In the face of this evidence it is vain for appellants to argue that there is no sufficient evidence to establish their liability. The jury could find from the evidence that no inspection of the floor in this aisle was made for a period of more than two hours. It certainly presented a fact question for the jury whether in the exercise of ordinary care appellants, with

knowledge of the fact that customers were in the habit of putting loose vegetables into the mesh carts and that loose bits of vegetable might fall and had previously fallen through the meshes to the floor, should have made more frequent inspections of the floor than the evidence indicates were in fact made in this case. It is ordinarily the rule that plaintiff must prove that the defective condition existed long enough so that by the use of ordinary care it should have been discovered and remedied. Otherwise stated: "the owner must have either actual or constructive knowledge of the dangerous condition *or have been able by the exercise of ordinary care to discover the condition,* which if known to him, he should realize as involving an unreasonable risk to invitees on his premises. His negligence in such cases is founded upon his failure to exercise ordinary care in remedying the defect after he has discovered it *or as a man of ordinary prudence should have discovered it.*" Emphasis ours; Hatfield v. Levy Brothers, 18 Cal.2d 798, 806, 117 P.2d 841, 845. There is no evidence that appellants had actual knowledge of the presence of this foreign matter on the floor, but there is ample evidence in the knowledge of the continuing danger of loose vegetables falling through the meshes of the carts as they had been known to do in the past, to make it a jury question as to whether appellants would "have been able by the exercise of ordinary care to discover the condition." Where a business invitor has knowledge of a course of conduct of third persons on his premises which may endanger the safety of his invitees he is under a duty to exercise ordinary care to forestall such injury. Rest. Torts, § 348; Stockwell v. Board of Trustees, 64 Cal.App.2d 197, 148 P.2d 405; Terrell v. Key System, 69 Cal.App.2d 682, 159 P.2d 704. In Harris v. Joffe, 28 Cal.2d 418, 425, 170 P.2d 454, 458, the court said of a recurring dangerous condition of the premises due to tenants tracking water into the hallway in wet weather: "Although there is no evidence that Mrs. Joffe had actual knowledge of the condition at the time of the injury, her constructive knowledge may be inferred from the prior complaints, and she had the affirmative duty of using ordinary care to keep the vestibule in a safe condition." Here the jury could reasonably find that with knowledge of the recurring danger from loose vegetable matter falling through the carts appellants had not used ordinary care for the protection of their customers from this known hazard.

[5] The first admission of appellant Kent was admitted into evidence against his employer Wallace as well as against himself on the theory that it was a part of the *res gestae.* We find no error in this ruling. Since the decision of Showalter v. Western Pac. R. Co., 16 Cal.2d 460, 106 P.2d 895, it has been recognized that where an occurrence is "startling enough to produce * * * nervous excitement and render the utterance spontaneous and unreflecting" and "before there has been time to contrive and misrepresent, i. e., while the nervous excitement may be supposed still to dominate and the reflective powers to be yet in abeyance", 16 Cal.2d at page 468, 106 P.2d at page 900, statements relevant to the occurrence are admissible as part of the *res gestae.* Here Kent found respondent in pain at the scene of her fall, he was shown the parsley upon which she slipped and he immediately told her that her knee seemed to be broken, that she could not go home but must go to a hospital, and added: "Don't you worry about this * * * we are insured and will pay your bills." Under the Showalter case and Lane v. Pacific Greyhound Lines, 26 Cal.2d 575, 160 P.2d 21, this declaration at the scene of the fall and under the impact of Kent's first discovery of the facts was properly held admissible against his employer.

[6] The suggestion that it was improper in this and the evidence of the later statement of Kent to include his references to insurance are answered by the cases holding that when a reference to insurance is an integral part of an otherwise admissible

declaration the whole is properly admitted. Hawke v. Burns, 140 Cal.App.2d 158, 167–168, 294 P.2d 1008 and cases cited.

[7] The court ruled that the second statement made after respondent was taken to the storage room was not a part of the *res gestae* and instructed the jury that the statement made by Kent in the storeroom would be admissible against his employer Wallace, if, and only if, the jury first found that this statement was made by Kent in the scope and course of his authority. Appellant Wallace argues that there was no evidence from which the jury could reasonably find that Kent had any authority to bind Wallace by any admission of liability. The evidence in this respect shows that Kent had general charge as manager of the store's operations and in case of injury to a customer it was his duty to see that the customer got the necessary attention. There is no evidence that he had any authority to negotiate or settle any claim that such a customer might have, nor is the negotiation or settlement of such claims any part of the ordinary operation of a manager of a market. The court was in error in leaving to the jury the question of Kent's authority to bind Wallace by any statement acknowledging liability.

[8] In Luman v. Golden Ancient Channel M. Co., 140 Cal. 700, 709, 74 P. 307, 311, the court said of the declaration of a mine superintendent, not a part of the *res gestae*, as to the cause of an accident: "Haskins, the superintendent of the mine, had no more power to bind his employer * * * by admissions as to the cause of the accident, than had Smith, the man operating the lever and the brake. He was not the defendant corporation, and did not represent it for the purpose of making admissions as to the cause of the accident that had already occurred. If he made an admission as to such cause, he was not, in doing so, performing on behalf of the defendant corporation any duty by law imposed upon it, and was not, as to such admission, the representative of his employer." Ferguson v. Basin Consolidated Mines, 152 Cal. 712, 93 P. 867; Beasley v. San Jose Fruit-Packing Co., 92 Cal. 388, 391–392, 28 P. 485; Westman v. Clifton's Brookdale, Inc., 89 Cal.App.2d 307, 311, 200 P.2d 814; Breland v. Traylor Eng. & Mfg. Co., 52 Cal.App. 2d 415, 421–422, 126 P.2d 455; Shaver v. United Parcel Service, 90 Cal.App. 764, 770–771, 266 P. 606. It is ordinarily no part of an agent's authority to make admissions binding on his principal and to make such admissions admissible against the principal more must be shown than the mere authority to act for the principal in the transaction in question. (Rest. Agency, § 288.) Cases may be found which seem at odds with this principle but examination will show that they rest at base on some other ground, e. g. Dressel v. Parr Cement Co., 80 Cal.App.2d 536, 539–540, 181 P.2d 962, where the agent's *post rem* admission was admitted to show his knowledge, which was imputable to the principal.

This error, standing alone, might not require a reversal, since the second conversation of Kent was largely corroborative of the first, which we have held properly admitted against Wallace under the *res gestae* rule.

Evidence in great detail was admitted, over appellants' objection, that respondent had an invalid husband, that while she was in the hospital he was taken to another hospital fatally ill and there died, that respondent was taken in an ambulance to see her husband while he was in this hospital and never saw him again alive and that she was taken to his funeral on a stretcher. This evidence was admitted on the theory that while appellants were not liable for any grief and suffering caused by the husband's illness and death the jury was entitled to consider these circumstances in determining the amount of mental suffering caused by the injury to respondent.

The precise argument has been twice presented to our Supreme Court and twice rejected by it. In Steinberger v. California Electric Garage Co., 176 Cal. 386, 168 P. 570, the plaintiff sought to justify

the admission of evidence of her poverty and the size and necessitous condition of her family "by the claim that it was offered as a part of the showing that plaintiff suffered 'mental worry.'" 176 Cal. at page 390, 168 P. at page 572. The court said, 176 Cal. at page 391, 168 P. at page 572: "On strictly logical grounds it is, perhaps, difficult to say why a plaintiff should not be allowed to show every fact connected with his situation in life. One can conceive of innumerable factors in the life of every individual, and of his relation to others, which might be thought to have some relevance to the extent of worry which would result in case of an injury to him. But logical relevancy is not the sole test of the admissibility of evidence. Certain kinds of evidence, although material to the issue, are excluded because of their tendency to mislead, confuse or prejudice the jury. We think that proof of the poverty of the plaintiff in personal suits is a fair example of the danger of injustice through the introduction of evidence of this kind, which has always, and we think properly, been regarded as outweighing the advantages to be derived from permitting it to be offered. * * Every person sustaining physical injuries will suffer mentally. If, under the guise of showing the extent of such mental suffering, the plaintiff may show his poverty, and consequent worry, he may on the same ground introduce in evidence a mass of circumstances which in themselves would not be proper elements of damage because too remote or speculative, bringing them in by the claim that he suffered increased worry by brooding over these extraneous factors. To allow such evidence at all is to invite parties to actions of this character to confuse the inquiry with an incalculable medley of collateral issues."

Again in Smith v. Atchison, T. & S. F. Ry. Co., 179 Cal. 611, 178 P. 501, evidence of the number of the plaintiff's children was admitted on counsel's argument: "It shows the man's condition, and if he had a helpless family how much more he would suffer in pain and mental anguish if he thought he was injured." 179 Cal. at page 614, 178 P. at page 502. The court on the authority of the Steinberger case, supra, held the evidence improperly admitted.

Counsel for the respondent has not discussed or attempted to distinguish these two California cases nor has he cited any authority from this state or elsewhere holding such evidence admissible. Indeed the courts which have considered the question seem all to have reached the same conclusion, that evidence of the family situation of the injured party is not admissible, and may not be admitted to show the effect on the mental anguish suffered by the injured person by reason of his disability.

In St. Martin v. New York, N. H. & H. R. Co., 89 Conn. 405, 94 A. 279, L.R.A. 1916D, 1035, the Connecticut court considered a case remarkably similar to this and held evidence of the illness and death of the plaintiff's wife while he was in the hospital inadmissible in the face of the argument that it was relevant to the extent of the plaintiff's mental suffering caused by his injuries. The note to that case in L.R.A.1916D, pages 1038–1039 contains a collection of cases in all of which similar rulings were made. So in a note in 10 Am. & Eng.Ann.Cas. 288, the rule is stated, with a citation of supporting cases: "The contention that the evidence is admissible on the theory that the mental anguish of the plaintiff in contemplating the inconvenience and hardships of those dependent upon him for support is an element of damages, is untenable." A like result was reached in Miranda v. Halama-Enderstein Co., 37 N.M. 87, 18 P. 2d 1019 and Maggio v. City of Cleveland, 151 Ohio St. 136, 84 N.E.2d 912, cases decided after the publication of the notes herein referred to.

[9] We are bound by the cited decisions of our Supreme Court to hold that the court erred in the admission of this evidence, and in view of the great em-

phasis placed upon it before the jury and the great appeal to the jury's sympathies necessarily involved in the facts disclosed to them we cannot hold that its admission was not prejudicial.

Appellant Kent argues that in no event could he be liable for his mere non-feasance. The rule is thus stated in Restatement, Agency, section 355: "An agent who has the custody of land or chattels and who should realize that there is an undue risk that their condition will cause harm to the person, land, or chattels of others is subject to liability for such harm caused, during the continuance of his custody, by his failure to use care to take such reasonable precautions as he is authorized to take." (See also 1 Mechem on Agency, 2d Ed., § 1474, et seq., pp. 1093–1098.)

[10] The true question is whether the agent owes a duty to the third person as well as to his principal. If he owes a duty to the third person to act he will be liable for his failure to act. (2 Am.Jur., Agency, § 325, pp. 254–256.) Here Kent was in charge of the market and under a duty to protect its customers from injury by the exercise of ordinary care. He owed that duty to the customers as well as to his employer Wallace. The breach of that duty to the customers will render him liable to them.

Appellants cite Fisher v. General Petroleum Corp., 123 Cal.App.2d 770, 780, 267 P.2d 841, as laying down the contrary rule, but an examination of the case shows that there was no liability in any event in that case, since the person for whose death the action was brought was a licensee as to whom mere nonfeasance could not be the basis of liability.

Appellants' claim that the verdict was excessive need not be discussed since the case must be retried.

Judgment reversed.

KAUFMAN, J., and DRAPER, Justice pro tem., concur.

Hearing denied; CARTER, J., dissenting.

148 Cal.App.2d 505

Mary TAYLOR, Plaintiff and Respondent,

v.

PACIFIC CONTAINER CO., Limited, a corporation, Edward J. Myer, et al., Defendants and Appellants.

Civ. 17152.

District Court of Appeal, First District, Division 1, California.

Feb. 14, 1957.

Rehearing Denied March 15, 1957.

Hearing Denied April 10, 1957.

Pedestrian's action for personal injuries sustained when she was struck by truck owned and operated by defendants. The Superior Court, City and County of San Francisco, Thomas M. Foley, J., entered judgment for pedestrian and defendants appealed. The District Court of Appeal, Bray, J., held, inter alia, that instructions as to truck driver's duty as to lookout while erroneous were not, under circumstances, prejudicial and damages were not excessive.

Affirmed.

1. Automobiles ⇐246(4)

In pedestrian's action for injuries sustained when she was struck by truck as she was attempting to cross street, instructions respecting duty of truck driver to look for pedestrians on street and in his path, which made not only the failure to look but the failure to see negligence as a matter of law, were erroneous.

2. Automobiles ⇐150, 245(39)

Generally, failure to look at all constitutes negligence as a matter of law while question of whether one who looks sees all that he should is one of fact for the jury.

3. Automobiles ⇐246(20)

In pedestrian's action for personal injuries sustained when struck by truck while attempting to cross street, instruction as to duty of truck driver to keep truck under control in order to enable him to avoid collision, was erroneous.

4. Automobiles ⇐245(39)

If the evidence and reasonable inferences therefrom justify only one conclusion, namely that either the vehicle driver did not look, or failed to see what he must have seen had he looked, then as a matter of law he was negligent and there would be no alternative but for the jury so to find.

5. Appeal and Error ⇐1064(1)

In pedestrian's action for personal injuries sustained when she was struck by truck while attempting to cross street, although instructions respecting truck driver's duty to keep lookout for pedestrians in street and to keep truck under such control as to avoid collision, were erroneous, but where evidence showed as a matter of law that driver either did not look or negligently did not see that which he could and should have seen instructions were not prejudicial.

6. Automobiles ⇐206

A pedestrian in a marked crosswalk may assume that the driver of an automobile will obey the law.

7. Trial ⇐296(3)

In pedestrian's action against owner and driver of truck for injuries sustained when truck struck her while she was attempting to cross street, no prejudice could have resulted from instruction to effect that owner would be bound by any acts or omissions or negligence of its driver, where jury was instructed several times that owners could be liable only if some acts of negligence of driver proximately contributed to accident.

8. Trial ⇐295(4)

In pedestrian's action for personal injuries sustained when she was struck by truck while she was attempting to cross street, obvious inadvertent substituting of word plaintiff for defendants in instruction when considered in the context with that which preceded and followed it as well as the instructions as a whole, was not prejudicial.

9. Trial ⇐296(4)

In pedestrian's action for personal injuries sustained when struck by truck while she was attempting to cross street, the omission of the phrase "if any" in discussing negligence of defendant in instruction on contributory negligence, could not when read with other instructions be construed to be an assumption by court that defendants were negligent or give impression that plea of contributory negligence was an admission of negligence by defendants.

10. Appeal and Error ⇐1064(1)

In pedestrian's action for personal injuries sustained when struck by truck while she was attempting to cross street, although instruction applying crosswalk rules if pedestrian was not more than one or two feet outside the limits thereof was erroneous because pedestrian under evidence was either in crosswalk or at least 18 feet out of it, was not prejudicial.

11. Automobiles ⇐246(4)

A court instruction in pedestrian's action for personal injuries to effect that while both parties were chargeable only with exercise of reasonable care a greater amount of care was required of driver because he was driving a truck capable of inflicting death or injury upon others in the street, was proper.

12. Appeal and Error ⇐1170(9)

Where from an examination of the entire record it did not appear that prejudicial error had been shown by instructions and it did not appear that a different result would have been probable had the questioned instructions not been given, jury verdict should be upheld. West's Ann. Const. art. 6, § 4½; West's Ann.Code Civ. Proc., § 475.

13. Evidence ⇐514(2)

In pedestrian's action for personal injuries sustained when she was struck by a truck while she was attempting to cross street, testimony of police officer whose competency as an expert on subject was not challenged, to effect that a truck of kind defendant was driving and with the con-

ditions of the pavement as shown by evidence, would require so many feet to stop including reaction time was admissible.

14. Damages ⇐132(8)

Verdict of $19,000 including special damages of $529.37, to an I.B.M. tab operator who sustained a complete laceration of the ulnar nerve of the left hand as well as bruises and contusions to left side and lower back as well as her right leg and a fracture through the distal end of the sacrum, with a permanent diminution of use of left hand in absence of surgery which had only a 50-50 chance of success and incapacitating her from procuring work requiring use of both hands, was not excessive.

15. Appeal and Error ⇐1004(3)

In reviewing award of damages, considerable weight must be given to the fact that trial court weighed all the facts of case in refusing on motion for new trial to reduce amount of damages or to grant a new trial.

Daniel J. O'Brien, Jr., Daniel J. O'Brien, III, San Francisco, for appellants.

George L. Cooke, San Francisco, for respondent.

BRAY, Justice.

Defendants appeal from a judgment after jury verdict in favor of plaintiff in the sum of $19,000 for personal injuries received in a pedestrian-automobile accident.

Questions Presented.

1. Alleged erroneous instructions.

2. Was expert testimony on stopping distance of truck admissible?

3. Were damages excessive?

Evidence.

The accident happened at or near the intersection of Third Street and Williams Avenue in San Francisco. As the sufficiency of the evidence on the question of liability is not challenged it is not necessary to detail the evidence. Plaintiff's contention was that she was hit by defendants' truck in the middle of a crosswalk and there was evidence to support the contention, as well as evidence that defendant driver was negligent and plaintiff was free from contributory negligence. Obviously, the jury so found. On the other hand, defendants' contentions were that plaintiff could have darted from behind the bus which she had just left, crossed an 8 foot parking lane, two 10 foot lanes and 3 to 5 feet into the lane in which defendant was driving, directly in front of, and 3 to 5 feet from, defendants' truck at a point approximately 18 feet beyond the crosswalk; that defendant driver was not negligent and that plaintiff was contributorily negligent. The jury did not so find.

1. Instructions. (a) To look and not see.

[1–5] Defendant driver (Myer) testified that he was making a left hand turn at the intersection. Plaintiff seemed to appear out of nowhere and was right in front of him about 3 to 5 feet from the truck when he first saw her. He does not know how she got there. He claimed that while proceeding to make the turn he looked in the crosswalk area and in the area north of the crosswalk (the area where he claimed plaintiff was hit) but saw no one. He further testified that just prior to the impact he was looking straight up the street, right in the direction from where plaintiff must have come. As before stated, plaintiff claimed to have been walking in the crosswalk when hit. The court gave the following instructions: "It was the duty of the defendant to look for pedestrians on the street and in his path before he attempted to cross at an intersection. This duty is not fulfilled by looking and failing to see that which is readily and clearly visible. When to look is to see, the mere statement that one did look and did not see will either mean that the person was negligent in not seeing that which he could see or that he did not look." "A driver of a vehicle is bound to anticipate that he

may meet persons at any point in the street and in order to avoid a charge of negligence, he is bound to use ordinary care and keep an ordinarily careful lookout for such persons and keep his machine under such control as will enable him to avoid collision." These instructions were erroneous. The first one is similar to one disapproved in Prato v. Snyder, 12 Cal. App.2d 88, 55 P.2d 255. It apparently made not only failure to look but failure to see, negligence as a matter of law. "Under the general rule, the failure to look at all constitutes negligence as a matter of law, while the question of whether one who looks sees all that he should is one of fact for the jury." 12 Cal.App.2d at page 97, 55 P.2d at page 259. It is entirely different from BAJI No. 140, upon which it probably was intended to be based. The second instruction is worse. It followed an instruction to the effect that a greater amount of care is required of the driver of a truck than of a pedestrian, and in effect, as applied to the facts of this case, it stated that a driver must anticipate that a person may run out from behind a parked vehicle and must keep his machine under such control as will enable him to avoid collision with that person. "A driver * * * is bound to anticipate that he may meet persons at any point in the street and * * * he is bound to * * * keep his machine under such control as will enable him to avoid collision." The driver testified that he was going 10 to 15 miles an hour and did not see plaintiff until suddenly she appeared directly in front of his truck and only 3 to 5 feet away. Obviously, his truck was not under such control that it could stop in time to avoid striking a person who might dart out in his path from behind a parked vehicle. The law has no such requirement. This instruction was similar to one denounced in Blythe v. City & Co. of San Francisco, 83 Cal.App.2d 125, 135, 188 P. 2d 40, which stated that it was the legal duty of a motorman to control his street car so as to enable him to stop at any time to avoid persons lawfully upon the highway. As there pointed out, if that were the law, it would be the duty of the motorman, proceeding carefully, to stop regardless of the time at which a person came upon the tracks. "Negligence cannot be based upon such an exacting formula completely divorced from the variables of time, place and surrounding circumstances. The instruction, containing as it does an incorrect statement of law, was properly refused." 83 Cal.App.2d at pages 135–136, 188 P.2d at page 46. The Blythe instruction was not as bad as the one here, for there it referred to persons *lawfully* upon the highway, while here there was no such qualification of persons in the street. "The first of these, referring to any other vehicle or person lawfully upon the highway, omitted the element that such a person must also be using the highway in a lawful manner. The others in effect instructed the jury that, if this appellant did not see the respondent it was negligence on his part, as a matter of law. They leave out of consideration the fact that the respondent may have suddenly appeared on the wrong side of the highway and the question whether it was possible for the appellant to have seen him in time to avoid the accident." Prato v. Snyder, supra, 12 Cal.App.2d at page 96, 55 P.2d at page 259. No modification of these instructions appears in the instructions given, although considering the instructions as a whole the error is not as glaring as appears in a reading of these two instructions separately from the others. Moreover, the failure to see instruction, although apparently making the question one of law rather than a question for the jury, stated a common sense proposition which every juror surely knows, namely, that if one fails to see that which is readily and clearly visible, the only reasonable inference is that he either did not look or was negligent in failing to see what he should have seen. The limitations of these instructions should have been given, and not having been given, the instructions were erroneous. The most serious question is whether under the facts of this case they were prejudicial. If the evidence and the

reasonable inferences therefrom justify only one conclusion, namely, that either the driver did not look, or failed to see that which he must have seen had he looked, then as a matter of law he was negligent and there would be no alternative but for the jury to so find. If the physical facts, the other evidence in the case, and the driver's own testimony required such a conclusion, the mere fact that he said he looked but could not see, would not in itself constitute a conflict in the testimony. As said in Zibbell v. Southern Pac. Co., 160 Cal. 237, 242, 116 P. 513, 515, the law does not permit a driver to blind his eyes to what is clearly visible, "'* * * neither will the eye of the law become blinded to the true situation of the case merely because of the absurd statement of a witness or witnesses, "I looked and could not see," * * *'" The evidence of plaintiff and her witnesses clearly establishes that the accident took place at the crosswalk. There were many contradictions in defendant driver's own testimony. He admitted that the blood spot which was found on the island indicated the point where plaintiff was placed after being lifted. He testified that he helped lift her directly at right angles from the street where she lay after being hit, to the island. (There were no blood spots or other indications of the point of impact in the street.) He testified that the blood spot was 18 to 20 feet from the northerly line of the crosswalk. Yet he contends that after first seeing her his truck went 8 to 9 feet before hitting her, and that after hitting her the truck went 3 to 5 feet and that she lay 3 to 5 feet ahead of the stopped truck. He also testified that the point of impact was 18 to 20 feet from the crosswalk. Thus, if she were hit at a point 18 to 20 feet from the crosswalk, and ended up 3 to 5 feet from the truck which had gone 3 to 5 feet after hitting her, the point at which the blood was found would have to be 24 to 30 feet from the crosswalk. (Plaintiff's witnesses testified that she was not taken to the island at right angles from the place where she lay, but diagonally in a northerly direction.) Actually defendant driver testified at one time that the place where she lay in the street after the accident was "somewhere around 24 feet" from the crosswalk, although he also testified that he helped move her directly to the island and that there she was 18 to 20 feet from the crosswalk. He even adopted the officer's mark on the map showing the blood spot as being 21 feet from the crosswalk. Other witnesses placed the spot there. These discrepancies and the question of exactly where she was when hit, were probably matters for the jury to straighten out. However, whether she was hit in the crosswalk or northerly thereof, there was no evidence from which the jury could have excused defendant driver's failure to see her. He himself does not attempt to excuse it. He does not know why he did not see her. To be hit as she was, in the third lane, she had to traverse at least 31 feet of the street in front of defendant driver who claims he was looking in the direction from which she came. He does not claim that any cars obscured his vision. There was nothing in plaintiff's evidence which helped defendants on this question of the failure of defendant driver to see what must necessarily have been plainly visible to him. Plaintiff testified that while waiting for the light to change she saw eastbound vehicles waiting to come out of Williams Street on the west side of Third, one being a truck. She did not see them again. She did not see defendants' truck until a second before it struck her, and then saw it only out of the corner of her eye. This fact could have been accounted for by the fact that plaintiff, after leaving the sidewalk when the light changed, was looking in the direction in which she was going. Apparently the jury so found. Under the evidence, as a matter of law, defendant driver must be held either not to have looked, or negligently not to have seen that which he could and should have seen. Therefore, the instructions could not have been prejudicial.

(b) Other instructions.

[6] Defendants select certain instructions completely separated from the rest of the instructions and attempt to give them a narrow meaning unrelated to the other instructions. The instruction at page 150 of the reporter's transcript upon the right of a pedestrian in a marked crosswalk to assume that the driver of an automobile will obey the law is a correct statement of the law. The instruction did not, as claimed, take from the jury the question of whether plaintiff herself was using ordinary care. There is no resemblance between this instruction and the one condemned in Roller v. Daley, Inc., 219 Cal. 542, 545, 28 P.2d 345.

[7] Defendants object to an instruction on the doctrine of respondeat superior to the effect that defendant corporation would be bound by "any acts or omissions or negligence" of its agent, defendant driver. Assuming that the words "any acts or omissions" should have been left out of the instruction, no prejudice could result from their being in, as the jury was several times instructed that the defendants could only be liable if some act of negligence of the driver proximately contributed to the accident.

[8] In an instruction defining the issues the court stated, in effect, that if the jury should find that the defendant driver was negligent but such negligence was not the proximate cause of plaintiff's injury its verdict must be for "the plaintiff." It obviously was an inadvertent substituting of the word "plaintiff" for "defendants," as admittedly the instruction was correct except for this one word. Taking this inadvertence in context with what preceded and followed it in the same instruction, let alone in the instructions as a whole, it is clear that the jury must have understood what was intended and that no harm could have been done. As said in Fagan v. Union Pacific R. Co., 85 Cal.App.2d 583, 587, 193 P.2d 776, where in some of the instructions the word "employee" referred to plaintiff, while in others it referred to coemployees of plaintiff, the error is so obvious as to negate its existence.

[9] An instruction on contributory negligence concluded with a statement that negligence, if any, of plaintiff would not be a defense unless it concurred and cooperated with the negligence of the defendants. While the words "if any" should have been added after "defendants," the instruction when read with the others cannot be construed to be an assumption by the court that defendants were negligent, or that it gave the impression that the plea of contributory negligence was an admission of negligence by defendants. See Hasty v. Trevillian, 102 Cal.App. 405, 410, 283 P. 148, 149, where the court said: "The defendants objected to instructions 41 and 42, because those instructions used the word 'negligence,' without following the same by such words as 'if any.' It is sufficient to state that neither instruction, when read together with all of the other instructions, may be said to instruct on a question of fact." Sheets v. Southern Pacific Co., 212 Cal. 509, 299 P. 71, is not in point. There the court instructed that the plea of contributory negligence admitted negligence of the defendant. Nor is the instruction condemned in McKeon v. Lissner, 193 Cal. 297, 306–307, 223 P. 965, similar to the one here. The language of the instruction there was such that the court held that it told the jury that if a defect in the elevator existed, defendants were negligent, even though a proper inspection had failed to disclose any defect.

[10] An instruction applied the crosswalk rules if a pedestrian were not more than one or two feet outside of the limits of the crosswalk. The instruction should not have been given as there was no testimony that plaintiff could have been in that area. Under the evidence she either was in the crosswalk or at least 18 feet out of it. However, the error could not have been prejudicial.

[11] The court instructed that while both parties were chargeable only with the exercise of reasonable care a greater amount of care was required of defendant

driver because he was driving a truck capable of inflicting death or injury upon others in the street. Such an instruction has been held to be proper. Dawson v. Lalanne, 22 Cal.App.2d 314, 315, 70 P.2d 1002. Cucinella v. Weston Biscuit Co., 42 Cal.2d 71, 265 P.2d 513, approves of the holding in the Dawson case and cites many cases upholding the same and similar instructions.

[12] From an examination of the entire record, it appears that prejudicial error has not been shown, and that it does not appear from the record that a different result would have been probable had the questioned instructions not been given. Therefore the jury verdict should be upheld. Cal. Const. art. VI, § 4½; Code Civ.Proc. § 475; Jacobs v. Bozzani Motors, 109 Cal. App.2d 681, 685, 241 P.2d 642.

2. Expert Testimony.

[13] Lieutenant of Police Williams, whose competency as an expert on the subject is not challenged, testified over objection that a truck of the kind defendant driver was driving, with the upgrade and dry condition of pavement shown by the evidence, going 15 miles per hour, would require about 22 to 26 feet to stop, including reaction time. Defendants assign the admission of this evidence as error, because they claim it was not relevant to the distance it would take *defendant driver* to stop *his* truck. This type of evidence was held proper in Berkovitz v. American River Gravel Co., 191 Cal. 195, 201, 215 P. 675, citing several cases. See also Martindale v. Atchison, T. & S. F. Ry. Co., 89 Cal.App. 2d 400, 201 P.2d 48. Defendants' contention that the lieutenant's testimony was not admissible because based on *a* truck and *a* driver and not *the* truck and *the* driver involved in the accident, would bar all expert testimony on the subject. This is not the law, nor can it be. See, in addition to the above cases, 7 Cal.Jur.2d § 390, p. 303.

3. Damages.

[14] The verdict was for $19,000. Special damages included therein were $529.37. "It has been decided by this court that the only means of discovering the existence of passion and prejudice as influencing a verdict is by comparing the amount of the verdict with the evidence before the trial court. To say that a verdict has been influenced by passion and prejudice is but another way of saying that the verdict exceeds any amount justified by the evidence." Zibbell v. Southern Pacific Co., supra, 160 Cal. at page 254, 116 P. at page 520.

Plaintiff suffered a complete laceration of the ulnar nerve of her left hand. Her left side and lower back were made sore. Her right leg was black and blue. Her arm, hand and legs were skinned. There was a fracture through the distal end of the sacrum. The day after the accident an operation on her wrist was performed to suture a severed nerve. She was then in the hospital only one day. In April, 1955, she was hospitalized four days for an operation on the severed nerve. Altogether she lost only 13 days of work. For a while her wrist motions were somewhat restricted due to discomfort and pain. There was almost a complete anesthesia of the ulnar aspect (little finger side) of the left hand to pin prick. At the present time there is atrophy of the space between the thumb and index finger (left hand) giving a sunken appearance. She tends to have a "cocking up" or a "slight clawing" of the little finger of the left hand, has trouble straightening it completely. Motions of the thumb are performed very well. There is no ability to bring the small finger in toward the rest of the hand. She has recovered sensation over the ulnar nerve, "but not real sharp." There is no sensation to pin prick at the end of her little finger. The operation of April, 1955, produced no improvement.

Plaintiff is right handed. Normally the grip of the left hand in a person is 90 per cent of the right. Hers is 50 per cent. This disability is permanent in the absence of surgery. With surgery there is a 50-50 chance to restore more sensation but it is doubtful if return of more than 50 per cent of the lost motor power would return. The sacrum has healed but there

is some soreness which, in time, might disappear, although that is not certain. Plaintiff, at the time of the accident, was an I.B.M. tab operator at $260 per month. Normally she could advance to a senior operator earning $350–$450 per month. But it would require use of both hands, which she cannot do at the present. She is now working as a comptometer operator. Salary was not stated.

[15] It is apparent that plaintiff has a left hand which has a substantial loss of power, and is somewhat deformed in appearance. There is clawing and cocking in the little finger. She has an unsightly scar and bump on her wrist. There is a reasonable probability that the local soreness and aching in the sacrum may be permanent. The condition of the hand is permanent. It interferes with her ability to obtain a job in which she is required to use both hands. This is in addition to the pain and suffering she has undergone and the slight scar on her nose. In Withrow v. Becker, 6 Cal.App.2d 723, 45 P.2d 235, it was held that the plaintiff had a duty to minimize damages by undergoing a hernia operation which the evidence showed would have completely remedied the disability. Here the projected surgery had only a 50-50 chance at best. Moreover, plaintiff has already had one operation which was not successful. We cannot say that the damages are so high as not to be supported by the evidence, or as to be the result of passion or prejudice. Considerable weight, also, must be given by us to the fact that the trial court weighed all the facts of the case in refusing on motion for new trial to reduce the amount or grant a new trial. See Deshotel v. Atchison, T. & S. F. Ry. Co., 144 Cal.App.2d 224, 300 P.2d 910; Leming v. Oilfields Trucking Co., 44 Cal.2d 343, 359, 282 P.2d 23.

Lavin v. Fereira, 10 Cal.App.2d 710, 52 P.2d 518, is not a criterion in this case. There the court seemed to doubt that the plaintiff had suffered a severance of the median nerve in his hand. The court held that the injury, if there was one, was minor in character and that the ill effects could be remedied by a simple operation, which would result approximately in an 80 per cent recovery. There was no suggestion in the opinion that the hand condition would, as in our case, interfere with the plaintiff's work.

Awards in other cases are not necessarily a criterion of the proper award in the instant case. "The types of injury, the age, physical condition, financial status of the various plaintiffs, and the value of the dollar at the time of injury, vary so greatly that it is almost impossible to find a case where the situation is on all fours with a case at bar." Germ v. City & County of San Francisco, 99 Cal.App.2d 404, 421, 222 P.2d 122, 134. See also Buswell v. City & County of San Francisco, 89 Cal.App.2d 123, 131, 200 P.2d 115; Newton v. Thomas, 137 Cal.App.2d 748, 770, 291 P.2d 503. We adopt the statement in Drotleff v. Renshaw, 34 Cal.2d 176, 180, 208 P.2d 969, 971: "* * * while the award to plaintiff may be liberal, it cannot be regarded as without 'the realm of reason' under all the circumstances to be considered. Freeman v. Nickerson, 77 Cal.App.2d 40, 52, 174 P.2d 688, 695; see, also, Butler v. Allen, 73 Cal.App.2d 866, 870, 167 P.2d 488."

The judgment is affirmed.

PETERS, P. J., and FRED B. WOOD, J., concur.

Hearing denied; CARTER, J., dissenting.

PEOPLE of the State of California, Plaintiff, Appellant and Respondent,
v.
Rodney G. SHERAN, Defendant, Respondent and Appellant.*
Cr. 3216.

District Court of Appeal, First District, Division 2, California.
Feb. 11, 1957.
Rehearing Granted April 11, 1957.

Defendant was convicted of murder in the second degree, and on motion for new trial the Superior Court, County of Marin, Carlos R. Freitas, J., modified verdict by reducing it to manslaughter. Defendant appealed from the judgment entered and from order made denying his motion for new trial, and the People appealed from the order modifying the verdict. The District Court of Appeal, Dooling, Acting P. J., held, inter alia, that the evidence sustained conviction of murder in the second degree, and that the trial court could not reweigh the evidence and hence could not reduce the crime to manslaughter.

Judgment and order denying motion for new trial affirmed, and order reducing crime to manslaughter reversed with directions.

1. Criminal Law ⇐938(1)
A motion for new trial on ground of newly discovered evidence is looked upon with disfavor.

2. Criminal Law ⇐938(1)
In murder prosecution wherein after conviction accused subjected himself to two sodium pentothal examinations as result of which he allegedly had a better recollection of certain incidents that happened on day of killing as to which he had claimed a loss of memory during trial, denial of motion for new trial based upon alleged newly discovered evidence resulting from such examinations was not an abuse of discretion where it did not appear why accused could not have taken such examinations before trial, and alleged newly discovered evidence did not seem to be likely to render a different result probable on re-trial.

3. Criminal Law ⇐935(1), 1159(2)
In determining whether verdict or finding is contrary to evidence, trial court has power to reweigh the evidence but a like power to reweigh evidence is not possessed by an appellate court on appeal. West's Ann.Pen.Code, § 1181, subd. 6.

4. Criminal Law ⇐890, 1159(5)
Where evidence will support conviction of higher degree of crime neither trial court nor appellate court can reduce degree of the crime. West's Ann.Pen.Code, § 1181, subd. 6.

5. Homicide ⇐254
Evidence sustained conviction of murder in the second degree.

6. Homicide ⇐146
Once homicide is proved the necessary malice to make it murder of second degree is presumed.

7. Homicide ⇐152
Where jury found defendant guilty of murder in second degree, unless circumstances were disclosed in People's case to reduce the crime to manslaughter burden of proving circumstances in mitigation of offense devolved upon defendant. West's Ann.Pen.Code, § 1105.

8. Criminal Law ⇐745
The inferences to be drawn from circumstantial evidence are primarily for the jury.

9. Criminal Law ⇐890
Where defendant's evidence in murder prosecution was not of such character as to compel jury to find that malice did not exist and jury found defendant guilty of murder in second degree, trial court could not reweigh the evidence and hence could not reduce the crime to manslaughter. West's Ann.Pen.Code, § 1105.

Edmund G. Brown, Atty. Gen., Clarence A. Linn, Asst. Atty. Gen., Victor Grif-

* Opinion vacated 315 P.2d 5.

fith, Deputy Atty. Gen., for plaintiff-appellant.

Bagshaw, Schaal & Martinelli, San Rafael, for defendant-appellant.

DOOLING, Acting Presiding Justice.

Defendant Rodney G. Sheran was accused by indictment of the murder of Esme Sheran, his wife. He pleaded not guilty and not guilty by reason of insanity but later withdrew the insanity plea. A jury found him guilty of murder in the second degree. On motion for new trial the court modified the verdict by reducing it to manslaughter. Defendant appeals from the judgment entered and from the order made denying his motion for a new trial. The People appeal from the order modifying the verdict to manslaughter.

The body of Esme Sheran was found on the Woodacre fire road in the hills four miles above Fairfax in Marin County at about 10:30 a.m. on May 26, 1955. She had been killed sometime between the hours of 6:00 p.m. and midnight the previous night. The right side of her skull had been crushed and there were large cuts, lacerations, or tears in the skin of her forehead. The cause of death was the crushing of the head from a blow or blows inflicted by some sort of a blunt-surfaced object which was rather heavy or which was moving at a high rate of speed. Two blood-stained rocks, one 10″ x 15″ and the other 4″ x 5″, were found near the body of the deceased. Dr. Manwaring, the autopsy surgeon who examined the body of deceased, testified that the fatal blows could have been inflicted with these rocks. No fingerprints could be taken from the rocks because of their rough surface and porous structure. It was likely that four blows had been struck to the victim's head by her assailant. There was a one by two inch opening in her head through which deceased's brain could be seen and there was brain tissue and dried blood in her hair. There was no alcohol in the body of the deceased and no evidence of rape or sexual molestation. Her clothes were clean and orderly and her arms, trunk and legs were generally quite clean and showed no bruising. Her fingernails were long, unbroken and clean. There were no cuts on her hands.

A neighbor of defendant and deceased testified that she last saw deceased between 4:30 and 4:45 p.m. on the day deceased was killed. Mrs. Sheran was then in a garage of the apartment where she lived. This same witness last saw defendant on that day about twenty minutes prior to this time as he looked down on the witness and deceased from a hill as they were sitting on the patio of the apartment. Another neighbor testified that she last saw deceased on May 25, 1955, in the apartment garage about 4:20 and that she last saw defendant park his red truck across from the apartment between 4:30 and 4:45 on that day.

James Oliver, the proprietor of a general store at Pt. Reyes Station and a longtime acquaintance of defendant's, testified that defendant drove up to his store in his red truck a few minutes after 7:00 p.m. on the evening of May 25, 1955. Defendant remained at the store about fifteen minutes, purchased some vermouth and burgundy wine, talked about mutual friends with Mr. Oliver, did not seem to be intoxicated, and in general appeared perfectly normal.

Louis Volk, a police captain of the city of Larkspur, testified that he saw defendant at about 11:30 p.m. in the Bon Air-Greenbrae area on the night of May 25, 1955. The witness stopped defendant in his truck because its location at that time of the night aroused his curiosity. He then recognized defendant and noted nothing unusual about him. There was no odor of alcohol about defendant and no one was in the truck with him.

The identity of the deceased was determined at approximately 7 p.m. on May 26, 1955. That evening certain law enforcement officers entered the apartment of defendant and deceased. There they found a note in defendant's handwriting bearing this message: "Dear Esme: I have de-

cided to leave for a few days, so don't feel hurt if I am not here when you return. I will mail you a check, and also one for the rent, so don't worry. All my love, Rod."

Alfons O. Pollentier, a member of the Oregon State Police, arrested defendant on May 28, 1955, on Highway 20 about 180 miles north and east of the California border. He noted nothing unusual about defendant other than that he appeared tired and disheveled. Defendant was then driving his red pick-up truck. The witness told defendant that he was under arrest, wanted in California, and said, "I imagine you know what for." Defendant replied: "I think so." Defendant made no protest and registered no surprise. When defendant was in the officer's car as he was being taken to the Sheriff's Office at Vale, Oregon, two broadcasts came over the car radio to the effect that the defendant, wanted for murder in California, had been apprehended. The defendant made no remark after the first of these broadcasts, but after the second he stated: "I hope they know what they are talking about, because I don't."

After his arrest in Oregon defendant was questioned by Sheriff John Elfering about his actions on May 25, 1955. The sheriff testified that in reply to a question as to when he last remembered seeing his wife defendant "* * * answered by saying that he and his wife were in their apartment; that his wife had given him a pack of cigarettes, and she had a pack of a like brand, and that they had gotten into the pickup, went to the market, where his wife did some shopping, and he waited for her outside the store; they then went into the hills and got out of the pickup; that an argument started; that everything went blooey after that." The defendant said that he thought the cigarettes given him by his wife contained marihuana.

The defendant testified in his own behalf. He stated that he suffered a lapse of memory on May 25, 1955, the day his wife was killed, and that this memory loss extended over a several day period. He said that he remembered being at the apartment with his wife in the afternoon of that day and that they later left the apartment together to do some shopping. At this time defendant felt fuzzy-headed and he wondered if there was anything wrong with the cigarette he was smoking. Defendant vaguely remembered driving to the business section of San Anselmo with his wife and he recalled his wife getting out of their truck there. The next thing he remembered was waking in the rear end of his truck as it was parked along a highway in an unfamiliar area. He had no recollection of seeing either Mr. Oliver or Captain Volk on the evening of May 25 and did not remember writing the note to his wife found in their apartment. Defendant could not recall being on the fire road with his wife on the day she was killed and he could not recall hitting his wife. To his knowledge neither he nor his wife had ever smoked marihuana.

It appeared that defendant was committed to Napa State Hospital in June of 1952 and released on leave in September of that same year. He was completely discharged in August of 1953. Defendant testified that this commitment was on his wife's petition and that when he was arrested in Oregon he thought that she had sworn out a warrant for his return to Napa. He stated that this was what he had in mind when he answered "I imagine so" to the arresting officer's inquiry "I suppose you know what you're wanted for."

Defendant was examined by a physician on May 24, 1955, the day before the killing. Dr. Griffin, the examining physician, testified that defendant then appeared well oriented and he did not detect any signs of psychosis or mental illness.

Dr. Poliak, a specialist in the field of psychiatry, testified for the People in rebuttal. He stated that he had conducted a psychiatric examination of defendant and concluded that if defendant had any amnesia at all that it was of an hysterical type precipitated by some great emotional shock or traumatic experience. In this type of amnesia the loss of memory pre-

cedes the event which caused it. The violent killing of a person could be the type of traumatic experience which could cause this amnesia or it could be caused by a fear. However the doctor stated that he had grave doubts whether the loss of memory described by defendant was genuine and in his opinion defendant might well be malingering.

Although defendant stated in his notice of appeal that he was appealing from the judgment entered he seems to have abandoned that portion of his appeal and limits his argument to the contention that the trial court erred in denying his motion for a new trial.

After the termination of the trial the defendant subjected himself to two sodium pentothal examinations. At the hearing on the motion for a new trial defendant testified that as a result of these examinations he had a better recollection of certain incidents that happened on May 25, 1955. However that recollection was quite vague and incomplete. In general defendant stated that after leaving San Anselmo on the afternoon in question he went toward Strawberry Point to see a Mr. Nider in regard to business. He then recalled being in Stinson Beach at a Shell Service Station and grocery store where he purchased some whiskey and then went to the McClure Ranch, beyond Inverness. He also stated that he had a vague recollection of having shaken Mr. Oliver's hand at his market sometime that evening.

In arguing that a new trial should be granted on the basis of newly discovered evidence defendant's attorney admitted that the evidence relied on failed to completely close the gap and failed to completely exonerate the defendant. This admission seems like quite an understatement. In denying the motion the trial court noted that in a situation of this sort the defendant might gradually over a long period of time remember certain events that occurred about the time of the crime. New trials could not be granted ad infinitum on the basis of this type of recollection.

[1, 2] It does not appear that the trial court abused its discretion in denying this motion. Such a motion on the ground of newly discovered evidence is looked upon with disfavor. People v. Miller, 37 Cal.2d 801, 236 P.2d 137. No reason appears why defendant could not have taken these sodium pentothal tests before the trial of the case. Defendant admits that such an examination given before or during the trial might have produced the same result as an examination after the trial. Here the trial court could reasonably find that defendant did not show proper diligence in presenting this evidence. Further the evidence claimed to be newly discovered does not seem to be likely to render a different result probable on retrial. On this basis also the motion was correctly denied. People v. McGarry, 42 Cal.2d 429, 267 P.2d 254.

Defendant's contention that the new trial should have been granted because of insufficiency of the evidence is without merit. The sufficiency of the evidence will be discussed in considering the People's appeal.

The power of a trial court to modify the judgment by reducing the degree of a crime on motion for new trial is found in Penal Code, § 1181, subd. 6, which gives the trial court power to grant a new trial "When the verdict on finding is contrary to law or evidence; but if the evidence shows the defendant to be not guilty of the degree of the crime of which he was convicted, but guilty of a lesser degree thereof, or of a lesser crime included therein, the court may modify the verdict, finding or judgment accordingly without granting or ordering a new trial, and this power shall extend to any court to which the cause may be appealed."

The first question which this section presents is whether the power granted to the trial court to modify the judgment includes the power to reweigh the evidence in determining whether "the evidence shows the defendant to be not guilty of the degree of the crime of which he was convicted."

[3] In determining whether "the verdict or finding is contrary to * * * evidence" under the same subdivision of this section the trial court does have the power to reweigh the evidence, People v. Robarge, 41 Cal.2d 628, 262 P.2d 14; People v. Sarazzawski, 27 Cal.2d 7, 161 P.2d 934, but a like power to reweigh the evidence is not possessed by an appellate court on appeal, People v. De Paula, 43 Cal.2d 643, 276 P.2d 600.

Whether the trial court has a like power to reweigh the evidence in exercising the power to reduce the degree of a crime is a matter left in some confusion by expressions by way of *dicta* in a series of decisions by the Supreme Court, in all of which that court was considering its own power to reweigh the evidence on appeal under Penal Code, § 1181, subd. 6, and did not expressly have before it the power of the trial court to do so.

In the first of these cases, People v. Thomas, 25 Cal.2d 880, at pages 904–905, 156 P.2d 7, at page 20, the court speaking of the respective functions of the trial court and appellate court under Penal Code section 1181, subd. 6, said: "While the *power* granted to the appellate court is equal to that given the trial court the circumstances which will justify its exercise in a particular court are those which are appropriate to typical functioning of that court. In other words, upon an application to reduce the degree or class of an offense, a trial judge may review the *weight* of the evidence but an appellate court should consider only its *sufficiency as a matter of law.*" Emphasis the Supreme Court's. Relying on this *dictum* Fricke in his California Criminal Procedure, 3d edition, at pages 337–338 says:

> "When the question is presented to an appellate court the conviction may be reduced only where, as a matter of law, the evidence does not sustain the conviction (People v. Meichtry, 37 Cal.2d 385 [231 P.2d 847]), but when it arises in the trial court which, on a motion for a new trial, may weigh the evidence, the duty of reducing the conviction * * * arises whenever there exists in the mind of the trial judge a reasonable doubt as to the defendant's guilt of the offense stated in the verdict of the jury (People v. Thomas, 25 Cal.2d 880 [156 P.2d 7])."

So the matter rested until the question of its own power under Penal Code, § 1181 subd. 6, came again before the Supreme Court in People v. Daugherty, 40 Cal.2d 876, 256 P.2d 911. In that case the Supreme Court discussed, and refused to follow, People v. Daniel, 65 Cal.App.2d 622, 151 P.2d 275. In the Daniel case the District Court of Appeal had *weighed* the evidence and reduced the degree of the crime on appeal. The Supreme Court said, 40 Cal.2d at pages 884–885, 256 P.2d at page 916: "The Daniel case relied on the rule in connection with the power of the trial court to reduce the degree of the crime under section 1181, subd. 6, of the Penal Code, but we held the rule was the same under that section, 1181, subd. 6, as it was under section 1260 of the Penal Code and in neither case may the Court reduce the degree of the crime unless the evidence is legally insufficient to support the higher degree of which defendant was convicted, and in determining that question, the evidence, even if circumstantial, is not weighed. People v. Odle, 37 Cal.2d 52, 230 P.2d 345."

A careful reading of this language leads to the conclusion that it is perfectly consistent with the dictum in People v. Thomas, supra, that in exercising the power to reduce the degree of the crime under section 1181, subd. 6, the trial court may weigh the evidence. What the court was saying is that when the appellate court reweighed the evidence in the Daniel case it was relying on a rule applicable to the trial court in reducing the crime under section 1181, subd. 6, but that it was held in People v. Odle that under section 1260, Penal Code, as under 1181, subd. 6, "in neither case may the Court [i. e. the appellate court] reduce the degree of the crime unless the evidence is legally insufficient to support the higher

degree * * * and in determining that question, the evidence * * * is not weighed."

That the Supreme Court in the Daugherty case was discussing only the power of an appellate court to reweigh the evidence would seem to follow from the fact that People v. Odle, 37 Cal.2d 52, 230 P.2d 345, upon which the court relied in deciding Daugherty was concerned with the provisions of section 1260, Penal Code, which in express terms defines only the powers of the appellate courts and has no application whatsoever to the trial courts. Nor in Odle did the Supreme Court discuss in any wise the function of the trial court under section 1181, subd. 6.

However in its latest dictum on the subject in People v. Sutic, 41 Cal.2d 483, 493, 261 P.2d 241, 246, the Supreme Court said flatly, citing People v. Daugherty as its sole authority on the subject:

> "As above discussed, the evidence fully justified the jury's finding that the homicide was * * * murder in the first degree. * * * Under such circumstances neither *the trial court* nor this court would be authorized to reduce the degree of the crime." Citing only People v. Daugherty, supra; emphasis ours.

Somewhat cryptically but none the less clearly in this latest *dictum* the Supreme Court is saying that where the evidence will support the conviction of the higher degree neither the trial court nor the appellate court can reduce the degree of the crime. The quoted language clearly equates the power of the trial court to its own. The same construction was placed on the Daugherty case by the District Court of Appeal in People v. Jones, 136 Cal.App.2d 175, 288 P.2d 544.

[4] Faced by these contradictory *dicta* we accept the latest pronouncement of the Supreme Court on the subject with the realization that that court can take this case over if it is not satisfied with our reading of its decisions and lay down a rule for the future guidance of trial courts in this case in which the question of the power of the trial court to reduce the crime under section 1181, subd. 6, is squarely presented.

[5–9] The evidence is sufficient to support the finding of the jury that appellant killed his wife. Once the homicide is proved the necessary malice to make it murder of the second degree is presumed. 25 Cal.Jur.2d Homicide, § 107, p. 619. Unless circumstances are disclosed in the People's case to reduce the crime to manslaughter the burden of proving circumstances in mitigation of the offense devolves upon the defendant. Pen.Code, § 1105. There was nothing in the People's case to compel a finding by the jury against the presumption of malice. There were no eyewitnesses to the crime and the evidence produced by the defendant was therefore all circumstantial. The inferences to be drawn from circumstantial evidence are primarily for the jury. Without reciting the defendant's evidence it was not of such a character as to compel the jury to find that malice did not exist, although the jury might from all the evidence have drawn that conclusion. It follows that the trial court in this case could not reduce the crime to manslaughter unless it had the power to reweigh the evidence. As we read People v. Sutic, supra, 41 Cal.2d 483, 493, 261 P.2d 241, the Supreme Court's latest expressed view is that no power to reweigh the evidence is given to the trial court in such a case. It follows that the order reducing the crime to manslaughter must be reversed.

Judgment and order denying motion for new trial affirmed. Order reducing the crime to manslaughter reversed with directions to the trial court to arraign the defendant for sentence for murder of the second degree as found by the jury's verdict.

KAUFMAN, J., DRAPER, J. pro tem., concur.

148 Cal.App.2d 230

Robert G. WILEY, Plaintiff and Appellant,

v.

Raymond S. LONG, George J. Cole, Ronald W. Cameron, Fred F. Thevenin, Annie McGaraghan, George G. Jacobs and C. Emahiser, Defendants and Respondents.

Civ. 8832.

District Court of Appeal, Third District, California.

Feb. 1, 1957.

Libel action. The Superior Court, Placer County, Lowell L. Sparks, J., transferred place of trial to Humboldt County, and plaintiff appealed. The District Court of Appeal, Schottky, J., held that, where original complaint alleged that one defendant's letter was false, malicious, and defamatory and that defendant, by such letter, intended to convey meaning that plaintiff had filed false expense statements and thereby intended to defraud state and that letter was so understood by persons reading it, was not, prima facie, so defective as to be beyond correction by amendment or so lacking in good faith that defendants would be entitled to change of venue to county in which the other defendants resided.

Order reversed.

1. Venue ⇐41

Where a number of defendants are joined in same action, those who are nonresident may not have change of venue to county of their residence unless they can show that none of the other defendants is a resident of county in which action has been brought. West's Ann.Code Civ. Proc., § 395.

2. Venue ⇐72

Motion for change of place of trial must be determined by the court in advance of any other judicial action.

3. Venue ⇐41

Right to change of place of trial to residence of a defendant must be determined by status of parties joined as defendants as revealed by pleadings existing at time party claiming the right first appeared in the action.

4. Venue ⇐41

Sufficiency of complaint and pleader's good faith are not to be denied upon motion for change of venue unless it can clearly be seen that allegations of fact concerning defendant, who is resident of county in which action is originally brought, are not related to facts alleged and relief relied upon as cause of action against the other defendants. West's Ann. Code Civ.Proc., § 395.

5. Libel and Slander ⇐81

Neither complaint, which alleged that one defendant had written letter stating that plaintiff had attempted to defraud state by filing false claims for refund of expenses, nor amendment thereto, which added allegations that such letter was not written by such defendant in proper discharge of any official duty or proceeding but that such defendant wrote the letter maliciously and intended to injure plaintiff by publication thereof, was sufficient to show any more than that the letter was qualifiedly privileged. West's Ann.Civ. Code, § 47; West's Ann.Code Civ.Proc., § 472.

6. Venue ⇐41

Original complaint, which alleged that one defendant's letter was false, malicious, and defamatory and that defendant, by such letter, intended to convey meaning that plaintiff had filed false expense statements and thereby intended to defraud state and that letter was so understood by persons reading it, was not, prima facie, so defective as to be beyond correction by amendment or so lacking in good faith that defendants would be entitled to change of venue to county in which the other defendants resided. West's Ann.Code Civ. Proc., § 395.

7. Venue ⇐67

In support of motions for change of venue, affidavits, which alleged that plaintiff had made one defendant a defendant

solely for purpose of having the action tried in county in which such defendant resided and of depriving other defendants of right to have action tried in county in which other defendants resided, were not sufficient to charge bad faith which would entitle movants to a change of venue. West's Ann.Code Civ.Proc., § 395.

Landis & Brody, Sacramento, for appellant.

Edmund G. Brown, Atty. Gen., by Clarence A. Linn, Chief Asst. Atty. Gen., for respondent Long.

Thevinin & McGaraghan:

Blaine McGowan, Eureka, for respondents Cole.

Huber & Goodwin, Eureka, for respondents Cameron and Jacobs.

Hill & Hill, Eureka, for respondent Emahiser.

SCHOTTKY, Justice.

This is an appeal by plaintiff from an order of the Superior Court of Placer County transferring the place of trial of the above-entitled cause to the Superior Court of Humboldt County.

Count I of the original complaint alleges that plaintiff was an employee of the Department of Fish and Game from April 1, 1951, to September 18, 1951, on which date he resigned; that he was at all times a police officer by profession; that he was employed as such by the City of Eureka, County of Humboldt, from July 14, 1949, to April 21, 1953, except for the interval of employment with the State Department of Fish and Game; that he was discharged from his position as police officer on April 21, 1953; that on June 5, 1953, the defendant Long wrote a letter which, in effect, stated that plaintiff had attempted to defraud the state by filing false claims for refund of expenses. The count further alleges that the letter was false, malicious and defamatory and that plaintiff, in fact, had not filed any false or untrue statement of expenses with the State of California, and that all and every portion of said letter charging plaintiff with such improper conduct are and were false, malicious, libelous, and untrue.

Count II of the original complaint alleges that defendant C. Emahiser "did publish said false, defamatory, and libelous statements by delivering said letter to the defendants, Geo. J. Cole, Ronald W. Cameron, Fred F. Thevenin, Annie McGaraghan, and Geo. C. Jacobs," and alleges a malicious libel by these defendants by the publication of this letter in the form of an advertisement which quoted the letter in full and which contained other statements which, in effect, charged the plaintiff with being dishonest and the head of a gang of dishonest police officers.

All of the defendants, except Long, are residents of Humboldt County. For convenience, they will be referred to as nonresident defendants.

The nonresident defendants filed general and special demurrers to the original complaint. In addition, they filed demands for a change of venue to Humboldt County. These defendants claimed that the reason Long was named as a defendant was to place the venue in Placer County. In support of this contention, the nonresident defendants filed their several affidavits of merits setting forth substantially that Count I of the original complaint failed to state a good cause of action against the defendant Long in that the alleged letter published by him was written in his capacity as an official of the Department of Fish and Game of the State of California, and was, therefore, a privileged communication as defined by Section 47 of the Civil Code and the various applicable subdivisions thereof.

Before argument was had on either the demands for change of venue or the demurrers, plaintiff filed, purportedly as a matter of right under Section 472 of the Code of Civil Procedure, his first amended complaint. Count I of the first amended complaint, in addition to the allegations set forth in the original complaint, further

alleged that the letter was not written by the defendant Long in the proper discharge of any official duty or in any official proceeding and that the defendant Long wrote said letter maliciously and intended to injure plaintiff by the publication of the libelous statement.

The demands for change of venue and the demurrers filed with respect to the original complaint were dropped from the calendar.

After the filing of the first amended complaint, Long, who is represented by the Attorney General of the State of California, filed his answer thereto. He denied generally the allegations in Count I of said amended complaint and, in addition, pleaded several special defenses, among which were defenses relating to privileged communication and absence of malice in writing and mailing the letter referred to. The nonresident defendants filed new motions for change of venue, this time attacking Count I of the first amended complaint. The affidavits of merits, filed by each of the nonresident defendants, were substantially identical in language. Each recited that Count I of the first amended complaint failed to state a cause of action against the defendant Long for the reason that the letter was written by Long in his capacity as an official of the Department of Fish and Game and was, therefore, a privileged communication as defined by section 47 of the Civil Code and the various applicable subdivisions thereto.

Following a hearing upon the motions for change of venue the court made the order transferring the cause, and plaintiff has appealed therefrom.

[1] In arguing for a reversal of the order appellant calls attention to the well-settled rule that where a number of defendants are joined in the same action, those who are nonresident may not have a change of venue to the county of their residence unless they can show that none of the other defendants is a resident of the county in which the action is brought. Code Civ.Proc. sec. 395; Monogram Co. of California v. Kingsley, 38 Cal.2d 28, 237 P.2d 265.

Respondents in reply contend that the foregoing rule is not applicable to the instant case because, they assert, a cause of action is not stated against defendant Long and he was included as a defendant for the purpose of attempting to confer jurisdiction upon the Superior Court of Placer County and for the further purpose of attempting to deprive the respondents of their right to change the place of the trial to the county of their residence. They argue that the rule is well established that an action will be transferred where a resident defendant is joined with a nonresident defendant or defendants and the complaint shows on its face that no cause of action is stated against the resident defendant.

[2–4] Certain applicable rules are well stated in McClung v. Watt, 190 Cal. 155, at pages 159–161, 211 P. 17, at page 19, as follows:

> "The motion for a change of place of trial to the county of the party's residence must be made by the moving party and determined by the court in advance of any other judicial action in the case. Heald v. Hendy, 65 Cal. 321, 4 P. 27; Brady v. Times-Mirror, supra [106 Cal. 56, 39 P. 209]. Hence the right to a change of place of trial to the residence of a defendant must necessarily be determined by the status of the parties joined as defendants in the action as revealed by the pleadings existing at the time the party claiming the right first appeared in the action. Buell v. Dodge, 57 Cal. 645; Remington S. M. Co. v. Cole, 62 Cal. 311; Brady v. Times-Mirror Co., supra; Donohoe v. Wooster, 163 Cal. 114, 124 P. 730. If the complaint in the instant case attempts, in apparent good faith, to state a cause of action against the corporation defendant, the individual defendant, Watt, did not have the

right to have the place of trial changed to the county of his residence. The sufficiency of the complaint and the good faith of the pleader are not to be denied, upon a motion for a change of venue, unless, at first blush, it can be clearly seen and said that the allegations of fact concerning the corporation defendant are in nowise related to the facts alleged and relied upon as a cause of action against the defendant * *.

"Conceding these allegations to be faulty in form, and in a measure vague and indefinite and somewhat ambiguous, nevertheless, when considered in conjunction with the remaining allegations of the complaint, even though they be strictly construed, it cannot be said that they are so inherently and utterly devoid of merit as to be radically insufficient upon which to found a cause of action. In short, it cannot be held that the allegations of the complaint concerning the corporation defendant are clearly bad and manifestly the making of a sham and frivolous pleading. If the allegations in question did no more than shadow forth the semblance of a cause of action, they would be proof against assault upon the ground that they were sham and frivolous. * * *

"True it is the complaint as a whole, and the allegations in question in particular, may be susceptible to special demurrer for some insufficiency of fact, as well as ambiguity and uncertainty, but whatever defects there may be in the form and phrasing of the complaint it is not so grievous but that it may be cured by appropriate allegations, founded, of course, in truth, by amendment following a ruling upon demurrer. It is enough, however, upon the hearing and determination of the demand for a change of venue, that the cause of action purported to be stated against the corporation defendant was apparently pleaded in good faith, and is not, *prima facie*, so glaringly and vitally defective as to be beyond correction by amendment."

See also Gottesfeld v. Richmaid Ice Cream Co., 115 Cal.App.2d 854, 252 P.2d 973; Monogram Co. of California v. Kingsley, 38 Cal.2d 28, 237 P.2d 265; Freeman v. Dowling, 219 Cal. 213, 25 P.2d 980; Dallman Supply Co. v. Sweet, 86 Cal.App. 2d 780, 195 P.2d 864; Dennis v. Overholtzer, 143 Cal.App.2d 606, 299 P.2d 950.

Section 47 of the Civil Code provides:

"A privileged publication or broadcast is one made—

"1. In the proper discharge of an official duty.

"2. In any (1) legislative or (2) judicial proceeding, or (3) in any other official proceeding authorized by law; * * *

"3. In a communication, without malice, to a person interested therein, (1) by one who is also interested, or (2) by one who stands in such relation to the person interested as to afford a reasonable ground for supposing the motive for the communication innocent, or (3) who is requested by the person interested to give the information."

Appellant contends that there is nothing in either the original complaint or in the amended complaint to indicate that defendant Long's action in publishing the letter was absolutely privileged under subdivisions 1 and 2 of section 47 of the Civil Code, nor does either complaint allege any matter which would disclose a qualified privilege under subdivision 3, but that even if such a qualified privilege does appear from the allegations, it is not a defense since it is alleged that the publication was in fact motivated by malice. Appellant argues that the questions as to whether this letter was an official communication and whether the publication was malicious are questions of fact to be determined upon the trial of the action, and that the fact that one individual holding office writes a letter on official stationery to another individual holding public office does not necessarily mean that the communication is an official

proceeding; nor that the sending of the letter was an official duty.

Appellant cites Layne v. Kirby, 208 Cal. 694, 284 P. 441, in which the complaint alleged that the defendant was a clerk in the War Department where the plaintiff also worked, and that the defendant wrote a letter to the Secretary of War concerning plaintiff which contained libelous matter. A demurrer was sustained on the ground that the letter was privileged under section 47, subdivision 2, of the Civil Code. The Supreme Court reversed the judgment, stating 208 Cal. at page 696, 284 P. at page 442:

"The complaint, if it shows privilege at all, shows only that the publication was qualifiedly privileged under the provisions of subdivision 3 of section 47 of the Civil Code. That subdivision provides that a publication is privileged when it is made 'in a communication, without malice, to a person interested therein, by one who is also interested, or by one who stands in such relation to the person interested as to afford a reasonable ground for supposing the motive for the communication innocent, or who is requested by the person interested to give the information.' Section 47, subd. 2, provides that a privileged publication is one made 'in any legislative or judicial proceeding, or in any other official proceeding authorized by law.' But it is not ascertainable from the complaint that the communication addressed by the defendant to the Secretary of War was intended to or did in fact initiate an authorized proceeding for any purpose. If such indeed is the case—i. e., that the letter properly initiated a proceeding before the Secretary of War and the communication is claimed to be absolutely privileged by virtue of the provisions of subdivision 2 of section 47 of the Civil Code—that claim cannot be made nor the privilege be successfully asserted by demurrer when the complaint itself does not show such privilege. In such a case privilege must be specially pleaded. Stevens v. Snow [191 Cal. 58, 214 P. 968], supra. Where, as here, the complaint shows on its face no more than that the libelous publication was made in a communication to a person interested, etc., and malice is pleaded, the plaintiff states a cause of action. The demurrer was improperly sustained."

[5] We do not agree with respondent that the allegations of either the original complaint or of the amended complaint show that the letter written by defendant Long was absolutely privileged. We believe that it shows only that it was qualifiedly privileged under the provisions of subdivision 3 of section 47 of the Civil Code. The original complaint alleged that the letter was "false, malicious and defamatory"; that every portion of it charging plaintiff with improper conduct was "false, malicious, libelous, and untrue"; and that defendant Long, by the publication of said letter, "intended to convey the meaning, and said letter was understood by the persons reading it to mean, that the plaintiff had filed a false and untrue statement of expenses with the State of California, and had intended thereby to defraud the State."

[6] While said allegations may be subject to special demurrer, we do not believe that it is correct to hold upon a motion for change of venue that the cause of action against defendant Long was not "pleaded in good faith" or is "prima facie, so glaringly and vitally defective as to be beyond correction by amendment."

As hereinbefore noted, Long, the resident defendant, filed no demurrer but filed an answer to the amended complaint pleading the special defense of absence of malice.

We believe that as stated in Gottesfeld v. Richmaid Ice Cream Co., 115 Cal.App.2d 854, at page 856, 252 P.2d 973, at page 975:

"In determining the question whether the resident defendant has been joined solely for the purpose of having the action tried in the county of his residence 'the real issue for determination by the trial court was wheth-

er plaintiff, in joining the resident defendant as a party, had reasonable grounds for the belief in good faith that plaintiff had a cause of action against the resident defendant.' [Citations.] It is also the rule 'that upon the hearing of such motion, the court should not try, upon conflicting affidavits, the issues of fact going to merits of the cause of action stated against the resident defendant.' [Citations.]"

The implied finding of the court that plaintiff in joining Long as a defendant did not have reasonable grounds for belief in good faith that plaintiff had a cause of action against Long is without support factually from the face of the pleadings and from the affidavits.

[7] The affidavits in support of the motions for change of venue alleged that plaintiff made Long a defendant solely for the purpose of having the action tried in the county of Placer and for the purpose of depriving the other defendants of the right to have the action tried in Humboldt County. Such an allegation does not amount to a charge of bad faith because if appellant had a cause of action against Long he had an absolute right to try it in Placer County. In such a situation it is the plaintiff who has the right to pick the place of trial. Saying that he joined Long for the purpose of depriving the defendants of their "right" to have the cause tried in Eureka amounts to nothing, because if he had a cause of action against Long or if he believed in good faith that he did have a cause of action against Long, then he was the one that had the "right" to pick the place of trial, and the other defendants had no "right" to complain. It is to be noted that in none of the affidavits in support of the motions is there any specific charge made of bad faith or fraud or any charge that plaintiff or his counsel did not in good faith believe that he had a cause of action against Long.

In McDonald v. California Timber Co., 151 Cal. 159, at page 160, 90 P. 548, in holding that the motion of the corporate defendant was properly denied, the court said:

"* * * unless it had a right to show, and succeeded in showing, as it attempted to do, that the plaintiff, without having any cause of action against Dent, or any reason to believe that he was liable to respond in damages for the injury alleged, had fraudulently named him as a defendant for the mere purpose of defeating the right of the real defendant to demand a change of the place of trial to the county of its legal residence."

And in California Collection Agency v. Fontana, 61 Cal.App.2d 648, at page 655, 143 P.2d 507, at page 511, the above language is quoted with approval and the court stated further:

"* * * In Henderson v. Cohen, 10 Cal.App. 580, on page 584, 102 P. 826, on page 827, the court treats the issue as one akin to fraud and, in affirming an order denying the motion, said, '* * * we think the plaintiff not only acted properly in joining him (the resident defendant) but that it was the safest course for him to adopt.' In Pacific Coast Auto. Ass'n v. Ahlf, 115 Cal.App. 21, 300 P. 841, the issue is again treated as one akin to fraud and the evidence was held 'sufficient * * * to show that certain of the defendants were not joined in bad faith * * *'. Page 24 of 115 Cal.App., page 842 of 300 P. The court further said on page 25 of 115 Cal.App., [on] page 843 of 300 P., 'It is enough upon the hearing and determination of the demand for change of venue, that the cause of action purported to be stated is apparently pleaded in good faith * * *.'"

In view of the foregoing we conclude that the court erred in granting the motions for change of venue.

The order is reversed.

VAN DYKE, P. J., and PEEK, J., concur.

The PEOPLE of the State of California
v.
Florence BRANDT, Defendant.
No. 13045.

Appellate Department, Superior Court, San Joaquin County, California.
Nov. 1, 1956.

Defendant was convicted under vagrancy Statute, on ground that she was a common prostitute. The Municipal Court entered judgment, and the woman appealed. The Superior Court, Appellate Division, held that evidence was insufficient to warrant conviction.

Judgment reversed.

1. Vagrancy ⇦1

A male cannot be a "prostitute" and hence is not subject to prosecution under vagrancy statute as a common prostitute. West's Ann.Pen.Code, § 647, subd. 10.

See publication Words and Phrases, for other judicial constructions and definitions of "Prostitute".

2. Vagrancy ⇦1

At common law, a "vagrant" was a person, without a settled home, an idle wanderer, or a loafer, but such meaning has been arbitrarily expanded by legislative enactment to include any of various offenders regardless of whether their unlawful act meets the commonly accepted definition of vagrancy and whether such acts are single or in series. West's Ann. Pen.Code, § 647.

See publication Words and Phrases, for other judicial constructions and definitions of "Vagrant".

3. Vagrancy ⇦1

There is implicit in the crime of vagrancy the element of a course of conduct as contradistinguished from isolated acts. West's Ann.Pen.Code, § 647.

4. Vagrancy ⇦1, 4

In some circumstances, a single act, denounced by section of the Penal Code dealing with vagrancy, may be sufficient to establish that person committing it has, for example, acquired status of a dissolute or lewd individual and is liable to conviction for vagrancy, but such situation arises only in event that single act of lewdness constituting the violation is of such a nature that it reasonably justifies an inference that no one not of lewd or dissolute character would do such an act even once, and whether such inference, in a particular case, may be drawn from the evidence is for the trier of the facts. West's Ann. Pen.Code, § 647.

5. Criminal Law ⇦507(7)

In prosecution of woman for vagrancy, on ground that she was a common prostitute, wherein the prosecution introduced testimony of man, who admitted an act of illicit intercourse with woman, the man was not an "accomplice", whose testimony was required to be corroborated, on ground that he was guilty of "vagrancy" because of the alleged illicit intercourse, since the alleged illicit intercourse would not have justified his conviction under vagrancy statute. West's Ann.Pen.Code, §§ 647, 1111.

See publication Words and Phrases, for other judicial constructions and definitions of "Accomplice" and "Vagrancy".

6. Vagrancy ⇦3

Evidence was insufficient to sustain conviction of woman under vagrancy statute, on ground that she was a common prostitute. West's Ann.Pen.Code, § 647, subd. 10.

John O. Fugazi, Stockton, for defendant and appellant.

Bradford Crittenden, Dist. Atty., Stockton, for plaintiff and respondent.

Before QUINN, P. J., and DUNNE and WOODWARD, JJ.

BY THE COURT.

Appellant was convicted in the Municipal Court of vagrancy, under Section 647, subd. 10 of the Penal Code, the complaint alleging that she was a "common prosti-

tute". The only evidence offered by the prosecution consisted of the testimony of Albert R. Trotter, who admitted an act of illicit intercourse with the appellant.

On appeal, appellant's counsel urges two points: (1) that Trotter was an accomplice and hence required corroboration under Section 1111 of the Penal Code; and (2) that, even if his testimony bore no taint, it was insufficient to establish guilt.

Before discussing either point, the first of which appears to be novel in the circumstances, we will paraphrase the testimony of the Peoples' only witness. Trotter testified that late in the evening of May 29, 1956, he went to the premises located at 1514 East Ninth Street, in the City of Stockton, and occupied by a Mrs. McPherson, whom he knew and had previously visited. According to his testimony, he had a brief—and, we may add, a cryptic —conversation with the woman. He did not, so far as the record reveals, disclose the reason for his previous visit. "I told her", said the witness referring to the occasion in question, "that I heard she was getting too large an operation, after which she informed me that I was mistaken. Then I went into the bedroom with 'Tina', as I was introduced to her. I gave her a ten dollar bill and proceeded with an act of intercourse after which I left". Trotter said he had never seen Tina before. He asserted also that he went to the McPherson home of his own volition, and not as a potential witness for the police. Following the cross-examination of the witness, the People rested, whereupon appellant took the stand and denied she had performed an act of sexual intercourse with Trotter, or for that matter, had ever seen him before.

Parenthetically, it may be mentioned in passing, that when appellant appeared for judgment several days later, her counsel suggested leniency on the ground that his client "has no record whatsoever", the truth of which assertion he offered to "verify through the District Attorney's office". The matter, however, was not further pursued, and the Court thereupon sentenced the appellant to the County Jail for a term of 120 days. In doing so, the trial judge said he had intended to levy a fine, "but since you intend to appeal it, I have no alternative but to give her a jail sentence".

Penal Code, Section 1111, relied on by appellant's counsel, provides that a conviction cannot be had upon the testimony of an accomplice unless it be corroborated by such other evidence as shall tend to connect the defendant with the commission of the crime. The section defines an accomplice as follows: "An accomplice is hereby defined as one who is liable to prosecution for the identical offense charged against the defendant on trial in the cause in which the testimony of the accomplice is given".

[1] It follows, therefore, that Trotter was an accomplice under the provisions of the section quoted only if he could be prosecuted for the identical offense charged against the appellant, namely, vagrancy. Obviously, a male cannot be a prostitute and hence is not subject to prosecution under subdivision 10 of the section. American Jurisprudence, Vol. 42, page 260; 8 Words and Phrases, Common Prostitute, page 166; Ferguson v. Superior Court, 26 Cal.App. 554, 147 P. 603; In re Carey, 57 Cal.App. 297, 304, 207 P. 271; but there are other acts enumerated in the section pursuant to which an offender may be prosecuted for vagrancy, and the question arises as to whether Trotter could be an accomplice by reason of his liability to prosecution under subdivision 5 of said section 647 which also defines as a vagrant, "Every lewd or dissolute person * * *."

[2] At common law, a vagrant was a person without a settled home, an idle wanderer, a loafer. However, the ordinary, commonly accepted meaning of the word has been arbitrarily expanded (or perverted) in Great Britain and in the United States by legislative enactment to include any of various offenders regardless of whether their unlawful act meets the commonly accepted definition of vagrancy and

whether said acts are single or in series. (See Webster's New International Dictionary.)

Our own statute, as amended in 1955, enumerates twelve "means" for identifying a vagrant, each constituting a separate subdivision and describing a different act. Digressing for a moment, we may observe, parodoxical as it seems, that an individual may be charged in one complaint with any or all of the twelve subdivisions, provided he is punished for only one crime. The word "means" quoted above is taken from the case of People v. Allington, 103 Cal.App.2d Supp. 911, 920, 229 P.2d 495, 501. In that case, the defendant had been convicted under two subdivisions of the section, each set forth as a count and punishment imposed accordingly. It was in this connection that the Court, in striking out the punishment pronounced under one of the alleged counts, took pains to state that the twelve subdivisions were nothing more than "twelve means" of identifying a vagrant. Judge Shaw, in a concurring opinion, expressed the thought that "there may be a limit to the legislative power thus to unify disparate forms of misconduct".

[3,4] It is firmly established in this State that, although vagrancy may be committed in various ways, any or all of them constitute but one crime. As we shall show later, there is implicit in the crime of vagrancy the element of a course of conduct as contradistinguished from isolated acts. It is true, in some circumstances, that a single act, denounced by Penal Code Section 647, may be sufficient to establish that the person committing it has, for example, acquired the status of a dissolute or lewd individual and is liable to conviction for vagrancy; but this situation arises only in the event that the single act of lewdness constituting the violation is of such a nature that it reasonably justifies an inference that no one not of a lewd or dissolute character would do "such an act even once". Whether such inference, in a particular case, may be drawn from the evidence is for the trier of the facts. People v. Smith, 48 Cal.App. 253, 191 P. 996; People v. Scott, 113 Cal.App.Supp. 778, 296 P. 601; People v. Babb, 103 Cal.App.2d 326, 229 P.2d 843; People v. Lund, 137 Cal.App.Supp. 781, 27 P.2d 958.

Regardless of the fact that the word "vagrant" has lost its technical meaning by reason of unique statutory enactments; regardless of the fact that a variety of unrelated acts may now constitute the crime of vagrancy, nevertheless the Courts have held uniformly that one who is a vagrant has become such by repetition of the same conduct—even though in some cases the repetition may be inferred from a single act.

In the case of People v. Craig, 152 Cal. 42, 91 P. 997, 1000, the Court says: "Vagrancy differs from most other offenses in the fact that it is chronic, rather than acute; that it continues after it is complete, and thereby subjects the offender to arrest at any time before he reforms". And, in the case of Ferguson v. Superior Court, supra, the Court went so far as to say that any series of acts would have to extend over a considerable period of time before they would constitute vagrancy.

Our attention has not been called to any California cases which hold that one act of illicit intercourse, even when consummated with a prostitute, makes either offender liable under the vagrancy statute; and there is one case from another jurisdiction, involving a similar statute, which holds to the contrary. In the case of People v. Anonymous, 161 Misc. 379, 292 N.Y. S. 282, 286, an unnamed male was charged with vagrancy for having committed a single act of sexual intercourse with a prostitute. The woman pleaded guilty, but the man moved for a dismissal of the charge on the ground that he could not be convicted of the offense even if it were established that he had participated in the illicit act. The Court, pointing out that it was a case of first impression in the State of New York, found it impossible to reconcile a single act of illicit intercourse with

the crime of vagrancy, declaring: "Before believing that our lawmaking body intended to initiate this radical departure, before concluding that it meant to class an otherwise respectable man with those 'who are vagrants,' I must ask for a much clearer expression of the legislative intent, for words that will leave no room for doubt."

[5] If our own legislature had intended that one act of illicit intercourse made the offender a lewd and dissolute person and hence guilty of vagrancy, it would have said so in a subdivision leaving no room for doubt. Because of our conclusion that Trotter was not liable to prosecution for vagrancy under any subdivision of the section, it is unnecessary for us to examine the ramifications and subtleties of the accomplice rule, all of which are fully set forth in the case of People v. Clapp, 24 Cal.2d 835, 151 P.2d 237.

[6] Turning now to the alleged insufficiency of the evidence. Since common prostitution is undoubtedly a way of life or status as already pointed out, appellant could not properly be convicted under the vagrancy statute, unless, in addition to the proven act of intercourse, there were attendant circumstances constituting a basis for finding that the practice was habitual. The incriminating circumstances, if any, were indeed meager. From the transcript, it would appear that there were two women in the private home which Trotter visited, namely, Mrs. McPherson and the appellant. Trotter had sexual intercourse with one of them. Aside from this, there was no proof that "Tina" practiced prostitution as a business, or that the premises were regularly used for such purpose. Nor was evidence offered by which such facts could be inferred—the coming and going of men, the presence of paraphernalia, the bad reputation of the house. The conversation Trotter had with the McPherson woman in the kitchen was vague and obscure in meaning and, standing alone, we doubt if it gave rise to a proper inference that Mrs. McPherson was operating a house of prostitution. Terms used in a local sense, which in the present instance may be loosely referred to as "double talk" require explanation. Obscure statements, especially in a criminal case, have little if any evidentiary value unless they are explained—or better still, not permitted to creep into the record. The question here does involve the undoubted right of the trial judge to weigh conflicting testimony. On the contrary, it is whether or not the appellant, by proof of one act of illicit intercourse in a house which may or may not have been a house of prostitution, can be convicted of vagrancy.

We are of the opinion that the evidence was insufficient to warrant the conviction, and the case is reversed.



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